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NO. 53924-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

PALLA SUM,

Appellant.

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

The Honorable Frank E. Cuthbertson, Judge

BRIEF OF APPELLANT

JENNIFER WINKLER
Attorney for Appellant

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

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to suppress evidence supporting a charge of making a false or misleading statement to a public servant, in violation of Article I, section 7 of the statute constitution and the Fourth Amendment.¹

2. The trial court erred in concluding that the appellant was not seized when a police officer asked for the appellant's identification while making it clear he was investigating vehicle theft. Conclusion of Law 4.²

3. The trial court erred in concluding that specific facts rather than a mere hunch supported the seizure of the appellant. Conclusion of Law 3.

4. The trial court erred when found that only one residence was located across the street from the location appellant's car was parked. Finding of Fact 8.

¹ RCW 9A.76.175 provides that

A person who knowingly makes a false or misleading material statement to a public servant is guilty of a gross misdemeanor. "Material statement" means a written or oral statement reasonably likely to be relied upon by a public servant in the discharge of his or her official powers or duties.

² The trial court's CrR 3.5 and CrR 3.6 findings and conclusions, filed on October 18, 2019, have been designated as supplemental clerk's papers. Meanwhile, they are appended to this brief.

Issue Pertaining to Assignments of Error

Where a police officer illegally seized the appellant, did the trial court err in failing to suppress evidence supporting the charge of making a false or misleading statement to a public servant?

B. STATEMENT OF THE CASE³

1. Suppression hearing

Mr. Palla Sum is the appellant in this case. After being charged with three crimes, and before trial, Sum moved to suppress evidence. Sum argued he was illegally seized by the police officer who approached his car and asked for identification under the guise of investigating vehicle theft, even after determining the car was not reported stolen. See CP 7-12 (motion to suppress); CP 13-22 (additional authority submitted by defense); RP 44-45 (defense closing argument for suppression hearing).

At the suppression hearing, Deputy Mark Rickerson testified for the prosecution. 2RP 9. The morning of April 9, 2019, he drove north on East L Street past East 71st Street in Tacoma. He glanced east toward a parking area located outside a fenced parking lot. 2RP 12-13. About four or five months earlier, another deputy had discovered a stolen car in that

³ This brief refers to the verbatim reports chronologically as follows: 1RP – 6/20 and 7/23/19; 2RP – 8/6/19; 3RP – 8/7/19; 4RP – 8/8/19; 5RP – 8/16/19; and 6RP – 8/30/19. Volumes 2-6 are consecutively paginated.

parking area and made an arrest. 2RP 13, 17. Also around that time, Rickerson spoke with an individual who said he lived across the street. The individual complained generally about non-residents parking there. 2RP 13, 40. The conversation occurred in the parking lot of the nearby Safeway. 2RP 13.

The day in question, Rickerson noticed a Honda parked just east of the fenced lot's gate. 2RP 16-17. The driver appeared to be asleep in his seat. 2RP 17-18. Rickerson drove past the Honda, made a U-turn at the dead end on 71st Street, and drove west toward the car. 2RP 18. As he did so, Rickerson input the Honda's Oregon license plate number into his vehicle's mobile data computer and determined the car had not been reported stolen. 2RP 19-20, 41. Instead, there was a record that the vehicle had been sold. 2RP 20-21. But, according to Rickerson, Oregon records of this type do not identify the purchaser or the date of sale. 2RP 20-21, 41.

Rickerson parked east of the Honda and did not block it. 2RP 19, 27. He got out and approached the car on foot. His first action was to check whether the last four digits of the car's visible Vehicle Identification Number (VIN) matched the VIN associated with the license plate. They matched. 2RP 21-22. But, as Rickerson examined the VIN,

he noticed another person in the car, who also appeared to be asleep. 2RP 21-22.

Neither occupant woke to Rickerson's presence, so he knocked on the driver's window. RP 22-23. The driver, Sum, woke after a few seconds and rolled down the window. 2RP 23. Rickerson asked what Sum was doing in the area. 2RP 23. According to Rickerson, Sum said either that he was visiting a friend, or waiting for a friend, from across the street. 2RP 23. Rickerson thought Sum was referring to the home of the person he had talked to.⁴ 2RP 23.

Rickerson asked Sum if the car was his. Sum said no.⁵ PR 24-25. Rickerson asked who owned the car. 2RP 25. Sum provided a first name but not last name. Rickerson did not specifically recall the name Sum provided. 2RP 25.

