

FILED
COURT OF APPEALS
DIVISION II

2016 OCT 31 AM 9:19

STATE OF WASHINGTON

NO. 49032-3-II

BY

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DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

NICHOLAS EDWARD NOVION,

Appellant.

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

The Honorable James Lawler

APPELLANT'S OPENING BRIEF

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P/M: 10/25/16

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it entered Finding of Fact 1.4:

“Officer Humphrey turned around and observed Mr. Novion running away from the residence he had come from.”

2. The trial court erred when it entered Finding of Fact 1.5:

“Upon seeing Mr. Novion running away, Officer Humphrey got in her marked patrol vehicle and began to search the area for him.”

3. The trial court erred when it entered Finding of Fact 1.7:

“Also located was a bindle that contained what appeared to be black tar heroin based on Officer Humphrey’s training and experience.”

4. The trial court erred when it entered Conclusion of Law 2.1:

“The stop by Officer Humphrey was a valid *Terry* stop. This informant was a known, named citizen-informant and was reliable based on prior interactions with Officer Humphrey and telephone contact prior to her arrival in this instance. This location being a known drug house where controlled substances are bought and/or sold or stolen property traded for controlled substances, along with Officer Humphrey’s interaction with the driver of the vehicle, their nervous appearance as well as inconsistent statement as to why they were there, along with Mr. Novion matching the description of the person described as engaging in suspicious activity, along with his flight from the area upon seeing Officer Humphrey provided a substantial possibility that criminal conduct was taking place.”

5. The trial court erred when it entered Conclusion of Law 2.2: “Even if the *Terry* stop is not valid, Mr. Novion abandoned the property that is the basis for his charges. None of the evidence in this case was found on Mr. Novion’s person, making the exclusionary rule inapplicable.”

6. The trial court erred when it entered Conclusion of Law 2.3: “There was no seizure until Officer Humphrey placed Mr. Novion in handcuffs. At that time, however, Officer Humphrey at a minimum had a basis to detain him for trespassing on the homeowner’s property.”

7. The trial court erred in denying Mr. Novion’s motion to suppress because the evidence was obtained illegally.

8. Officers violated Mr. Novion’s right to privacy under Art. 1, Section 7 of the Washington Constitution by seizing him without probable cause or reasonable suspicion?

B. ISSUES RELATED TO THE ASSIGNMENTS OF ERROR

Did the trial court err by finding that Officer Humphrey observed Mr. Novion running away from the residence when she had testified that she did not see him run, but assumed he had because, after she saw him exit a residence, she turned around, and when she turned around again Mr. Novion was no longer visible? (Assignments of Error 1, 2, 4, 7, 8).

Did the trial court err by finding that a bindle containing heroin was found and identified based on the Officer’s training and experience

when that officer had actually testified she recovered two makeshift bindles of methamphetamine but at the time she found the bindles did not know what was in them? (Assignment of Error 3).

Was Mr. Novion illegally seized when the officer directed him to come to her car, where a second officer quickly showed up while the first officer searched the area he had come from when no reasonable or articulated suspicion that he was involved in criminal activity? (Assignments of Error 5, 6).

C. STATEMENT OF FACTS

Lewis County prosecutors charged Nicholas Novion with unlawful Possession of a Controlled Substance – heroin (count I) and Possession of a Controlled Substance – methamphetamine (count II). CP 1-3.

At the 3.6 hearing, defense counsel argued that Novion was illegally seized because the officer did not have articulable facts to support a *Terry* stop, that Novion simply going into a home, even one known for drug activity was not enough to show a crime had been committed. RP 32-35. During this hearing, City of Centralia Police Officer Angie Humphrey testified that she had been dispatched to a particular city block where the reporting party had called in reporting a suspicious male and vehicle in the area. RP 5-6. The reporting party had reported a green Volvo parked on the block and a male going to and from the vehicle wearing a sweatshirt and carrying a black

backpack. *Id.* The officer did not recall who the reporting party was but testified she responded to calls regarding suspicious drug activity from the reporting party in the past and that he had proven reliable. RP 7. The officer spoke with the reporting party before arriving to confirm the vehicle was still present and its location. RP 15.

