

No. 44535-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

SAMUEL B. FOSTER,

Appellant.

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

The Honorable Chris Wickham, Judge
Cause No. 12-1-01405-6

BRIEF OF RESPONDENT

Carol La Verne
Attorney for Respondent

2000 Lakeridge Drive S.W.
Olympia, Washington 98502
(360) 786-5540

TABLE OF CONTENTS

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....1

B. STATEMENT OF THE CASE.....1

C. ARGUMENT.....4

 1. The court reasonably concluded that Officer Anderson was authorized to seize Foster.....7

 2. The court reasonably concluded that Officer Anderson and Sergeant Renschler properly placed and kept Foster in handcuffs.....11

 3. The court reasonably concluded that Foster’s consent to search was valid.....13

D. CONCLUSION15

TABLE OF AUTHORITIES

U.S. Supreme Court Decisions

<u>Bumper v. North Carolina</u> , 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968)	14
<u>Florida v. Bostick</u> , 501 U.S. 429, 111 S. Ct. 2382 (1991).....	6
<u>Katz v. United States</u> , 389 U.S. 347, 88 S. Ct. 507 (1967).....	13
<u>Schneckloth v. Bustamonte</u> , 412 U.S. 218, 93 S.Ct. 2041 (1973).....	14
<u>Terry v. Ohio</u> , 392 U.S. 1, 88 S. Ct. 1868 (1968).....	6

Other State Case Decisions

<u>State v. Groth</u> , 144 Vt. 585 (1984), 481 A.2d 26 (1984).....	13
--	----

Washington Supreme Court Decisions

<u>City of Spokane v. Neff</u> , 152 Wn.2d 85, 93 P.3d 158 (2004).....	5
<u>State v. Armenta</u> , 134 Wn.2d 1, 948 P.2d 1280 (1997).....	7
<u>State v. Castellanos</u> , 132 Wn.2d 94, 935 P.2d 1353 (1997).....	5, 11
<u>State v. Ellis</u> , 136 Wn.2d 498, 963 P.2d 843 (1998).....	5, 11
<u>State v. Gluck</u> , 83 Wn.2d 424, 518 P.2d 703 (1974).....	6

<u>State v. Mendez,</u> 137 Wn.2d 208, 970 P.2d 722 (1999).....	5
<u>State v. Shoemaker,</u> 85 Wn.2d 207, 533 P.2d 123 (1975).....	14
<u>State v. Smith,</u> 84 Wn.2d 498, 527 P.2d 674 (1974).....	5
<u>State v. Thompson,</u> 93 Wn.2d 838, 613 P.2d 525 (1980).....	6-7

Decisions Of The Court Of Appeals

<u>State v. Aase,</u> 121 Wn. App. 558, 89 P.3d 721 (2004).....	5
<u>State v. Bliss,</u> 153 Wn. App. 197, 222 P.3d 107 (2009).....	7
<u>State v. Hopkins,</u> 128 Wn. App. 855, 117 P.3d 377 (2005).....	7
<u>State v. Perez,</u> 41 Wn. App. 481, 705 P.2d 625 (1985).....	13
<u>State v. Rodriguez,</u> 20 Wn. App. 876, 582 P.2d 904 (1978).....	14
<u>State v. Soto-Garcia,</u> 68 Wn. App. 20, 841 P.2d 1271 (1992).....	14

Rules and Other Authorities

CrR 3.6	4-5
Fourth Amendment to the US Constitution	5-6

Fourteenth Amendment to the US Constitution	5-6
Article I, § 7 of the Washington Constitution	4-6

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the trial court abused its discretion by finding that the police reasonably seized Foster

