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NO. 51213-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

LONG PHAM,

Appellant.

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

The Honorable Daniel L. Stahnke, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in finding that the deputy "did not say anything to direct or command the Defendant to speak with him." CP 156 (CrR 3.6 Finding of Fact 1.3).

2. The trial court erred in concluding that the deputy's "initial contact with the Defendant was a social contact and did not rise to the level of a seizure." CP 157 (CrR 3.6 Conclusion of Law 2.4).

3. The court erred in denying the motion to suppress evidence obtained as the result of an unlawful seizure.

4. The court erroneously applied ER 410 to exclude relevant evidence crucial to the defense.

Issues pertaining to assignments of error

1. Although he had no reasonable suspicion appellant was engaged in criminal activity, a deputy contacted appellant as he walked down the street and asked him questions about the car he had just left. Once appellant answered a few questions, the deputy told him he wanted to talk to appellant about whether the car was stolen. Where the deputy's accusation indicated that compliance with his request might be compelled, must evidence obtained as a result of the seizure be suppressed?

2. The court excluded, under ER 410, a declaration of appellant's criminal history prepared by the State during plea negotiations and offered by the defense at trial. Where the document does not constitute a guilty plea, an offer to plead guilty, or a statement in connection with such plea or offer, did the court err in excluding it?

B. STATEMENT OF THE CASE

1. Procedural History

By amended information filed October 5, 2017, the Clark County Prosecuting Attorney charged appellant Long Pham with unlawful possession of heroin with intent to deliver, unlawful possession of methamphetamine, and unlawful possession of buprenorphine. CP 115-16; RCW 69.50.401(1), (2)(a); RCW 69.50.4013(1). The possession with intent charge included an allegation that the offense was committed within 1000 feet of a school bus route stop. CP 115; RCW 9.94A.533(6).

Pham moved to suppress evidence obtained as a result of an unlawful seizure and dismiss the charges. CP 2-105. The Honorable Daniel Stahnke denied the motion following an evidentiary hearing and entered findings of fact and conclusions of law. CP 155-59.

The case proceeded to jury trial, and the jury returned guilty verdicts and an affirmative special verdict on the school zone. CP 187-91.

The court imposed a standard range sentence of 90 months confinement, and Pham filed this timely appeal. CP 200, 213.

2. Substantive Facts

At about 11:30 in the evening of October 15, 2016, Clark County Sheriff's Deputy Ryan Preston was on routine patrol when he pulled into the parking lot of a 7-Eleven. RP 29-31. He saw a newer model Ford Fusion in the parking lot, and as he does in every parking lot he enters while on patrol, he ran the license plates. RP 30, 34-35. While waiting for information on the vehicle, he circled the building. RP 36. When he again approached the Fusion, he saw a man, later identified as Long Pham, walking away from the car. When Pham noticed Preston's patrol car he changed directions and started walking down the street. RP 36-37.

By this point Preston had learned that the Fusion had not been reported stolen and that the registered owner was a woman. RP 40. He followed Pham in his patrol car, and when Pham stopped at a corner Preston pulled up next to him and initiated a conversation. RP 42. Preston asked Pham if he had just come from the Fusion, and Pham said he had. RP 42-43. Preston asked who owned the car, and Pham said a friend, although he sounded uncertain and could not identify that person. RP 43. Preston then told Pham that he wanted to talk to him about

whether the car was stolen. RP 46, 57. In response, Pham immediately fled. RP 43, 46.

Preston continued to follow Pham, and when he saw Pham throw a backpack from his shoulders, he decided to detain Pham. RP 58. As Preston approached he saw Pham fall and a plastic container fall from his hand. RP 58. Preston handcuffed Pham and placed him in his patrol car. RP 159. Preston searched Pham and the backpack. He recovered a container of buprenorphine, a glass pipe which Pham said he used to smoke methamphetamine, straws and a scale with residue of what appeared to be heroin, empty plastic baggies, a plastic container of heroin, and a container of methamphetamine. RP 166, 169, 171-75, 177-79, 182, 262-65.

