

NO. 47939-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

BENJAMIN CHESTER,

Appellant.

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

The Honorable Michael J. Sullivan, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

RANGER BENENATI DID NOT HAVE REASONABLE SUSPICION TO JUSTIFY HIS WARRANTLESS SEIZURE OF CHESTER.

The State makes no attempt to defend the trial court's conclusion that there was probable cause to detain Chester. This is for good reason. See Brief of Appellant, at 11 (noting that because Ranger Benenati did not have reasonable suspicion of criminal activity, he certainly did not have probable cause).

The State does, however, argue the presence of reasonable suspicion. And this argument is largely premised on one fact: that the area in which Chester appeared to be harvesting *something* on the ground was closed to the harvesting of *everything*. Therefore, argues the State, Ranger Benenati had reasonable suspicion of a criminal offense without having to see what, if anything, Chester was harvesting. Brief of Respondent, at 5-6.

Indeed, the State's assertion on appeal that the area was closed to harvesting of all edibles is found throughout its brief. See Brief of Respondent, at 1 ("Petitioner mistakenly asserts that this area was open to harvesting edible plants. In fact, the area was closed to harvesting all edible plants and a violation constituted a gross misdemeanor."); Brief of Respondent, at 2 ("The State rejects

Mr. Chester's statement that 'this portion of the park was still open for harvesting of non-mushroom edibles.' . . . The park, and the area where Mr. Chester was crouching down and rummaging through the leaf litter with his hands, was closed to harvesting edibles."); Brief of Respondent, at 2 ("The area was closed to harvesting any type of edible, including mushrooms. RP (5/29/15) 17."); Brief of Respondent, at 3 ("Ranger Benenati located Mr. Chester in an area of the park closed to the harvest of mushrooms, and other edibles. RP (5/29/15) 11, 12, 17, and WAC 352-28-030."); Brief of Respondent, at 5 ("[Benenati] testified and demonstrated that this area was closed to the harvest of any edible and was posted as such with two large signs and a map of the park outlining what area was closed.").

Thus, the State points to signage in the park, a map of the park, WAC 352-28-030, and Ranger Benenati's testimony as establishing its position that all edibles were off limits.

But the signs simply indicate, "NO MUSHROOM PICKING." Similarly, the map says, "AREA CLOSED TO MUSHROOM

COLLECTION.”¹ And WAC 352-28-030(1) *permits* the harvesting of all edible plants and fruits “unless otherwise posted at the park.”

This leaves Ranger Benenati’s testimony as the only possible source for the State’s position that Chester was prohibited from harvesting all edibles and not just mushrooms. A review of his testimony, however, reveals the State’s position to be indefensible.

Ranger Benenati testified that a portion of the park was “closed and posted as such to harvesting mushrooms.” 7RP 11. Using the park map, he testified the map “includes an area that is highlighted in red as closed to mushroom collection.” 7RP 11. He then testified that Chester was contacted in this area and described the two signs indicating that “mushroom harvest collection is not permitted.” 7RP 12-13. Later, Ranger Benenati explained “why this area is closed to mushroom harvest.” 7RP 15.

The first mention of other edibles is found at 7RP 17 and involves the following exchange between the prosecutor and Benenati:

¹ The State attached a copy of a photo of the signs (which appears to be pretrial exhibit B) and a copy of the map (which appears to be pretrial exhibit A) to its briefing. It does not appear, however, that the State filed a designation in the Superior Court properly making these part of the record for appeal. See generally RAP 9.6-9.8. Undersigned counsel is rectifying this oversight.

Q: So as you went to the area [where Chester was located], again, this is an area that's closed; is that right?

A: It is closed to vehicle traffic. It is open to pedestrian traffic.

Q: Is it open to harvesting any type of edibles?

A: No. It is closed to mushroom harvesting.

Q: And in fact, to harvest a mushroom or any sort of edible in that area would have been a crime?

A: It would have been a crime. That's correct.²

7RP 17.

"Any" can mean "every" or "all." Webster's Third New International Dictionary 97 (1993). And that is obviously how Ranger Benenati interpreted the word, since he responded "no" when asked if the park was open to the harvesting of "any type of edible." He then solely identified mushroom harvesting as the prohibited activity. The issue then became confused, however, because the prosecutor's next question and Benenati's next answer assume that the harvesting of every type of edible would have been a crime.

² Benenati was likely thinking of RCW 79A.05.165(1)(a), which makes it a misdemeanor to take or remove plants or other natural objects from a park if prohibited by park rules.

Fortunately, defense counsel was paying attention and recognized the incongruity in what had just occurred. On cross-examination of Ranger Benenati, defense counsel made it clear that the harvesting of non-mushroom edibles was permitted in the park when Chester was seized:

Q: Show you what's been marked as Plaintiff's Exhibit G. Is that the Washington Administrative Code that you sent to me?

A: Yes, it is.

Q: Is that the Washington Administrative Code that was in effect at the time Mr. Chester was in the area which was closed to mushroom harvest?

A: Yes.

Q: Was it closed to all edibles?

A: No it was closed to mushroom harvesting only.

7RP 40-41 (emphasis added).

This question and answer settle the matter. And although a cite to this very interaction was included in Chester's opening brief, see Brief of Appellant, at 4, the State does not acknowledge, much less discuss, this question and answer in its briefing.

Because there was lawful harvesting of edible plants in the area of the park in which Chester was found, and Ranger Benenati

did not see any harvested mushrooms prior to seizing Chester, Benenati did not have reasonable suspicion of criminal activity and the fruits of the unlawful seizure should have been suppressed, including the nearby bag he had not abandoned.

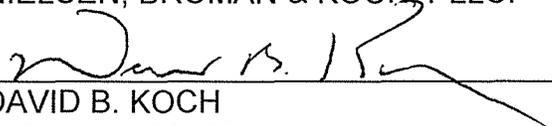
B. CONCLUSION

For the reasons discussed in Chester's opening brief and above, this Court should reverse Chester's conviction for possession of a controlled substance.

DATED this 14th day of March, 2016.

Respectfully Submitted,

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DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 14TH DAY OF MARCH 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] BENJAMIN CHESTER
8605 WALLINGFORD AVENUE N.
SEATTLE, WA 98103

SIGNED IN SEATTLE WASHINGTON, THIS 14TH DAY OF MARCH 2016.

x *Patrick Mayovsky*

NIELSEN, BROMAN & KOCH, PLLC

March 14, 2016 - 3:08 PM

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