

No. 44848-3-II

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JAMES MESSER,

Appellant.

REPLY BRIEF OF APPELLANT

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Introduction¹

The only evidence before the trial court at the CrR 3.6 hearing consisted of the testimony of Deputy Gray, Mr. Messer, and Chrystal Thomas (Ms. Thomas), the passenger in Mr. Messer's vehicle. The State's arguments in Respondent's Brief reduce to a simple proposition: the findings of fact, and the conclusions of law deriving from those findings, set forth by the trial court in response to Mr. Messer's CrR 3.6 motion to suppress evidence that formed the basis for his subsequent conviction are supported by substantial evidence. As to what substantial evidence supports the findings and conclusions that Mr. Messer has challenged in this appeal, the State simply points to Deputy Gray's testimony that is in conflict with Mr. Messer's testimony. In critical respects, however, Deputy Gray's testimony is internally inconsistent. Further, the most critical finding for the purposes of this appeal is in conflict with another related finding, one based on the testimony of Mr. Messer and Ms. Thomas, as opposed to that of Deputy Gray. Because the trial court made no credibility determinations, the inconsistencies referenced above undermine the State's contention that substantial

¹At page 9 of Appellant's Brief Mr. Messer referred to the Felony Judgment and Sentence entered against him on May 8, 2013. That document was not included in the Clerk's Papers that Mr. Messer designated. The document appears, however, at pages 13- 30 of the Supplemental Clerk's Papers.

evidence supports the finding that Deputy Gray observed a “big” knife next to Mr. Messer.

Argument

- 1. The evidence, in the form of Deputy Gray’s testimony, in the record regarding the existence of a “big” gun in Mr. Messer’s vehicle is internally inconsistent.**

This appeal centers on one question: Was Deputy Gray’s frisk or pat down of Mr. Messer for weapons lawful? The answer to that question depends on whether, in view of the totality of the circumstances surrounding the frisk/pat down, Deputy Gray had reason to suspect that Mr. Messer was armed and dangerous. Again, there is no physical evidence in the record to support a finding that Mr. Messer was, in fact, armed when Deputy Gray approached Mr. Messer’s vehicle. Instead, the only evidence before the trial court as to whether Mr. Messer was armed consisted of the testimony of Deputy Gray and Mr. Messer as to what Deputy Gray described as a “Jim Bowie” knife. Thus, the ultimate question upon which the lawfulness of Deputy Gray’s frisk/pat down for weapons depends is whether substantial evidence exists to support Deputy Gray’s testimony that he observed a “Jim Bowie” knife. As the trial court noted, Deputy Gray’s testimony on the matter conflicted with Mr.

Messer's testimony. In its entirety Deputy Gray's testimony as to the existence of the "Jim Bowie" knife is as follows:

Q. Okay. Go ahead and describe your observations of the defendant and how he reacted to you asking him to roll down the window.

A. Well, like I said he was startled when he first woke up. When I made the motion to roll his window down he kind of snickered and opened up the door to tell me that his window didn't roll down, and that's when I saw he had a Jim Bowie knife, type knife, on the left side of his leg there in the door panel. I believe it was the door panel.

Q. What's a Jim Bowie . . . ?

A. It's a big knife. It – I don't know if it was specifically a Jim Bowie knife. It's a five- to six-inch blade and had a bone handle on it.

Q. Was it a fixed blade?

A. Fixed blade, yes.

Q. Was it in a sheath?

A. No.

Q. Was it on his person?

A. No.

Q. Where was it exactly?

A. Just to the left of his leg in the car.

Q. Was it on the seat?

A. No, it wasn't on the seat.

Q. Where was it?

A. I believe it was in the door panel of the door that he had just opened.

VRP 5, l. 4-25; 6, l. 1-4.