Pham moved to suppress the evidence discovered in the backpack and on his person, arguing that Preston lacked reasonable suspicion to detain him during their initial encounter. RP 65; CP 2-14.

The State agreed that Pham's startled reaction to seeing Preston and his quick departure from the area did not give rise to a reasonable suspicion that Pham was engaged in criminal activity. RP 70. It argued that Preston did not seize Pham merely by engaging him in conversation, and a reasonable person in Pham's position would feel free to leave. The encounter did not turn into a seizure until Preston had reasonable

suspicion of criminal activity, when Pham started throwing things as he ran. RP 68- 70.

The court recognized that until Pham started throwing the bag he was carrying there was no justification for a *Terry* stop. RP 73. It found, however, that there was no seizure during the social contact, and Preston "did not say anything to direct or command [Pham] to speak with him." CP 156; RP 74. But once Pham threw the backpack, the circumstances created reasonable suspicion of criminal activity and the subsequent seizure was permissible. RP 73-74. It denied Pham's motion to suppress. RP 74.

The case proceeded to trial. Preston described the incident and testified that when he asked Pham about the drugs in his possession Pham said he was dealing drugs and that he was a middleman. RP 185-86.

Pham testified in his defense. He admitted possessing the controlled substances and explained that he is a drug addict and they were for his personal use. RP 275-76. He denied telling Preston he was a drug dealer, saying he would not confess to something he has never done before. RP 273.

On cross examination the State was permitted to ask Pham about a prior conviction for possession of methamphetamine with intent to deliver, to impeach his testimony that drug dealing is something he has never done

before. RP 279-80, 283. When asked about the prior conviction, however, Pham responded that as far as he knew he did not have a conviction for possession with intent on his record. RP 283. The State attempted to refresh his recollection with a certified copy of the conviction documents. Pham agreed that the documents pertained to him and contained his signature. RP 284-88. He maintained, however, that his "rap sheet" did not include a possession with intent conviction. RP 288-89, 291.

After the defense rested and the State presented rebuttal testimony from Preston, defense counsel moved to reopen. In an offer of proof counsel indicated that the State had made an offer of settlement prior to trial. Attached to that offer was a declaration of Pham's criminal history. The declaration of criminal history described the conviction relied on by the State to impeach Pham as possession of methamphetamine. There is no conviction for possession with intent listed in the declaration. Counsel had shared the offer and attached declaration with Pham. RP 338-39. Counsel argued that the declaration was relevant to Pham's credibility because it would help explain why Pham was confused when he testified that he had no conviction for possession with intent. RP 339-41. The court ruled that the proposed evidence violated ER 410 because it was a

statement in connection with an offer of settlement, and therefore it could not be admitted. RP 342-43.

C. ARGUMENT

1. EVIDENCE OBTAINED AS THE RESULT OF THE UNLAWFUL SEIZURE SHOULD HAVE BEEN SUPPRESSED AND THE CHARGES AGAINST PHAM DISMISSED.

The Fourth Amendment of the U.S. Constitution provides, "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause ...." Article I, section 7 of the Washington Constitution provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." It is well established that Art. I, sec. 7 is more protective than the Fourth Amendment. *State v. Parker*, 139 Wn.2d 486, 493, 987 P.2d 73 (1999).

Warrantless seizures are per se unreasonable, or unlawful, under both the Fourth Amendment and Article I, section 7. *State v. Hendrickson*, 129 Wn.2d 61, 70, 917 P.2d 563 (1996). Where the State seeks to introduce evidence obtained via warrantless seizure, the State bears a burden to prove one of the narrowly drawn and jealously guarded exceptions to the warrant requirement applies. *State v. Williams*, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984).

Here, Preston followed Pham as he walked down the street and contacted him when he stopped at an intersection. Preston asked Pham if he had just come from the Ford Fusion and Pham said he had. Preston asked Pham if he was the registered owner, and Pham said the car belonged to a friend. Preston then told Pham that he wanted to talk to him about the vehicle and whether it was stolen. CP 156. Pham immediately started running away through the parking lot. CP 156. Preston followed, and when he saw Pham throw a backpack he had been carrying, he took Pham into custody. *Id*. Preston admitted that at the time he contacted Pham there was no reasonable suspicion that criminal activity was afoot, and he had no reasonable suspicion until Pham threw the backpack as he was running. RP 52.