Rickerson then asked for Sum's identification. 2RP 25. Sum asked why Rickerson was asking. 2RP 25. Rickerson responded to Sum that he was asking, "[b]ecause [Sum] couldn't tell me exactly who the

⁴ Again, the conversation cited by Rickerson occurred, not at a residence, but in the nearby Safeway parking lot. 2RP 40. Although the trial court appeared to find there was only one residence located across the street, Finding of Fact 8, there are in fact several houses located on the other side of the street from the fenced lot and parking area. Pretrial Exs. 1 and 2.

⁵ In fact, Sum did own the car. 2RP 33 (pretrial hearing); 3RP 197 (trial testimony).

vehicle belonged to and it was in an area where we've recovered stolen vehicles before." 2RP 26. Sum then provided an incorrect name and birth date, whereas the passenger provided what turned out to be his true name. 2RP 26-27.

Rickerson then asked Sum and the passenger if they had been arrested before. 2RP 27. Rickerson explained that he wanted to verify their identities through booking photos. 2RP 27. Rickerson did not recall their responses. 2RP 27.

Rickerson returned to his car to look up the names provided using "Global Name Inquiry," a database that includes booking photos. 2RP 28. Rickerson was not able to confirm Sum's identity with the name given. 2RP 28.

Meanwhile, Rickerson heard the Honda's engine start. He thought little of it, assuming the driver only wanted to warm the car on a chilly day. 2RP 28-29. A few seconds later, however, the car backed up at an angle, drove over the corner (including grass and sidewalk), and headed south on East L Street at a high rate of speed. 2RP 29. Disregarding a stop sign, the Honda turned west onto East 72nd Street, sliding into an improper lane as it did so. 2RP 29-30. Rickerson and another deputy caught up with the car after it skidded onto some landscaping blocks at the intersection of East 72nd Street and South Yakima Avenue. 2RP 32.

2. Trial court's ruling refusing to suppress evidence

The trial court made findings consistent with the facts set forth above, except it found (relevant to Sum's explanation for being in the area) that there was only one residence located across the street from the parking area. Finding of Fact 8. In fact, the photographic exhibits reveal several homes on the other side of the street. Pretrial Exs. 1, 2.

From these findings, the court entered the following conclusions of law:

2. Deputy Rickerson's initial contact with [Sum], who was apparently unconscious in the driver's seat of a Honda Civic parked on East 71st Street, was not a seizure, but a reasonable check on health and safety because the public's interest in confirming [Sum's] safety at the time outweighed [his] interest in freedom from police interference.

3. The fact that [Sum] then told Rickerson that the vehicle in which he was sitting did not belong to him, that he could not fully identify the owner of that vehicle, and, to a lesser extent, the fact that the location in which [Sum] had parked was a high-crime area from which stolen vehicles had been recovered, were specific and articulable facts which would lead one to believe that there was a substantial possibility that criminal conduct had occurred, and hence, justified a [stop under Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)] of [Sum,] which rendered Rickerson's request for [Sum] and his passenger to identify themselves lawful and reasonable.

4. Because Rickerson did not retain [Sum's] physical identification to conduct his records check, [Sum] was not seized when Rickerson asked him to identify himself, and [Sum's] motion to suppress evidence obtained

thereafter as the product of an unlawful seizure is therefore denied, and such evidence is admissible.

Appendix at 4-5.

3. Verdicts and sentence

Following a trial, the jury convicted Sum of making a false or misleading statement to a public servant. He was also convicted of attempt to elude a pursuing police vehicle⁶ and first degree unlawful possession of a firearm,⁷ relating to a pistol eventually found under the driver's seat of the Honda. CP 23-24, 51-53.

The trial court sentenced Sum to 31 months in prison for the firearm charge, which carried the longest sentence range. The court ran the six-month attempt to elude and 364-day false statement sentences concurrently. CP 61, 70-71.

Sum timely appeals. CP 77.

⁶ RCW 46.61.024(1).

⁷ RCW 9.41.040(1)(a).

C. ARGUMENT

THE TRIAL COURT ERRED WHEN IT FAILED TO SUPPRESS THE EVIDENCE AGAINST MR. SUM IN VIOLATION OF THE STATE AND FEDERAL CONSTITUTIONS.

The trial court erred in finding Sum was not seized when asked to identify himself. Correspondingly, the court erred when it found that, in any event, investigative detention was warranted. Sum was seized on a hunch. Because the seizure violated both the state and federal constitutions, the trial court erred when it failed to suppress Sum's statement misidentifying himself. Only that evidence supports the false statement charge. Thus, dismissal of the charge will be the likely result.