Officer Humphrey responded to the call in her patrol vehicle but did not turn on her lights. RP 7-8. Officer Humphrey first observed the area, saw nothing suspicious and then contacted the occupant of the green Volvo, who was identified as Noreen Novion, the mother of Nicholas Novion. RP 7, 8, 15. The officer testified that Ms. Novion appeared nervous, speaking in circles and did not provide a clear answer for what she was doing. *Id.* While talking to Ms. Novion, the officer heard a door shut, looked over and saw a male matching the description provided on the porch of a house that the officer associated with drug activity and then that man began walking down the stairs to leave. RP 6, 9, 16.

After Officer Humphrey saw the reporting party on the porch, the officer directed her attention once again to Ms. Novion when she heard the reporting party yell "There he is and he's running." RP 9. When Officer Humphrey looked again she did not see the male. *Id.* She testified she wanted to see where he was running to and so she went to look for him. *Id.* She did not actually see Novion run. RP 16. During cross-examination, Officer Humphrey stated that when she got

back into her car to look for Novion she did not have articulable facts about a crime being committed, only a report of a suspicious man in the area. RP 17.

She patrolled the area looking for Novion and saw him at the side of a residence. RP 10, 17-18. Officer Humphrey then parked at an angle in the street and turned on her rear flashing lights. *Id.* Officer Humphrey exited her patrol vehicle and said to Mr. Novion “Hey come here” Mr. Novion just looked at the officer and so she repeated “Hey come here.” RP 10. Mr. Novion complied and went to the patrol car as instructed to speak with the officer. RP 10-11.

During cross-examination, when asked if, at the time she told Novion “Hey come here” whether at that point she had suspicion of criminal activity, she said at that point Novion was trespassing. RP 18. When asked if she was looking for Novion for trespassing, Officer Humphrey admitted she was not stopping Novion for the trespass but instead because she wanted to see what he was doing. RP 18.

At the same time Officer Humphrey made contact with Novion outside of the home, the occupant of the home came out to ask what Novion was doing at the side of his home. RP 11. The officer asked Novion about his actions in running away and Novion responded that he did not run away, that he walked away. RP 12. Officer Humphrey placed Novion in handcuffs and waited for a second officer to arrive. RP 11-12.

Officer Humphrey testified that she did not see Novion run, but she would have still seen Novion walking if he had not run. RP 12-13. She also testified that “He could have walked at a fast pace.” RP 13. In response to questioning, Novion told the officer that he had warrants and that is why he walked away, planning to go into another’s yard to hop the fence and loop back around to where his mom was. RP 13.

Soon after Novion had been handcuffed, the second officer arrived and stayed with Novion while Officer Humphrey went to look at the area Novion had just come from. RP 12-13. Officer Humphrey saw a pile of discarded items, including papers, matches and prescription bottles that had Nicholas Novion’s name on them. RP 12. In this pile the officer found the heroin and methamphetamine that Novion was charged with possessing. RP 13.

The court denied the 3.6 motion to suppress evidence and the matter proceeded to a stipulated facts bench trial. RP 39. Following a bench trial before the Honorable James Lawler, Novion was convicted as charged. CP 24-27 (Sub. No. 34). He was sentenced to 60 days of electronic home monitoring and this appeal timely followed. CP 30-39.

D. ARGUMENT

THE TRIAL COURT ERRED WHEN IT DENIED MR. NOVION’S MOTION TO SUPPRESS EVIDENCE.

This court should reverse the conviction and remand for suppression of the evidence. Officer Humphrey illegally seized Nicholas Novion. This seizure was unconstitutional because there was

no articulated reason to hold Novion, outside of issuing a citation for trespass, which Officer Humphrey admitted was not the reason she went after Novion. The real reason according to the officer was to see why he was running, although she admitted that she did not see him run and that he may have walked away. The remedy for an illegal seizure is suppression of the evidence as fruit from the poisonous tree. *State v. Ladson*, 138 Wn.2d 343, 359, 979 P.2d 833 (1999).

A trial court's ruling on a suppression motion is reviewed for substantial evidence to support the challenged findings and a de novo review of challenges to the trial court's conclusions of law. *State v. Carneh*, 153 Wn.2d 274, 281, 103 P.3d 743 (2004).

