

FILED
Court of Appeals
Division II
State of Washington
9/10/2019 9:12 AM
No. 53039-2

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

STATE OF WASHINGTON, Respondent

v.

Reanasha McCord, Appellant

APPEAL FROM THE SUPERIOR COURT
OF THURSTON COUNTY
THE HONORABLE JUDGE ERIK PRICE
THE HONORABLE JUDGE CAROL MURPHY

BRIEF OF APPELLANT

Marie J. Trombley
WSBA 41410
PO Box 829
Graham, WA
253-445-7920

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I. ASSIGNMENTS OF ERROR

A. The trial court erred when it made Finding of Fact No.4:

“Officer Miller was advised by dispatch that a citizen reported that occupants in a silver Mercedes Washington license BCW1957 were using heroin.”

B. The trial court erred when it made Finding of Fact No. 5:

“Upon arrival, Officer Miller observed a silver Mercedes SUV with the same license plate in the rear parking lot of Taco Bell.”

C. The trial court erred in entering Conclusion of Law No. 5:

At that point the defendant was seized, the seizure was supported by lawful authority under *Terry v. Ohio* because the totality of circumstances supports the seizure of the defendant.

D. The trial court erred in denying Ms. McCord’s motion to

suppress, where the facts did not support an individual suspicion of criminal activity.

ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Did the trial court err in denying Ms. McCord’s motion to suppress where the facts did not support an individualized suspicion of criminal activity?

II. STATEMENT OF FACTS

1. CrR 3.6 Hearing

On August 23, 2017, shortly after 2 pm, Officer Miller was dispatched to investigate "suspicious people in a vehicle" who were possibly using heroin. 11/5/18 RP 10. He drove to the address given to him by dispatch and saw a car parked in a lot by a Taco Bell in Lacey. 11/5/18 RP 10. He testified he had no other details. 11/5/18 RP 17. He did not testify as to the make of the vehicle or the license plate, or testify that it matched information he received from dispatch.

Miller parked about 40 feet away from the car. He said, "Well, I figured if they were using narcotics I was going to see what they were doing, to get my own observations, because right now we just had a phone call into dispatch and I didn't actually talk to that person so I wanted to see what I could see before approaching the vehicle." 11/5/18 RP 11. He observed the backseat passenger door was open, and the occupant had a syringe in her hand, about to inject herself in her inner arm. 11/5/18 RP 11. He announced himself and told them to show their hands. 11/5/18 RP 12,19.

He reported the passenger dropped the syringe and stuffed something under the seat. He saw the front passenger place things

between the two front seats, and saw the driver, Ms. McCord, appear to put something toward the door compartment. 11/5/18 RP 11. Other than the backseat passenger, Officer Miller said he saw no other illegal activity. 11/5/18 RP 19. He saw no weapons. 11/5/18 RP 20.

But Officer Miller reported he gave Ms. McCord, the driver, her *Miranda* warnings. 11/5/18 RP 13. He said Ms. McCord told him she had set a piece of heroin into the driver's side pocket of the car¹. 11/5/18 RP 15. He reported she said she was going to use heroin and was a user not a dealer.² 11/5/18 RP 15-16. She gave consent for a car search and he found the drug in the place she indicated. 11/5/18 RP 16-17.

The court entered written findings of fact and conclusions of law. The court found "Officer Miller was advised by dispatch that a citizen reported that occupants in a silver Mercedes Washington license BCW1957 were using heroin." And "Upon arrival, Officer Miller observed a silver Mercedes SUV with the same license plate in the rear parking lot of Taco Bell." CP 27.

¹ The small piece of heroin was residue on tin foil. 2/19/18 RP 23.

² At trial, Ms. McCord testified she told him she had used heroin a few hours earlier, not that she was getting ready to use heroin. 2/19/18 RP 123.

The court concluded the movement by Ms. McCord was sufficient to broaden his suspicion from the one passenger to Ms. McCord. The court concluded Ms. McCord was seized, and it was supported by lawful authority under *Terry v. Ohio*. CP 29. The court denied the suppression motion. CP 29.

Ms. McCord was charged by amended information with possession of heroin, methamphetamine, and bail jumping. CP 9. The matter proceeded to a jury trial and Ms. McCord was found guilty of possession of heroin and bail jump, and not guilty of possession of methamphetamine. CP 99-101. The court imposed a first-time offender sentence. CP 136-146. She makes this timely appeal. CP 124-135.