2. Whether the trial court abused its discretion by finding that the police reasonably placed Foster in handcuffs.

3. Whether the trial court abused its discretion by finding that Foster gave voluntary consent to be searched.

B. STATEMENT OF THE CASE.

In early October 2012, property crime in southeast Olympia—the so-called “David area”— was at a high. RP 35, 37.¹ Bicycle hopping was a particular problem, as thieves would steal mountain, BMX, and children’s bicycles from garages and porches and abandon them where new thefts would occur. RP 24-25. The Olympia Police Department diverted its resource of patrol officers to the David area in an attempt to preempt this problem; Officer Brenda Anderson was a part of this deployment. RP 35-36. On the evening of October 7, 2012 Anderson was driving through the David area when a citizen, Mr. Adams, flagged her down from the side of the road. RP at 10-11. Adams explained that both he and his neighbor were victims of burglaries on a prior day. RP 11. His neighbor had a tent stolen, and Adams had fought and chased one

¹ Unless otherwise noted, references to “RP” are to the Verbatim Report of Proceedings for Samuel Foster’s 3.6 hearing dated January 15, 2013.

of the burglars from his garage. Id. Adams handed Anderson a photograph. RP 12. It depicted three individuals sitting together on the Chehalis Western Trail: two men and a woman. Id. This photograph had been taken the same day by Adams' neighbor when he came across the group sitting together along the trail and recognized his stolen tent. RP 11-12, 22. Adams believed one man in the picture was the same he had fought with in his garage. RP 12. He pointed across the street at a man wearing a black sweatshirt with two spray painted bicycles. RP 12-13. He believed that the man across the street was also in the photograph and involved with the man who burgled his house. Id. Officer Anderson saw the resemblance, alerted the police station that she would make a contact, and approached the man across the street. RP 21-22, 13. This was the appellant, Samuel Foster.

Officer Anderson approached Foster from the right as he was moving towards the trailhead in the area. RP 14. He was on one bicycle and holding another. Id. She advised Foster that she would like to talk with him. RP 16. He turned around, saw Anderson, but ignored her and kept moving. RP 14-15. Anderson again advised Foster that she would like to speak with him. Id. Foster did not respond; instead, he began fumbling with something

in his sweatshirt pocket. RP 14-15, 25-26. Anderson told him to take his hand out of his pocket. Id. He did not. RP 14-15, 16. Alone and not sure what he was handling, Anderson removed Foster's hands from his pocket and handcuffed him. Id. Sergeant Matt Renschler arrived in his patrol car and Anderson passed Foster on to him. RP 16-17.

Sergeant Renschler knew Foster. RP 38-42. They had interacted on multiple occasions during Renschler's years as an officer in Downtown Olympia. Id. Most of these interactions, whether formal or informal, had not resulted in arrest; they were casual conversations. Id. Renschler and Foster began talking about the bikes and the recent property crimes. RP 42-43. Towards the end of their conversation, Renschler asked Foster if Foster would have any narcotics on his person. RP 43. Foster replied "no." Id. Renschler requested Foster's consent to search. Id. Foster said "go ahead." Id. Sergeant Renschler proceeded to search Foster and found methamphetamine concealed in a cigarette pack in his front pocket. CP 7.²

² Unless otherwise noted, references to "CP" are to the Clerk's Papers. References to "Supp. CP" are to the Supplemental Clerk's Papers, which are not number consecutively to the Clerk's Papers.

The State charged Foster with unlawful possession of a controlled substance. CP 3. Foster filed a motion to suppress on the grounds that Sergeant Renschler's search was unlawful under article I, section 7 of the Washington Constitution and a hearing was held. Supp. CP 27. The trial court found that Anderson had sufficient grounds from which to suspect that Foster was involved in criminal activity. Supp. CP 34. This suspicion was sufficient to justify a detention and seizure, which escalated to the point where Anderson had to use handcuffs for protection. Id. It found that Foster's consent to search was valid because it was not obtained by exploitation of any prior unlawful seizure, and it denied Foster's motion to suppress. Supp. CP 35.

Foster waived his right to a jury, and was tried by the bench. CP at 6. The court found him guilty on the stipulated facts. CP 9. Foster appeals his conviction. He challenges the trial court's denial of his CrR 3.6 motion to suppress, and asks this court to dismiss his case with prejudice. Appellant's Opening Brief at 7, 18.

C. ARGUMENT.

The Superior Court did not err when it denied Foster's motion to suppress. His conviction should be affirmed.