Mr. Messer's conflicting testimony regarding the existence of a knife in his vehicle is as follows:

Q. Okay. And while we're at it, was there any kind of Jim Bowie knife in your door panel?

A. No, there's no place you could put a Jim Bowie knife into a door panel on a Oldsmobile. They're a - -

Q. There's no kind of pouch or anything along the door?

A. No, Sir.

Q. There was a knife in your vehicle; was there not?

A. Yeah, a little deer - it was like a - I collect knives, because my last name is Messer. My last name, Messer, means knife in German. So it was a little deer horn knife,

which was like the Indians used to use; it had a little piece of rock for a blade.

Q. Where was that? Where was that knife?

A. It was behind my seat in a shoe box.

Q. So, was it plainly visible by anybody outside your vehicle?

A. If you dug through my – through that shoebox you'd see it.

VRP 19, l. 1-17.

Deputy Gray's testimony regarding the "Jim Bowie" knife came in the midst of a series of questions from the prosecuting attorney regarding Deputy Gray's actions upon discovering Mr. Messer's parked vehicle. After Deputy Gray's last answer regarding the knife, set forth above, the line of questioning proceeded as follows:

Q. Was it [i.e., the Jim Bowie knife] within reaching distance of the defendant when he opened the door?

A. Oh, yeah. Absolutely. That's why I asked him to then step out.

Q. Well, that was going to be my next question. Why did you ask him to step out then?

A. To distance him from the knife.

Q. And what did you do after that?

A. Asked him to step out.

Q. What happened after that?

A. He stepped out and I asked him to step to the rear of the vehicle to get him away from the open door.

Q. What happened after that?

A. He complied. He stepped out and came to the rear of the vehicle and I asked him if he had any other weapons on him and which he said no.

Q. And what happened after that?

A. I patted him down for weapons and . . . I felt a glass pipe which I automatically recognized as a methamphetamine pipe used to ingest methamphetamine.

...

Q. And at the point you felt that meth pipe, at that point you placed him in cuffs; is that correct?

A. Correct.

Q. And so, at that point, he was under arrest?

A. At that point, yes, I did place him under arrest for the methamphetamine pipe, for the drug paraphernalia.

...

Q. And then what happened after you placed him into handcuffs?

A. I continued to pat him down for weapons, because I hadn't even began my search [for weapons] because the first pocket I grabbed was a methamphetamine pipe so I still needed to search for weapons.

VRP 6, l. 5-24; 7, l. 1-25; 8, l. 16-21.

Subsequent to Deputy Gray's last answer above, there followed from the prosecuting attorney questions: as to what Deputy Gray found as he continued the search for weapons; whether what he found was on Mr. Messer's person; whether Deputy Gray read Mr. Messer his Miranda rights; and as to why Deputy Gray had initially contacted Mr. Messer. Although in his earlier testimony reproduced above Deputy Gray made clear the need that he felt to continue to search Mr. Messer for weapons after observing the "Jim Bowie" knife and discovering the meth pipe on Mr. Messer's person, at no time did Deputy Gray state that he took any steps to secure that knife. Deputy Gray had explained, however, that he asked Mr. Messer to step from the vehicle so as to distance him from the knife. Despite the fact that he was unaccompanied by other law enforcement personnel during his encounter with the occupants of Mr. Messer's vehicle, Deputy Gray expressed no such concern about the

passenger who, if a “Jim Bowie” knife was where Deputy Gray claimed, would have been able to reach that weapon. Regardless, Deputy Gray’s concern that led him to approach the vehicle initially extended to both Mr. Messer and Ms. Thomas:

Q. At the – going back to your initial encounter with the vehicle, at that point did you reasonably suspect that the occupant or occupants of the vehicle were engaged in or about to engage in criminal activity?

A. Yes, that’s why I contacted *them* (emphasis supplied).

VRP 9, l. 17-21. Remarkably, by his own testimony Deputy Gray felt the need to distance Mr. Messer from the “Jim Bowie” knife, but expressed no such felt need regarding Ms. Thomas’s ability to reach the knife. Thus at one and the same time Deputy Gray was and was not concerned about the danger to his well-being posed by the existence of a “Jim Bowie” knife in Mr. Messer’s vehicle.

