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Court of Appeals
Division II

NO. 49998-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
State of Washington
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

LARRY SMITH, JR.,

Appellant.

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

The Honorable Elizabeth Martin, Judge

REPLY BRIEF OF APPELLANT

MARY T. SWIFT
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ARGUMENT IN REPLY

1. SMITH WAS SEIZED WHEN DEPUTY STEWART ASKED HIM TO TURN OFF THE VEHICLE AND SMITH EXPRESSED HIS DESIRE TO LEAVE.

Below, the State conceded Deputy Stewart's initial contact with Smith "was a Terry¹ stop right from the get-go." 2RP 38. In its written response to Smith's motion to suppress, the State likewise acknowledged "[t]his was not a social contact, but was in fact an investigatory stop." CP 58. The State noted Stewart did not activate his lights or siren, and did not block Smith's vehicle with his patrol car, but agreed that instructing Smith to turn off his vehicle was a "show of authority." CP 58-59.

The trial court likewise recognized that, pursuant to Terry, "a law enforcement officer may briefly detain a citizen for questioning where that officer has a well-founded suspicion of criminal activity based upon specific and articulable facts." CP 50. The court concluded Stewart "conducted a valid stop of the defendant pursuant [to] Terry v. Ohio, supra." CP 50.

Thus, Smith, the State, and the trial court all agreed that Smith was seized pursuant to Terry when Stewart contacted him and asked him to turn off the vehicle. For the first time on appeal, the State argues "the record supports that Deputy Stewart did not seize [Smith] by approaching his parked vehicle, and asking for his name. The encounter was a valid social

¹ Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

contact.” Br. of Resp’t, 12. The State contends Smith “was not seized until Deputy Stewart asked him to exit the vehicle following the records check.” Br. of Resp’t, 16.

A review of the case law and the record demonstrates the State is incorrect. The State repeatedly minimizes or ignores Stewart’s show of authority in asking Smith to turn off the vehicle, in addition to asking for his identification and his purpose at the apartment complex. And, there is the additional fact that Smith was not allowed to leave after expressing his desire to do so. Ex. 2, at 8. As the State properly conceded below, Smith was seized when Stewart contacted him, asked for his identification, instructed Smith to turn off the vehicle, and Smith expressed his desire to leave.

Not every encounter between an officer and an individual amounts to a seizure. State v. Armenta, 134 Wn.2d 1, 10, 948 P.2d 1280 (1997). Rather, a person is “seized” under the Fourth Amendment if, “in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.” Id. (quoting United States v. Mendenhall, 446 U.S. 544, 554, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980)). Put another way, the crucial test is “whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers’ requests or otherwise terminate the encounter.” Florida v. Bostick, 501 U.S. 429, 439, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991).

Whether police conduct amounts to a seizure is a mixed question of law and fact. State v. Harrington, 167 Wn.2d 656, 662, 222 P.3d 92 (2009). The trial court is entitled to “great deference” in resolving the facts, but “the ultimate determination of whether those facts constitute a seizure is one of law and is reviewed de novo.” State v. Thorn, 129 Wn.2d 347, 351, 917 P.2d 108 (1996), overruled on other grounds by State v. O’Neill, 148 Wn.2d 564, 62 P.3d 489 (2003).

In Armenta, Armenta and Cruz approached a police officer at a truck stop and asked if he knew an auto mechanic who could repair the car. 134 Wn.2d at 4-5. The officer did not, but offered to look at their car himself. Id. at 5. On the way to the vehicle, the officer asked the men for identification. Id. The officer subsequently noticed a bulge in one of Cruz’s pockets, which turns out to be a wad of money. Id. The officer then asked the men several questions and Armenta voluntarily produced three more bundles of money. Id. The officer eventually called dispatch and put the money in his patrol car “for safe keeping.” Id. at 5-6.

The supreme court held Armenta and Cruz were not seized when the officer asked them for identification and questioned them on the way to Armenta’s vehicle. Id. at 11. The court explained “a police officer’s conduct in engaging a defendant in conversation in a public place and asking for identification does not, alone, raise the encounter to an investigative

detention.” Id. This was particularly true where the officer “requested the identification for some purpose other than investigating criminal activity.” Id. And, Armenta and Cruz initiated contact with the officer, then prolonged it by accepting the offer of assistance. Id. The court concluded, however, that Armenta and Cruz were seized when the officer placed their money in his patrol car: “Reasonable persons in their position would have realized at that point that they were not free to leave.” Id. at 12.