III. ARGUMENT

A. The Trial Court Erred In Denying The Motion to Suppress Evidence.

This Court should overturn the trial court's order denying the motion to suppress, because the officer had no individualized suspicion of criminal activity by Ms. McCord.

1. Two of The Findings Are Not Supported By Substantial Evidence.

Challenged findings entered after a suppression hearing not supported by substantial evidence are not binding. *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the finding. *State v. Lee*, 7 Wn.App.2d 692, 699, 435 P.3d 847 (2019). Conclusions of law derived from the factual findings are reviewed de novo. *State v. Levy*, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006).

Here, the court entered two findings from the CrR 3.6 hearing not supported by substantial evidence. Officer Miller did *not* testify that dispatch gave him any information about the make of the vehicle or the license plate. Similarly, he did not give testimony about the type of car he approached in the parking lot. Findings of facts four and five are not supported by substantial evidence and should not be considered in reviewing the conclusion of law.

2. The Trial Court Erred When It Denied The Motion To Suppress.

Article I, §7 of the Washington Constitution provides: “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Const. art. I, §7. When analyzing police-citizen interactions, the reviewing Court must first determine

whether a warrantless seizure has taken place, and if it has, whether the action was justified by an exception to the warrant requirement. *O'Neill*, 148 Wn.2d at 574.

A person is seized under article I §7 of the Washington Constitution when with physical force or a show of authority, his freedom of movement is restrained and a reasonable person would not have believed he was free to leave or free to decline an officer's request and end the encounter. *State v. O'Neill* 148 Wn.2d at 574. Under Washington law, even a temporary detention of individuals during a traffic stop constitutes a seizure. *State v. Stroud*, 30 Wn.App. 392, 396, 634 P.2d 316 (1981).

Officer Miller testified that when he ordered the group to show their hands, he said it in a tone that meant everyone needed to comply. 11/5/18 RP 19. A reasonable person in the same circumstances would not have felt free to end the encounter. *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980).

Warrantless seizures are per se unreasonable and there are few exceptions to the warrant requirement. *State v. Doughty*, 170 Wn.2d 57, 61, 239 P.3d 573 (2010). The State must show that a warrantless seizure falls within a narrowly drawn exception by clear

and convincing evidence. *State v. Garvin*, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009).

One of the few exceptions to the warrant requirement is the investigative detention, or *Terry* stop: an officer may briefly detain a person if he has a reasonable suspicion, based on specific articulable facts, that *the individual* is engaging in criminal activity. *Terry v. Ohio*, 392 U.S.1, 21, 88 S.Ct.1868, 20 L.Ed.2d 889 (1968). “Articulable suspicion” is defined as a substantial possibility that criminal activity has occurred or is about to occur. *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986).

A sufficient suspicion of wrongdoing is required to justify a seizure. *State v. Johnson*, 8 Wn.App.2d 728, 736, 440 P.3d 1032 (2019). The suspicion must be individualized, and it must be the officer’s “actual, conscious, and independent cause” to stop the person. *State v. Chacon Arreola*, 176 Wn.2d 284, 299-300, 290 P.3d 983 (2012). Ms. McCord was seized without an individualized articulable suspicion that she was involved in criminal activity.

Under *Terry*, the officer’s action must be justified at its inception, and related in scope to the circumstances which initially justified the interference. *State v. Ladson*, 138 Wn.2d 343, 350, 979 P.2d 833 (1999).

Here, Officer Miller's reason for issuing his command was to contact the backseat passenger "before she injected the drug."

11/5/18 RP 12. He approached the car, saw the passenger attempting to use drugs, announced himself and directed everyone to show him their hands. 11/5/18 RP 19. The officer's suspicion of criminal activity was based on the passenger doing something illegal. He did not have a reasonable and articulable individualized suspicion that Ms. McCord was involved in criminal activity.

Absent "specific evidence pinpointing the crime on a person, that person has the right to their own privacy and constitutional protections against police searches and seizures." *State v. Grande*, 164 Wn.2d 135, 145-146, 187 P.3d 248 (2008). Guilt by association is not an acceptable way to establish individualized suspicion. *State v. Richardson*, 64 Wn.App. 693, 694, 825 P.2d 754 (1992). Ms. McCord's proximity to the rear passenger was not sufficient to establish an individualized suspicion.

