

No. 47939-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

BENJAMIN J. CHESTER,

Appellant.

BRIEF OF RESPONDENT

MARK MCCLAIN
Pacific County Prosecuting Attorney

By:



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I. RESPONSE TO PETITIONER'S ASSIGNMENTS OF ERROR

1. The trial court did not error when it denied appellant's motion to suppress evidence pursuant to CrR 3.6.
2. The trial court did not error in finding the defendant was stopped and questioned based on the park official's observations of two men in the area illegally harvesting mushrooms.
3. There was no error on the trial court's conclusions of law 3-5 in support of its decision on the motion to suppress.

II. RESPONSE TO PETITIONER'S ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Petitioner mistakenly asserts that this area was open to harvesting edible plants. In fact, the area was closed to harvesting of all edible plants and a violation constituted a gross misdemeanor. Consequently, when the Park Ranger observed Mr. Chester on his hands and knees intently rummaging through the leaf litter on the ground, which, based on the Ranger's training and experience is how mushrooms are harvested, there were articulable facts justifying the detention for harvesting in an area closed to all harvesting. Once detained, the Ranger located a bag containing freshly harvested psilocybin mushrooms.

2. The trial court's findings and conclusions supported the denial of the Defendant's motion to suppress, as did the evidence presented at the hearing.

III. STATEMENT OF THE CASE

With the exception noted below, the State accepts the Appellant's factual statement of the case.

The State rejects Mr. Chester's statement that "this portion of the park was still open for harvesting of non-mushroom edibles." Appellant's brief at p 4. 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. Additionally there were two 18 by 24 inch red and white aluminum signs indicating the area was also closed to mushroom harvesting along with a State Park map outlining the area close to harvesting, including mushroom harvesting. RP (5/29/15) 11, 12, see also exhibits admitted at the CrR 3.6 hearing attached hereto as Appendix. This area was closed to harvesting any type of edible, including mushrooms. RP (5/29/15) 17. See also WAC 352-28-030 (admitted at the hearing and incorporated herein by reference) and referenced by Ranger Thomas Benenati when discussing the portion of the park which was closed where Mr. Chester was located.

Further, when Ranger Benenati stopped and got out of his vehicle, Mr. Chester recognized the vehicle was a ranger vehicle. Mr. Chester stood up, turned, and took several brisk steps away from

the officer. RP (5/29/15) 19, 22. Ranger Benenati located a bag which had been a yard away from where Mr. Chester had been searching and located the freshly picked mushrooms. RP (5/29/15) 19-21.

IV. ARGUMENT

RANGER BENENATI HAD REASONABLE SUSPICION TO JUSTIFY A SEIZURE OF CHESTER.

When reviewing a motion to suppress, the Court evaluates findings of fact under the substantial evidence standard. *State v. Levy*, 156 Wash.2d 709, 733, 132 P.3d 1076 (2006). Conclusions of law are reviewed *de novo*. *Id.* Appellate Courts may affirm the trial court for any reason supported by the record and the law. *State v. Kelley*, 64 Wash. App. 755, 764, 828 P.2d 1106 (1992). Challenged findings entered after a suppression hearing that are supported by substantial evidence are binding, and, where the findings are unchallenged, they are verities on appeal. *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003).

Mr. Chester challenges only finding of fact 7 as it relates to two men in the area illegally harvesting mushrooms, and conclusions of law 3-5.

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 352-28-030.¹ Mr. Chester was observed on his hands and knees in a remote area of the park intently staring at the ground and rummaging around in the 3 or 4 inch deep leaf debris contained on the forest floor. RP (5/29/15) 18 (see also Appendix for photos of the area where Mr. Chester was located which were admitted at the CrR 3.6 hearing). Ranger Benenati, who in addition to having significant experience in this park with those mushrooms, also has a degree in biology with an emphasis on botany, and he indicates this is how someone locates and harvests mushrooms. Further, when Mr. Chester noticed the Officer, Mr. Chester stood up and briskly began walking away from the Officer. RP (5/29/15) 19, 22. Ranger Benenati briefly detained Mr. Chester, knowing that recently two others had run from Park Officials, and Ranger Benenati returned to where Mr. Chester had been and located freshly picked psilocybin mushrooms in a sack. RP (5/29/15) 19-22.