A denial of a CrR 3.6 motion to suppress is an evidentiary ruling. The Court of Appeals reviews evidentiary decisions for abuse of discretion. City of Spokane v. Neff, 152 Wn.2d 85, 91, 93 P.3d 158 (2004) (citing State v. Ellis, 136 Wn.2d 498, 504, 963 P.2d 843 (1998)). The trial court abuses its discretion when “no reasonable person would take the view” it adopts. Ellis, 136 Wn.2d at 504 (quoting State v. Castellanos, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997)). When considering the denial of a motion to suppress, the Court of Appeals first decides whether substantial evidence supports the findings of fact and then reviews conclusions of law *de novo*. State v. Aase, 121 Wn. App. 558, 564, 89 P.3d 721 (2004) (citing State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999)). “Where the trial court’s findings of fact and conclusions of law are supported by substantial but disputed evidence, [the appellate court] will not disturb [the trial court’s] ruling.” Id. (citing State v. Smith, 84 Wn.2d 498, 505, 527 P.2d 674 (1974)).

Foster argues that the trial court abused its discretion when it concluded that, under the Fourth and Fourteenth Amendments to the federal constitution and article I, section 7 of the Washington Constitution, his seizure was lawful and his consent to search freely

given. In fact, substantial evidence supports the trial court's conclusion; its decision was reasonable.

The Fourth and Fourteenth Amendments to the Federal Constitution, and article I, section 7 of the Washington Constitution protect citizens against unlawful seizures and the disturbance of citizens' private affairs without the authority of law. The authority to search and seize usually comes from the existence of a warrant, for which probable cause is required. State v. Gluck, 83 Wn.2d 424, 426-427, 518 P.2d 703 (1974). An investigatory stop short of arrest, however, is an exception to the rule; an officer may perform an investigatory stop when she has a reasonable suspicion that a person is involved in criminal activity. State v. Thompson, 93 Wn.2d 838, 840, 613 P.2d 525 (citing Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868 (1968)). Likewise, there is no warrant requirement to search when the detained person gives free and voluntary consent to the search. Florida v. Bostick, 501 U.S. 429, 438, 111 S. Ct. 2382 (1991).

The trial court reasonably concluded (1) that Anderson was authorized by law to seize Foster, (2) that it was proper for Anderson and Renschler to place and keep Foster in handcuffs, and (3) that Foster's consent to search was valid.

1. The court reasonably concluded that Officer Anderson was authorized to seize Foster.

The court concluded that Anderson seized Foster lawfully. Supp. CP 34.

All seizures must be tested against the prohibition against unreasonable searches and seizures. Thompson, 93 Wn.2d at 840. In order to justify an investigatory stop, a police officer must be able to identify specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion. State v. Bliss, 153 Wn. App. 197, 204, 222 P.3d 107 (2009). The officer must be able to attest to the specific and objective facts that caused him to make the inference that the person detained was involved in completed or ongoing criminal activity. State v. Hopkins, 128 Wn. App. 855, 862, 117 P.3d 377 (2005) (citing State v. Armenta, 134 Wn.2d 1, 10, 948 P.2d 1280 (1997)).

The trial court found that Anderson had a reasonable suspicion that Foster was involved in criminal activity. Supp. CP 34. Anderson was deployed specifically to an area with a high volume of bicycle thefts, Foster was across the street with two bicycles—one of them spray painted, Foster had just been

identified together with an alleged burglar and he had reacted furtively to Officer Anderson's approach. Id. The court's conclusion was not unreasonable.

Foster disagrees. He points out that he was together with an alleged tent burglar, not a bicycle burglar, that he was not a suspect in a tent burglary, and that there is nothing illegal about having two bicycles. Appellant's Opening Brief at 10-13.

Foster fails to acknowledge the full circumstances that played into the court's consideration, however. The court did not limit its consideration to any single factor:

THE COURT: Standing alone, [the possession of two bicycles] would not be a sufficient basis to seize [Foster], but it seems to me there is much more than that here. There is the identification from the picture....

...

THE COURT: I think the bikes were just there. The facts were that she had a citizen across the street who identified the defendant as being involved with this group.... [A]nd then she had the defendant being evasive and not complying with her when she is asking him questions.