2. Despite Deputy Gray’s testimony being the basis for the trial court’s finding that he observed a “big” knife, Mr. Messer’s and Ms. Thomas’s testimony provided the basis for the trial court’s finding that Deputy Gray pulled Mr. Messer from the vehicle.

As set forth above, without hesitation Deputy Gray explained that after observing the “Jim Bowie” knife, he asked Mr. Messer to step out of and to the rear of the vehicle. In its entirety, Ms. Thomas’s testimony at the CrR 3.6 hearing involved what she observed as to Mr. Messer’s exit from the vehicle:

Q. Okay. You were with Mr. Messer back in February 6th of 2012?

A. Yes, I was.

Q. When the police came up to the car you were sleeping in and arrested you? Arrested Mr. Messer?

A. Yeah.

Q. Okay. So you were there in your car sleeping, you and Mr. Messer, and were you in the passenger’s seat?

A. Yeah.

Q. What happens when you wake up?

A. I woke up to [Mr. Messer] being pulled out of the car, him saying hey, hey, hey, and I leaned over, and I’m like – and I told him you need – or, he was sort of – or, relax.

Or, I told him, I said you need to settle down because he ripped him out of the car.

Q. So, when you woke up Mr. Messer was being physically ripped out of the car?

A. Yes, he was being pulled out of the car.

VRP 11, l. 15-25; 16, l. 1-6.

Mr. Messer's testimony as to his exit from the vehicle on February 6, 2012 is as follows:

Q. Okay, let's take it step by step. So, you saw someone outside your vehicle motioning for you to roll down your window?

A. Yes.

Q. Okay. And what happened next?

A. Then I just, I reached open and I cracked my door like this much to say my window doesn't roll down, at which point it started - [Deputy Gray] started pulling my door and I couldn't hold it shut and he pulled it right open.

Q. And after he pulled the door open, what happened next?

A. I started to kind of get out of the car and he reached down and grabbed me right under this arm right here and he spun me around and he put me up against the car . . .

VRP 14, l. 1-13.

Disputed Fact No. 4 derives exclusively from Deputy Gray's testimony about the "Jim Bowie" knife. Strikingly, Disputed Fact No. 5 incorporates disputed Fact No. 4 as to the "big" knife but adopts the testimony of Mr. Messer and Ms. Thomas as the evidentiary basis for the finding that Deputy Gray pulled Mr. Messer from the vehicle.

3. There are no credibility determinations in either the trial court's oral ruling or the Findings of Fact and Conclusions of Law.

Mr. Messer's challenge to Disputed Facts No. 4 and No. 5 centers on the alleged existence of a Jim Bowie knife in the vehicle. That the trial court accepted Deputy Gray's testimony as to the existence of the knife finds expression in those two Disputed Facts. Yet even a cursory reading of the Findings of Fact and Conclusions of Law fails to discover any credibility determinations. Further the trial court's oral ruling on the issue does not contain a credibility determination:

At this point the deputy approached the vehicle. He approached the driver's side, knocked on the window. The defendant woke up. He told the defendant to roll the window down. According to the deputy, and there does not appear to be a dispute as to, actually, those facts. The defendant snickered, was startled from sleep. And the

Court would find that that would make sense, that woken up you would be startled. It's reasonable. The defendant opened the door and said that his window wouldn't roll down.

At that time the deputy says that he saw a big knife. The – we have our first disputed issue of fact here, and that is that the defendant says that there was no knife, but he had a knife, but the knife was in a container in the back seat of his car. The Court would find that the deputy saw what appeared to be a knife, grabbed the defendant and pulled him out of the car.