The evidence did not support the trial court's findings that "Officer Humphrey turned around and *observed* Novion running away from the residence he had come from" and "upon *seeing* Mr. Novion running away, Officer Humphrey got in her marked patrol vehicle and began to search the area for him." (Emphasis added - Findings of Fact 1.4, 1.5). Officer Humphrey testified that after she heard a door shut, she saw Novion walking down stairs, then turned her attention back to Noreen Novion. Then she heard the neighbor say "There he is and he's running", but she never saw it herself nor testified that she saw it herself. Instead, she actually testified she did not see him run, but assumed he must have, eventually admitting it could have been a fast

walk. RP 12-13. Thus, these key factual findings the court based its legal conclusions on are not supported in the record.

The Fourth Amendment to the United States Constitution guarantees “the right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. Const. amend. IV. A warrantless seizure is presumed unreasonable under the Fourth Amendment. *State v. Smith*, 145 Wn.App. 268, 274, 187 P.3d 768 (2008). It is the State’s burden to show that a warrantless search or seizure was lawful. *State v. Williams*, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). An exception to the warrant requirement is the circumstance where the officer has probable cause to believe the individual has committed a crime, or can provide specific and articulable facts that give rise to a reasonable suspicion that the individual has been or is about to be involved in a crime. *State v. Armenta*, 134 Wn.2d 1, 10, 948 P.2d 1280 (1997), *Smith* 145 Wn.App. at 275.

Article 1, Section 7 of the Washington Constitution provides: “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Under Article 1, Section 7 of the Washington Constitution, a person is “seized” when an officer restrains, either physically or by a show of authority, the person’s freedom of movement to such an extent that a reasonable person would not feel free to leave or to decline the officer’s request and terminate the

encounter. *State v. O'Neill*, 148 Wn.2d 564, 574, 62 P.3d 489 (2003). A seizure occurs where the officer's commands or actions prevent a person from leaving. *State v. Ellwood*, 52 Wn. App. 70, 73, 757 P.2d 547 (1988) (seizure occurred when officer told the defendant to "wait right here.") The defendant has the burden of proving a seizure has occurred. *State v. O'Neill*, 148 at 581, 62 P.3d 489 (2003). This Court reviews de novo the question of whether the facts surrounding a police encounter amount to a seizure. *State v. Rankin*, 151 Wn. 2d 689, 709, 92 P. 3d 202 (2004).

Here, the seizure occurred when Officer Humphrey stopped her patrol car in front of him and told him for a second time to "hey come here" after he was not responsive to her first command. It was clear at this point Novion was not clear to leave and he would have been stopped if he had tried to leave.

Terry requires a reasonable and articulable suspicion of criminal activity to justify a warrantless seizure. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed 2d 889 (1968). An investigative detention based on a reasonable articulable suspicion of criminal activity is one of the "jealously and carefully drawn" exceptions to the warrant requirement, and is constitutionally authorized only if "the officer's action was justified at its inception." *Terry*, 392 U.S. at 20. The officer must point to specific facts that criminal activity is afoot. *State v. White*, 97 Wn.2d 92, 105, 800 P.2d 1061 (1982). The level of articulable suspicion

required to justify a *Terry* stop is a substantial possibility that criminal conduct has occurred or is about to occur. *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986).

Under *Martinez*, innocuous facts do not justify a stop and simply being present in a high crime area is not enough, instead, circumstances must suggest a substantial possibility that a particular person has committed a specific crime or is about to do so. *State v. Martinez*, 135 Wn. App. 174, 180, 143 P.3d 855 (2005). In *Martinez*, the court found that there was not reasonable suspicion to stop the defendant despite him being in a area known for vehicle prowls, and that he walked away from the officer and seemed nervous. *Martinez*, 135 Wn. App. At 178-79.