Pham argued that evidence found in the backpack and on his person must be suppressed because it was the product of an unlawful detention. Preston did not have reasonable articulable suspicion that Pham was engaged in criminal activity and thus no justification for conducting a *Terry*[1] stop. CP 12-14.

Under the *Terry* exception to the warrant requirement officers may briefly detain a suspect for investigation where there is a "'reasonable suspicion' that the detained person was, or was about to be, involved in a

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

crime." *State v. Z.U.E.*, 183 Wn.2d 610, 617, 352 P.3d 796 (2015) (quoting *State v. Acrey*, 148 Wn.2d 738, 747, 64 P.3d 594 (2003)). Both the Fourth Amendment and Article I, section 7 require the officer's suspicion to be "grounded in 'specific and articulable facts.'" *Z.U.E.*, 183 Wn.2d at 617 (quoting *Terry*, 392 U.S. at 21)). Because Article I, section 7 is more protective than the Fourth Amendment, it "generally requires a stronger showing by the State." *Z.U.E.*, 183 Wn.2d at 617 (citing *Acrey*, 148 Wn.2d at 746-47, 64 P.3d 594; *Hendrickson*, 129 Wn.2d at 69, 917 P.2d 563).

The standard of review for determining whether a seizure occurred is a mixed one of fact and law. Factual findings are reviewed for "substantial evidence." *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). The legal determination of whether such facts constitute a "seizure" for Fourth Amendment and Art. I, sec. 7 analysis is reviewed *de novo*. *State v. Hansen*, 99 Wn. App. 575, 577-78, 994 P.2d 855 (2000).

To determine whether a seizure has occurred, courts consider whether "circumstances ... amount to a show of official authority such that 'a reasonable person would have believed he was not free to leave.'" *Florida v. Royer*, 460 U.S. 491, 499, 502, 103 S.Ct. 1319, 1325, 75 L.Ed.2d 229 (1983) (plurality) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497); *see also State v.*

Crespo Aranguren, 42 Wn. App. 452, 455, 711 P.2d 1096 (1985) (citing *Mendenall*, 446 U.S. at 554).

Under Art. I, sec. 7, the following police actions constitute a "nonexclusive list" which "likely result in seizure ... the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *State v. Harrington*, 167 Wn.2d 656, 664, 222 P.3d 92 (2009) (internal quotation marks omitted) (quoting *State v. Young*, 135 Wn.2d 498, 512, 957 P.2d 681 (1998) (quoting *U.S. v. Mendenhall*, 446 U.S. at 554-55)).

In particular, commands such as "halt," "stop, I want to talk to you," and "wait right here" qualify as seizures. *See State v. Whitaker*, 58 Wn. App. 851, 854, 795 P.2d 182 (1990), *review denied*, 116 Wn.2d 1028 (1991); *State v. Ellwood*, 52 Wn. App. 70, 73-74, 757 P.2d 547 (1988); *State v. Sweet*, 44 Wn. App. 226, 230, 721 P.2d 560, *review denied,* 107 Wn.2d 1001 (1986); *State v. Friederick*, 34 Wn. App. 537, 541, 663 P.2d 122 (1983).

Here, Pham was seized under both the Fourth Amendment and Art. 1, sec. 7, by Preston's show of authority. *See Terry*, 392 U.S. at 19, n. 16

(noting seizure occurs when officers restrain liberty through force or show of authority).

As the State admitted and the trial court recognized, there was no reasonable, articulable suspicion of criminal activity at the time Preston stopped to talk to Pham. RP 70, 73. Preston found it curious that Pham had turned and walked away upon spotting him, and he wanted to question Pham. And Preston was curious whether the car Pham had been walking near was stolen, but he had no specific facts which could elevate his curiosity to a reasonable suspicion that Pham was engaged in anything criminal. RP 45.