VRP 25, l. 1-2; 26, l. 1-14. The last sentence above adopts in part both Deputy Gray's testimony and the conflicting testimony of Mr. Messer and Ms. Thomas and finds expression in Disputed Fact No. 4 and No. 5.

4. Disputed Facts No. 4 and No. 5 as to Deputy Gray's

observation of a "big" knife are not supported by substantial evidence.

In reviewing a trial court's denial of a suppression motion, we review challenged findings of fact to determine whether substantial evidence supports them. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999). Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the finding. *Mendez*, 137 Wn.2d at 214. We review the trial court's conclusions of

law de novo, *State v. Levy*, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006), deferring to the trial court on issues of credibility and weight. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

State v. Sadler, 147 Wn. App. 97, 123, 19 P.3d 1108 (2008).

Because the trial court made no credibility determinations, this appeal centers on whether substantial evidence supports the challenged finding that Deputy Gray observed a “big” knife. Further, whether Deputy Gray had a lawful basis for patting down Mr. Messer for weapons requires an assessment of the totality of the circumstances attending the decision to pat down. *State v. Collins*, 121 Wn.2d 168, 847 P.2d 919 (1993). Mr. Messer submits that an examination of the totality of the circumstances does not establish substantial evidence for the finding that Deputy Gray observed a “big” knife. In addition to the detailed testimony of Mr. Messer regarding the existence of a knife in his vehicle are the following undisputed facts: After shining the spotlight on the two occupants, Deputy Gray approached the vehicle because he was concerned about the possibility that both occupants were about to engage in criminal activity. At the suppression hearing the State produced no physical evidence of a “big” knife. Deputy Gray offered no testimony regarding whether he took any steps to secure

the alleged “Jim Bowie” knife. Because Ms. Thomas was seated next to Mr. Messer, she could have reached the alleged “Jim Bowie” knife given, according to Deputy Gray, its location inside the vehicle in the driver’s side door panel. Deputy Gray did not testify that after allegedly observing the “Jim Bowie” knife, he asked both Mr. Messer and Ms. Thomas to step out of the vehicle.

Taking Deputy Gray’s testimony at face value reveals a fundamental inconsistency: Deputy Gray’s concern for his safety led him to distance Mr. Messer from a weapon, but it did not lead the deputy to distance Mr. Thomas from the same weapon that she could have accessed, given its location as described by Deputy Gray. Of course, were there, in fact, as Mr. Messer testified, neither a “Jim Bowie” knife nor a driver’s side door panel, Deputy Gray would have had no need to distance Ms. Thomas from a weapon. Again, after allegedly observing the knife, Deputy Gray, according to his own testimony, asked Mr. Messer alone to step out of the vehicle. We submit that the only conceivable reason Deputy Gray did not seek to distance Ms. Thomas from the knife was that there was no knife in the driver’s side door panel in Mr. Messer’s vehicle. Accordingly, substantial evidence does not support the trial court’s finding that Deputy Gray observed a “big” knife in that vehicle.

The absence of substantial evidence regarding the “big” knife undermines Conclusions of Law No. 4 and No. 5. That is, in the absence of substantial evidence regarding the knife, there was no legitimate reason for Deputy Gray to frisk/pat down Mr. Messer “for officer safety.” Consequently, the “safety frisk” was not lawful.

Conclusion

For the reasons set forth above, Mr. Messer submits that discovery of the evidence that formed the basis for his conviction was the product of an unlawful frisk/pat down. Consequently, under “fruit of the poisonous tree” doctrine, the trial court did not grant but should have granted his motion to suppress that evidence. Accordingly, reversing the dismissal of Mr. Messer’s motion to suppress and vacating his conviction for unlawful possession with intent to deliver a controlled substance are appropriate.

Respectfully submitted this 8th day of January 2014.

KING LAW GROUP, LLC

pledged to submit, etc

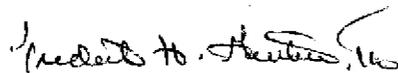
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