RP at 56, 58-59. The court's conclusions of law demonstrate the same type of reasoning. Supp. CP 34.

Foster also points out, correctly, that proximity to criminal activity alone does not justify an investigative stop. Appellant's Opening Brief at 12. But Foster underestimates the implication of involvement that the photograph carries. In this photo, Foster is seen reclining next to a man and a woman together on the Chehalis Western Trail. RP 30. One of these persons has been identified as a burglar. There is an allegedly stolen tent with them. The Chehalis Western Trail is miles long. It is reasonable to infer that people who rest together along the trail are probably not strangers. Groups that carry tents together along trails often sleep together in those tents and are friends. The photograph depicts more than proximity; it suggests company. It was reasonable for Anderson to suspect that Foster was involved with this allegedly criminal group, and it was reasonable for the court find the same.

To further bolster his argument, Foster points out that during the suppression hearing the court seems to have been ready to find that Anderson seized Foster before Foster began rummaging in his pocket. Appellant's Opening Brief at 10. Indeed, there does appear to be a discrepancy between what the court seems to have been considering and what is actually recorded in the court's conclusions of law. In the record the court states that the seizure

took place before the handcuffs, but the conclusions of law include the fact that Foster was handling the inside of his pocket as part of the grounds for Anderson's decision to seize Foster. RP 50-51, 57; Supp. CP 34.

When considering whether or not Anderson's decision to seize was founded on a justifiable suspicion that Foster was engaged in criminal activity, however, it is irrelevant whether Foster was seized before he groped in his pocket or after. Whether or not Foster was fumbling in his pocket does not speak to his involvement in crime. In fact, Foster's identification of this discrepancy highlights the soundness of the court's decision. The court apparently understood that whether or not Foster reached for his pocket after Anderson called him was irrelevant to Anderson's suspicion that Foster was engaged in criminal activity. Why the conclusions of law suggest otherwise is unclear.

The court concluded at the hearing that Anderson's seizure of Foster before the handcuffs were used was justified. RP 57. The requirements for an investigatory stop are much lower than that of a full arrest. An officer is justified in making the stop when he can identify specific articulable facts that suggest criminal involvement. The trial court concluded that Foster's possession of

two bicycles—one of which was spray painted, in an area with a disproportionate number of bicycle thefts, his furtive responses to Anderson’s contact, and his apparent involvement in the group responsible for other burglaries, taken together, were sufficient facts from which Anderson could articulate a reasonable suspicion that Foster was involved in criminal activity ongoing or present. This was not a conclusion that “no reasonable person” would make; the court did not abuse its discretion when it found that Officer Anderson lawfully seized Foster and its conclusion was reasonable. Ellis, 136 Wn.2d at 504 (quoting Castellanos, 132 Wn.2d at 9).

2. The court reasonably concluded that Officer Anderson and Sergeant Renschler properly placed and kept Foster in handcuffs.

The court found that Anderson placed Foster in handcuffs out of concern for her safety. Supp. CP 34. Foster does not challenge Anderson’s initial safety concerns and handcuffing, but argues that Anderson was only authorized to use handcuffs to pat Foster down for weapons immediately after the handcuffs. Appellant’s Opening Brief at 13-15. Foster appears to argue that his continued detention past the point at which Officer Anderson

could have given him a pat-down made the seizure illegal. Appellant's Opening Brief at 14-15.

It's unclear where Foster draws authority for his argument that a delayed pat-down taints an otherwise lawful seizure. While it is true that a pat-down pursuant to a warrantless detention is limited to discovering weapons in order to protect officer safety, Foster fails to cite any authority stating that a detained subject must receive a pat-down immediately after being detained.

Foster concedes that Anderson was justified to handcuff him in reaction to his furtive movements. Appellant's Opening Brief 13-14. Renschler received custody of Foster immediately after Foster was handcuffed and he kept Foster in handcuffs for the duration of their conversation. RP 36-43. Renschler at no time exceeded the bounds of an investigatory stop by, for example, searching Foster without a warrant or without consent. Renschler kept Foster in the handcuffs only because he trusted Anderson's judgment and he wanted to maintain order and safety through the investigation:

[PROSECUTOR]: Sgt. Renschler, when you found the victim (sic), he was in handcuffs, but you never told him that he was arrested for any crimes?