A *Terry* stop is justified if the officer can “point to specific and

¹ WAC 352-28-030(1) provided, in relevant part, that “the recreational harvest, possession, or transport of edible plants and edible fruiting bodies including, but not limited to, mushrooms, berries, and nuts, is allowed up to an amount of two gallons per person per day, unless otherwise posted at the park. (4) The director or the designee of the director may close, temporarily close, or condition public access to certain park areas for recreational harvesting of edibles upon finding that the activity degrades or threatens to degrade the park's natural or cultural resources, or to protect public health, safety, and welfare. Such closure shall be posted at the entrance to the park area affected and at the park office.” Here, the park was closed to all harvest and marked accordingly. RP (5/29/15) 11, 12, 17.

articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 1877–78, 20 L.Ed.2d 889 (1968). When reviewing the merits of an investigatory stop, a court must evaluate the totality of circumstances presented to the investigating officer. *United States v. Cortez*, 449 U.S. 411, 418, 101 S. Ct. 690, 66 L.Ed.2d 621 (1981). The court takes into account an officer's training and experience when determining the reasonableness of a *Terry* stop. *State v. Mercer*, 45 Wash. App. 769, 774, 727 P.2d 676 (1986). Courts also consider the Officer's experience, location of the conduct, and reasonableness of the suspicion. *State v. Little*, 116 Wash.2d 488, 806 P.2d 749 (1991)(upholding the search where there was reasonable suspicion of criminal trespass and flight by the defendant warranting arrest).

Here, because of Ranger's training and experience as both an officer and a botanist, he understood how someone harvests mushrooms and in what areas of the park such mushrooms grow. He further 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. A violation of the rule constituted a crime. Consequently, Mr. Chester was

observed by an officer committing a gross misdemeanor and detained accordingly. While Mr. Chester was briefly detained, Ranger Benenati returned to where Mr. Chester had walked from and located an abandoned bag of illegal mushrooms. The search thereof was warranted pursuant to *Terry* and *Little*.

Without conceding that the Ranger was not permitted to search Mr. Chester's person following his arrest, the location of the bag, which was not on Mr. Chester at the time of the search but instead three feet from where the Ranger initially observed Mr. Chester, was validly searched. Police need neither a warrant nor probable cause to retrieve and search voluntarily abandoned property. *State v. Reynolds*, 144 Wash.2d 282, 27 P.3d 200 (2001). Where a defendant abandoned property and that property was subsequently searched, the defendant may assert a constitutionally protected privacy interest only upon a showing that he or she involuntarily abandoned the property in response to illegal police conduct. To establish that the abandonment of the searched property was involuntary, a defendant must therefore show two elements: "(1) unlawful police conduct and (2) a causal nexus between the unlawful conduct and the abandonment." *Id.* 144 Wash. 2d at 288, quoting *State v. Whitaker*, 58 Wash. App. 851, 853, 795 P.2d 182 (1990)

(citing *United States v. Roman*, 849 F.2d 920, 923 (5th Cir.1988)).

Here, the officer's conduct was not unlawful. Further, the circumstances of Mr. Chester walking away from the seized evidence demonstrated to both the officer and the trial court (and later the jury) that Mr. Chester's desire was to walk as far away from the illegal item as possible.

V. CONCLUSION

Mr. Chester was briefly detained upon reasonable and articulated facts which demonstrated Mr. Chester was illegally harvesting mushrooms in a location closed to harvesting of any mushrooms. Mr. Chester's flight, along with the other two men who had recently fled from park personnel, warranted the brief detention. Immediately following this detention (where no narcotics were found on Mr. Chester), Ranger Benenati located the psilocybin mushrooms and formal arrest followed. The trial court properly denied Mr. Chester's motion to suppress and the result should not be disturbed on appeal.

RESPECTFULLY submitted this 15TH day of February, 2016.