In *Richardson*, the Court held the facts could not support reasonable suspicion for a seizure. *Id.* at 694. There, a patrol officer was in an area known for drug activity. Over a period of hours, he observed an individual acting in a manner which suggested he was a drug runner. *Id.* When the officer later saw that person walking

with Richardson, he asked the men to stop, had them empty their pockets, and put their hands on his patrol car. The officer searched Richardson and found cocaine. *Id.* at 695.

In reviewing whether the seizure was constitutional, the Court analyzed whether mere proximity to another independently suspected of criminal activity was sufficient to constitute reasonable suspicion. *Id.* at 697. The Court noted the only two things the officer knew during the seizure were 1) the other person acted like a drug runner, and 2) Richardson was walking with that individual. *Id.* The Court concluded the officer's suspicion of Richardson was not only unreasonable, but the seizure was unlawful.

Additionally, here, the movement inside the car was not sufficient to establish a substantial possibility that criminal activity was occurring to justify the seizure. There must be a substantial possibility that criminal activity is occurring. *State v. Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2003).

Officer Miller testified that after the individuals had been seized, he saw the occupants putting items in different places in the car. 11/5/18 RP 15,19. He had no idea if Ms. McCord put something in the car door compartment, and if she did, what the item(s) were. He saw no weapons, nor did he appear to fear for his

safety. 11/5/18 RP 20. The trial court concluded that when the officer observed Ms. McCord and other car occupants “quickly stuffing, and attempting to conceal items”, his “reasonable suspicion was broadened”. CP 29. The trial court’s conclusion is wrong.

Under the protections of our state constitution, citizens have a right to remain free from police intrusion unless officers have objective facts that indicate the individual poses a safety concern, or the officer develops reasonable suspicion to investigate criminal activity. *State v. Rankin*, 151 Wn.2d 689, 695, 92 P.3d 202 (2004). Although *Rankin* focused on passenger detention after a traffic stop, the principle is analogous to the current case. The issue being whether officers can detain individuals for whom they do not have a reasonable suspicion of being involved in criminal conduct. *Rankin*, 151 Wn.2d at 696.

Ms. McCord’s car was legally parked, and the engine was off. 11/5/18 RP 18. The officer was three feet from the vehicle when he saw the rear passenger preparing to inject herself. On that basis, he ordered everyone to show their hands. 11/5/18 RP 20. After his order, he believed he observed Ms. McCord put something toward the door compartment. 11/5/18 RP 12. The act by Ms.

McCord does not amount to reasonable suspicion of criminal conduct.

3. An Unlawful Seizure Vitiates Consent To Search.

An unlawful seizure can vitiate any subsequent consent to search. *State v. Coyne*, 99 Wn.App. 566, 574, 995 P.2d 78 (2000). On review, the Court looks to four factors: (1) the temporal proximity of the illegality and the subsequent consent; (2) the presence of significant intervening circumstances; (3) the purpose and flagrancy of the official misconduct; (4) the giving of *Miranda* warnings. *Id.*

Ms. McCord was asked for consent to search her car immediately after her unlawful seizure. There were no significant intervening circumstances between the seizure and the request for consent. The officer saw nothing that associated Ms. McCord with the rear seat passenger's contraband. The purpose of the officer's request to search was to investigate, without any evidence she had committed a crime. The officer provided *Miranda* advisements, but because of the illegal seizure, her consent was vitiated. *State v. Coyne*, 99 Wn.App. at 574. The evidence should be suppressed.

IV. CONCLUSION

Based on the foregoing facts and authorities, Ms. McCord respectfully asks the Court to reverse his convictions and remand to the trial court for suppression of the evidence. The appropriate remedy must be dismissal for insufficiency of the evidence.

Respectfully submitted this 10th day of September 2019.

Marie Trombley

Marie Trombley WSBA 41410
Attorney for Reanesha McCord
PO Box 829
Graham, WA. 98338

CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury under the laws of the State of Washington, that on September 10, 2019, I mailed to the following US Postal Service first class mail, the postage prepaid, or electronically served, by prior agreement between the parties, a true and correct copy of the Appellant's Opening Brief to the following: Thurston County Prosecuting Attorney at paoappeals@co.thurston.wa.us and to Reanasha McCord, 3852 S. 29th Street #B10, Tacoma, WA 98409.

A handwritten signature in black ink that reads "Marie Trombley". The signature is written in a cursive style and is enclosed within a thin black rectangular border.

Marie Trombley
WSBA 41410
PO Box 829
Graham, WA 98338

MARIE TROMBLEY

September 10, 2019 - 9:12 AM

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Superior Court Case Number: 17-1-01523-1

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