What started as a permissible social contact, in which Preston merely engaged Pham in conversation and asked a few questions, ripened into a seizure when Preston told Pham he wanted to talk to him about whether the car was stolen. This accusation that Pham was knowingly associated with a stolen vehicle carried the implication that compliance with Preston's request might be compelled. *See Harrington*, 167 Wn.2d at 664 ("the use of language or tone of voice indicating that compliance with the officer's request might be compelled" constitutes a seizure). That Preston's language constituted a show of authority is demonstrated by the fact that Pham fled the scene rather than simply declining to talk and continuing on his way. The evidence does not support the trial court's

finding that the deputy "did not say anything to direct or command the Defendant to speak with him" or its conclusion that Preston's initial contact with Pham did not rise to the level of a seizure. CP 156-57.

Where the State fails to prove that an exception to the warrant requirement applies, all evidence or statements derived directly or indirectly must be suppressed unless sufficiently attenuated from the initial illegality. *Wong Sun v. United States*, 371 U.S. 471, 484-88, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963); *State v. Warner*, 125 Wn.2d 876, 888, 889 P.2d 479 (1995). Courts apply a "but-for analysis." *State v. Aranguren*, 42 Wn. App. 452, 457, 711 P.2d 1096 (1985).

Here, the evidence found in Pham's backpack an on his person, as well as the statements he made when he was arrested, would not have been obtained but for the unlawful seizure. It should be suppressed and the charges against Pham dismissed.

2. THE COURT ERRONEOUSLY APPLIED ER 410 TO EXCLUDE RELEVANT EVIDENCE CRUCIAL TO THE DEFENSE.

Statements made in connection with an offer to plead guilty are protected from admission by ER 410, which provides:

> Except as otherwise provided in this rule, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in any

> civil or criminal proceeding against the person who made the plea or offer….

ER 410(a); *State v. Hatch*, 165 Wn. App. 212, 214, 267 P.3d 473 (2011). The court below excluded a declaration of Pham's criminal history prepared by the State and presented to the defense during plea negotiations, concluding it was prohibited by ER 410. RP 342-43. The standard of review for a conclusion regarding the applicability of ER 410 is *de novo*. *Hatch*, 165 Wn. App. at 217.

"The purpose underlying the rule is to encourage the disposition of criminal cases through plea bargaining by allowing an accused to participate candidly in plea discussions, without the fear that his plea or plea-related statements will be used against him at trial." *Hatch*, 165 Wn. App. at 217 (citing *State v. Nowinski*, 124 Wn. App. 617, 621, 628, 102 P.3d 840 (2004)). This rule was designed to protect the defendant and by its terms applies to statements made in connection with an offer to plead guilty. It does not apply to statements made by the State during the plea bargaining process. The court erred in ruling that the offered evidence was prohibited under ER 410.

This error was prejudicial to the defense, which rested on Pham's credibility. Pham admitted being in possession of the charged substances but testified they were for his personal use. He denied telling Preston that

he was a drug dealer and said he would not confess to something he had never done. RP 273. The State was permitted to offer evidence that Pham had been convicted previously of possession of methamphetamine with intent to deliver, to impeach his testimony. RP 279. Pham explained that he did not think he had a possession with intent conviction on his record because it was not included in his rap sheet. RP 283, 288. Evidence that he was in fact shown a declaration of criminal history which identified the offense as possession of methamphetamine, rather than possession with intent to deliver, would have helped the jury evaluate his credibility and was therefore crucial to the defense. The court's error requires reversal of the possession with intent conviction and remand for a new trial.

D. CONCLUSION

Evidence obtained as a result of the unlawful seizure must be suppressed and the charges against Pham dismissed. In addition, the court's erroneous application of ER 410 prejudiced the defense and requires reversal.

DATED May 7, 2018.

Respectfully submitted,

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Certification of Service by Mail

Today I caused to be mailed copies of the Brief of Appellant and Motion to Extend in *State v. Long Pham,* Cause No. 51213-1-II as follows:

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Airway Heights Corrections Center
P.O. Box 2049
Airway Heights, WA 99001-2049

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Catherine E. Glinski
Done in Manchester, WA
May 7, 2018

GLINSKI LAW FIRM PLLC

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