MATT RENSCHLER: That's correct.

[PROSECUTOR]: So what was – did you think this was only for an investigation?

MATT RENSCHLER: As for the reason the handcuffs are on?

[PROSECUTOR]: Uh – huh.

MATT RENSCHLER: Again, I'm an instructor for defensive tactics for our department, and we teach our officers that handcuffs can be used to prevent attack, prevent escape. It is not something we just put on when we put somebody into custody.

RP 45. Renschler used the handcuffs to maintain his own safety. "An officer is not required to experience trembling fear or an overt threat as a prerequisite to reasonable action which protects his safety." State v. Perez, 41 Wn. App. 481, 487, 705 P.2d 625 (1985) (quoting State v. Groth, 144 Vt. 585 (1984)). Renschler had legitimate reasons for keeping Foster in handcuffs through the investigatory stop. The detention did not become unlawful because Renschler kept the handcuffs on Foster as they spoke.

3. The court reasonably concluded that Foster's consent to search was valid.

The court found that Foster's consent to search was valid.

A warrantless search is presumed unreasonable but for limited exceptions. Katz v. United States, 389 U.S. 347, 357, 88 S. Ct. 507 (1967). Among the exceptions is a search conducted

pursuant to free and voluntary consent. State v. Rodriguez, 20 Wn. App. 876, 880, 582 P.2d 904 (1978); Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041 (1973). Free and voluntary consent acts as a waiver of the constitutional right against unreasonable searches. Id.; Bumper v. North Carolina, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968). The court considers whether a person's consent is voluntarily or not by considering the totality of the circumstances. State v. Shoemaker, 85 Wn.2d 207, 211-12, 533 P.2d 123 (1975). If the defendant was illegally seized at the time he gave consent, then the consent is tainted and ineffective to justify a search. State v. Soto-Garcia, 68 Wn. App. 20, 27-19, 841 P.2d 1271 (1992).

The trial court found that Foster's consent was neither involuntary nor tainted by any prior illegality. Supp. CP 35. Renschler described how Foster was calm and engaged during their conversation; Renschler and Foster had engaged casually with each other numerous times before and Foster didn't appear intimidated or concerned. RP 39-41.

Perhaps recognizing that his consent was intelligent and otherwise freely given, Foster does not argue that he was pressured into saying "go ahead" to the search. Appellant's

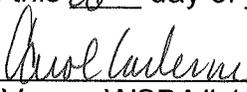
Opening Brief at 17. Instead, he limits his argument to alleging that his seizure was illegal and his consent tainted. Id.

The legality of Foster's seizure and the Anderson and Renschler's decision not to immediately frisk Foster has been addressed. In the absence of indicia that Foster's consent was not freely given, the trial court reasonably concluded that Foster's consent was valid.

D. CONCLUSION.

The Superior Court did not abuse its discretion when it denied Mr. Foster's suppression motion. It reasonably concluded that Officer Anderson had sufficient suspicion to justify a detention. Foster's time in handcuffs was not improperly prolonged. From this the court concluded that, in the absence of any evidence to the contrary, Foster's consent was valid, free, and voluntarily given, and that the search was lawful. The trial court's conclusion was reasonable; there was no abuse of discretion. The State respectfully asks this court to affirm Foster's conviction.

Respectfully submitted this 26th day of August, 2013.



Carol La Verne, WSBA# 19229
Attorney for Respondent

THURSTON COUNTY PROSECUTOR

August 26, 2013 - 2:32 PM

Transmittal Letter

Document Uploaded: 445352-Respondent's Brief.pdf

Case Name:

Court of Appeals Case Number: 44535-2

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

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.

Sender Name: Caroline Jones - Email: jonescm@co.thurston.wa.us

A copy of this document has been emailed to the following addresses:
lisa.tabbut@comcast.net