The State relies heavily on O’Neill to support its contention that “[Smith] was not seized when Deputy Stewart approached [Smith’s] parked vehicle, asked what he was doing, and requested identification.” Br. of Resp’t, 13-16. But O’Neill actually supports Smith’s—as well as the trial court’s and trial prosecutor’s—position that he was seized when Stewart asked him to turn off the vehicle and Smith expressed his desire to leave.

In O’Neill, a police officer observed a car parked in front of a store that had been closed for about an hour and had recently been burglarized. 148 Wn.2d at 571-72. The officer activated his spotlight in order to see the license plate and then asked the driver, O’Neill, to roll down his window. Id. at 572. The officer inquired what O’Neill was doing there and eventually requested O’Neill’s identification. Id. After O’Neill told the officer his driver’s license had been revoked, the officer asked O’Neill to step out of the vehicle. Id.

The supreme court held O’Neill was not seized until the officer asked him to step out of the vehicle. Id. at 581-82. The court explained that asking O’Neill to roll down his window did not constitute a seizure because “[i]t is not improper for a law enforcement officer to engage a citizen in conversation in a public place.” Id. at 579. O’Neill was parked in a public place, “visible and accessible to anyone approaching.” Id. The court likened this to an individual parked on a ferry or in the parking lot of a closed public park—both public places where there is not the same expectation of privacy as with a vehicle parked in a private location. Id. (citing State v. Knox, 86 Wn. App. 831, 832, 939 P.2d 710 (1997), and State v. Thorn, 129 Wn.2d 347, 349, 917 P.2d 108 (1996), respectively). The court further explained that, under Armenta, asking for identification, by itself, does not constitute a seizure. O’Neill, 148 Wn.2d at 580.

There are several critical distinctions between Smith’s case and O’Neill that make Stewart’s contact with Smith a seizure. Stewart was dispatched to building E of the Miramonte Apartment Complex, which has approximately nine buildings. 2RP 7-11, 28. Stewart explained he drove into the complex toward building E, which “is located toward the back of the complex.” 2RP 12; see also 2RP 28 (explaining one road in the complex leads back to buildings D-H). He observed Smith backing the Dodge truck into a parking space in front of building H. 2RP 12.

Stewart parked his fully marked patrol car 10 to 20 feet from the truck. 2RP 12-13, 29. Stewart was wearing his department-issued uniform. 2RP 13. Stewart immediately contacted Smith, whose window was already rolled down, with the truck running. 2RP 14, 29. Stewart began asking Smith questions, but then asked Smith to turn off the truck because it was hard to hear. 2RP 14. Once Smith did so, Stewart asked Smith's purpose at the complex, and requested Smith's name and identification. 2RP 15, 31.

At that point, Smith "stated he just wanted to leave and that the police are always harassing him."² Ex. 2, at 8. Following Smith's expressed desire to leave, Stewart ran Smith's name and the license plate through the police database, discovering Smith's license was suspended and the vehicle had been reported stolen. 2RP 15-16. Stewart then requested that Smith step out of the vehicle. 2RP 16.

Like O'Neill, Stewart engaged in conversation with Smith and asked for his identification. Unlike O'Neill, however, this contact did not occur in a public place. Rather, an apartment complex is private property, with an increased expectation of privacy. This is distinguishable from the public places identified in O'Neill: in front of a store, a public park, and a ferry

² Deputy Stewart did not testify to this statement at the CrR 3.6 hearing. However, it is included in the arrest report, which was admitted into evidence at the CrR 3.6 hearing as plaintiff's exhibit 2. 2RP 23-24. It is therefore properly before this Court in considering whether, under the totality of the circumstances, Smith was seized before Stewart asked him to step out of the vehicle.

boat. O'Neill, 148 Wn.2d at 579. Stewart's contact with Smith in a more private place moves it closer to a seizure than O'Neill. And, unlike Armenta, Stewart requested Smith's identification to investigate suspected criminal activity.