In this case, there was no reasonable individualized suspicion that Novion had committed any criminal act. The only thing Novion was alleged to have done is to be at a residence where the officer knows of the occupant of that residence and that past drug activity has occurred there and to be going from that residence back to a parked car. The reporting party did not see Novion with controlled substances nor did he see Novion selling controlled substances. Novion was followed by the officer not because of a reasonable and articulable suspicion of criminal activity but instead because, while carrying a backpack, he went into a private home whose occupants had in the past been suspected of such criminal drug activity, his mother

appeared nervous while waiting for him, and, like the defendant in *Martinez*, he quickly went away from the officer. As defense counsel argued, it is highly likely, that even in the case of a known drug home, other, non-criminal reasons likely exist for people to be going in and out of the home. Without a reasonable, individualized suspicion to suspect Novion of criminal activity it was improper to seize his person. RP 34-35.

Because the seizure occurred when Officer Humphrey told Novion for a second time to “Hey come here”, this Court can only consider evidence known to the officer before the stop. *Terry*, 392 U.S. at 20. The improper seizure of Novion cannot be justified after the fact by what was found where Novion had been standing.

The evidence does not support the trial court’s finding that there was no seizure until Officer Humphrey placed him in handcuffs. The officer obviously quickly pursued Novion. When she saw him she said “Hey come here” when he just looked at her in response, the officer repeated the command. No reasonable person would have felt free to walk away after the second time the officer told him to come to her patrol car.

Further, the evidence does not support the trial court’s finding that Officer Humphrey at a minimum had a basis to detain Novion for trespassing on the homeowner’s property because, as the officer admitted during cross-examination, she was not acting in response to

the trespass, she acted in response to him leaving the “known drug home” and then going away from the area where he saw the officer speaking to his mother. This after the fact justification of trespassing is misplaced. Where the reason for the initial police contact is discharged, any further seizure is without legal authority and evidence obtained as a result of that seizure should be suppressed. *State v. Coyne*, 99 Wn.app. 566, 570, 95 P.2d 78 (2000).

The trial court erred when it concluded that the exclusionary rule is not applicable here. Where an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed. Suppression is constitutionally required. *State v. Ladson*, 138 Wn.2d 343, 359, 979 P.2d 833 (1999). Here evidence was uncovered as a result of the improper seizure and thus is fruit of the poisonous tree and must be suppressed.

Because Novion placed his property in the yard, where it was found and not on his person, does not make the exclusionary rule inapplicable. In *State v. Dorey*, the investigating officer saw the defendant toss a fanny pack into the bushes when he realized he was being pursued by the officer and the officer later recovered methamphetamine from the discarded fanny pack. *State v. Dorey* 145 Wn.App. 423, 186 P.3d 363 (2008). In finding the seizure unreasonable, the Court in *Dorey* held that if the defendant had not

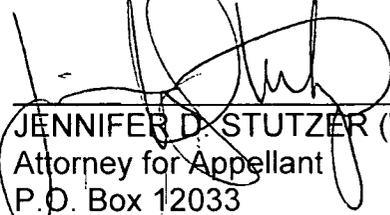
been improperly stopped the methamphetamine would not have been found by the officer, the fact he abandoned it in the bushes while being pursued did not cure the problem that probable cause did not exist to detain the defendant in that case. In *Dorey*, the court found that the nature of the reason the police were called was so innocuous, there was no crime to investigate. The same is true for in this case because going from a “known drug house” back and forth to a car while wearing a backpack is not a crime. The evidence does not support the inference of a crime and therefore the stop of Novion was improper and all evidence seized as a result of that stop must be suppressed. *State v. Larson*, 93 Wash.2d 638, 645-46, 611 P.2d 771 (1980). Here, because the illegal stop violated Novion’s rights under the Fourth Amendment and Article 1, Section 7 of the Washington Constitution, the evidence obtained must be suppressed as fruit of the poisonous tree and the trial court erred by denying the suppression motion.

E. CONCLUSION.

Based on the foregoing facts and authorities, Mr. Novion respectfully asks this Court to reverse his convictions for possession of heroin and methamphetamine and remand to the trial court to dismiss the charge with prejudice.

DATED this 25th day of October, 2016.

Respectfully submitted,



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DECLARATION OF DOCUMENT FILING AND SERVICE

I, JENNIFER STUTZER, STATE THAT ON THE 25th DAY OF October, 2016, I CAUSED THE ORIGINAL **APPELLANT'S OPENING BRIEF** TO BE FILED IN THE **COURT OF APPEALS - DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN COLVILLE, WASHINGTON THIS 25TH DAY OF October, 2016.

x 