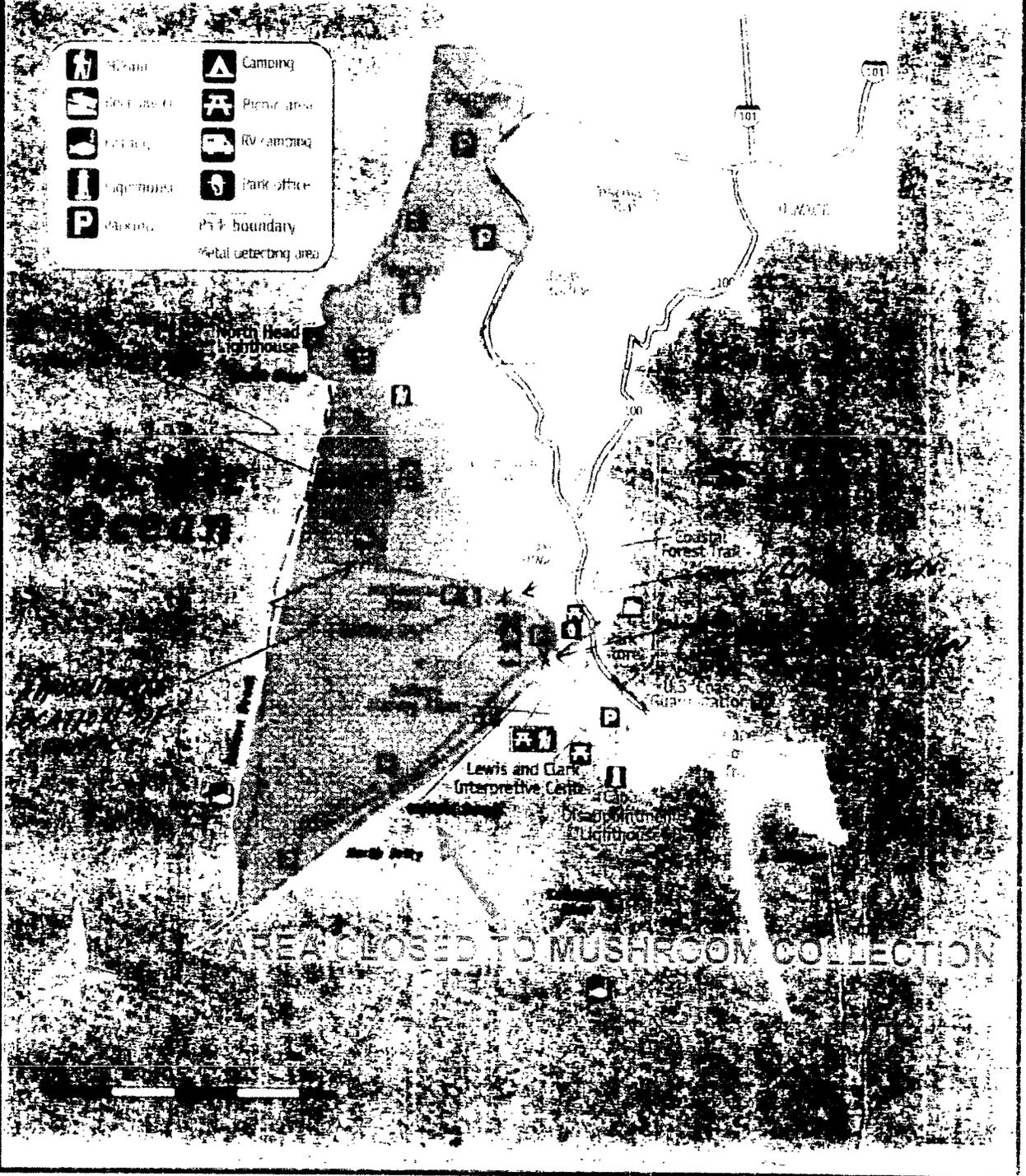
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APPENDIX



Cape Disappointment State Park

- | | |
|----------------------|-------------|
| Hiking | Camping |
| Picnic area | RV camping |
| Park office | PS boundary |
| Metal detecting area | |



**NO MUSHROOM
PICKING
VIOLATORS SUBJECT TO
CRIMINAL CITATION**

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PICKING
VIOLATORS SUBJECT TO
CRIMINAL CITATION**





PACIFIC COUNTY PROSECUTOR

February 16, 2016 - 12:01 PM

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