In addition to the questioning and request for identification, Stewart instructed Smith to turn off the vehicle. As the State recognized below, this was an increased show of authority—greater than asking someone to roll down the window. The request to roll down the window in O'Neill was simply a request that O'Neill converse with the officer, which occurred in Smith's case when Stewart parked and approached the vehicle. Stewart's request to turn off the vehicle then physically limited Smith's ability to terminate the encounter and leave the scene—more akin to the request to exit the vehicle in O'Neill. Given Smith's increased expectation of privacy, Stewart's request for identification, and the instruction to turn off the vehicle, Smith was seized at that point in time.

Smith's subsequent statement to Stewart demonstrates he was, in fact, not free to leave. Before Stewart learned the truck was stolen and asked Smith to exit the vehicle, Smith told Stewart "he just wanted to leave." Ex. 2, at 8. But Smith was not allowed to leave. Rather, Stewart returned to his patrol car to run Smith's name and the license plate number in the police database. This key fact was overlooked in Smith's opening brief and by the

State in its response brief, though the State made note of it below. CP 55. There were no similar facts in O'Neill—at no point did O'Neill state his desire to leave and at no point did the officer rebuff such a request.

The record demonstrates Smith was seized when Stewart instructed him to turn off the vehicle, and certainly by the time Smith expressed his desire to leave. The trial court was correct in its conclusion that Stewart's contact rose to the level of a Terry stop before he asked Smith to step out of the vehicle. This Court must therefore determine whether that seizure was supported by reasonable, articulable suspicion based on the unknown citizen informant's tip. Armenta, 134 Wn.2d at 12; see also O'Neill, 148 Wn.2d at 577 (“Once a seizure is found, however, the reasonableness of the officer's suspicion and the factual basis for it are relevant in deciding the validity of the seizure.”).

2. THE INFORMANT DID NOT PROVIDE ANY FACTUAL BASIS FOR HIS BELIEF THAT THE INDIVIDUALS WERE RESPONSIBLE FOR RECENT VEHICLE PROWLING.

In response to Smith's argument regarding the illegal seizure, the State repeatedly contends the 911 caller “reported ongoing vehicle prowling.” Br. of Resp't, 22. The State claims “the caller's report here of vehicle prowling” distinguishes Smith's case from State v. Z.U.E., 183

Wn.2d 610, 352 P.3d 796 (2015). Br. of Resp't, 25. But the State's argument vastly overstates the factual basis for the 911 caller's report.

To put it plainly: the previously unknown citizen informant did not report current vehicle prowling. Rather, the informant told the 911 dispatcher that the three individuals in the Dodge Ram were "casing the area" around Building E of the apartment complex. 2RP 10-11; Ex. 1. The computer-aided dispatch (CAD) did not specify what the informant meant by "casing the area"—whether the individuals were prowling vehicles, casing the apartment complex, casing a specific apartment, driving slowly through the complex, idling loudly outside the informant's apartment, or any other factual basis for that conclusion. Without any such supporting information, Stewart had no way to corroborate the informant's report.

The informant further told the 911 dispatcher that he believed the individuals were responsible for recent vehicle prowls in the area. 2RP 33; Ex. 1. Contrary to the State's claims, however, this report connoted *past* vehicle prowling, not *current* vehicle prowling. Notably, the informant did not say the individuals were currently prowling vehicles and did not describe any behavior consistent with prowling—only that they may be responsible for previous car prowls. And, again, the informant provided no factual basis whatsoever for his belief that these particular individuals were responsible for past vehicle prowling, let alone any current vehicle prowling. Stewart

acknowledged he was not aware of any “recent vehicle prowling activity” at the apartment complex. 2RP 27. It cannot be said the informant “reported ongoing vehicle prowling,” as the State claims.

B. CONCLUSION

For the reasons articulated here and in the opening brief, this Court should dismiss Smith’s conviction.

DATED this 27th day of October, 2017.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



MARY T. SWIFT
WSBA No. 45668
Office ID No. 91051

Attorney for Appellant

NIELSEN, BROMAN & KOCH P.L.L.C.

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