1. Standard of review for CrR 3.6 motions and appropriate remedy

This Court reviews a trial court's decision on a CrR 3.6 motion to suppress evidence to determine whether the court's findings are supported by substantial evidence and whether those findings, in turn, support the conclusions of law. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). This Court reviews conclusions of law de novo. State v. Johnson, 128 Wn.2d 431, 443, 909 P.2d 293 (1996).

If a reviewing court finds that the seizure in question was unlawful, the trial court generally must suppress its fruits. Wong Sun v. United

States, 371 U.S. 471, 484-85, 83 S. Ct. 407, 9 L. Ed. 2d. 441 (1963); State v. Larson, 93 Wn.2d 638, 645, 611 P.2d 771 (1980).

2. Under the state and federal constitutions, authority to seize is carefully circumscribed.

Article I, section 7 of the state constitution provides that “[n]o person shall be disturbed in his [or her] private affairs, or his [or her] home invaded, without authority of law.” This provision is qualitatively different from the Fourth Amendment and provides greater protections. State v. Mayfield, 192 Wn.2d 871, 878, 434 P.3d 58 (2019) (citing State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986)). Article I, section 7 “is grounded in a broad right to privacy” and protects citizens from governmental intrusion into their private affairs without the authority of law. State v. Chacon Arreola, 176 Wn.2d 284, 291, 290 P.3d 983 (2012).

Whether police “seized” a person is a mixed question of law and fact. State v. Armenta, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997); State v. Carriero, 8 Wn. App. 2d 641, 654, 439 P.3d 679 (2019). “The resolution by a trial court of differing accounts . . . surrounding the encounter are factual findings entitled to great deference, but the ultimate determination of whether those facts constitute a seizure . . . is reviewed de novo.” State v. Harrington, 167 Wn.2d 656, 662, 222 P.3d 92 (2009) (internal quotation marks omitted) (quoting 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)).

An accused “bears the burden of proving a seizure occurred.” State v. Johnson, 8 Wn. App. 2d 728, 738, 440 P.3d 1032 (2019) (citing Harrington, 167 Wn.2d at 664). But, if a seizure did occur, warrantless seizures are per se unconstitutional, and a heavy burden falls to the State to demonstrate that a warrantless seizure falls into a narrow exception to that general rule. State v. Boisselle, 194 Wn.2d 1, 10, 448 P.3d 19 (2019).

A brief investigatory seizure, commonly referred to as a Terry stop, is one such exception to the warrant requirement, under both State and federal jurisprudence. Terry, 392 U.S. 1. Under this exception, a police officer may, without a warrant, briefly detain an individual for questioning if the officer has reasonable and articulable suspicion that the person is or is about to be engaged in criminal activity. State v. Fuentes, 183 Wn.2d 149, 158, 352 P.3d 152 (2015); Carriero, 8 Wn. App. 2d at 663.

A valid Terry stop requires that the officer have a well-founded, reasonable suspicion that criminal activity is occurring, based on specific and articulable facts. Fuentes, 183 Wn.2d at 158. This Court looks at the totality of the circumstances known to the officer at the time of the stop when evaluating the reasonableness of the officer’s suspicion. State v. Glover, 116 Wn.2d 509, 514, 806 P.2d 760 (1991).

3. Sum was seized by Deputy Rickerson.

Under the circumstances here, Sum was seized. Under the facts of this case, the trial court's conclusion that Sum was not seized—because Deputy Rickerson did not physically take Sum's identification card—was legally untenable.

Under Article I, Section 7, a seizure occurs when, considering all the circumstances, an individual's freedom of movement is restrained and the individual would not believe he is (1) free to leave or (2) free to decline an officer's request and terminate the encounter. Johnson, 8 Wn. App. 2d at 737.

This standard is a purely objective one, looking to “the officer's actual conduct and whether the conduct appears coercive.” Harrington, 167 Wn.2d at 662; Carriero, 8 Wn. App. 2d at 655. As such, “[t]he relevant question is whether a reasonable person in the individual's position would feel [he] was being detained.” Harrington, 167 Wn.2d at 662. “[T]he ‘reasonable person’ test presupposes an innocent person.” Florida v. Bostick, 501 U.S. 429, 438, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991).

“Article I, section 7 does not forbid social contacts between police and citizens: ‘[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.’” State v. Young, 135

Wn.2d 498, 511, 957 P.2d 681 (1998) (alteration in original) (quoting State v. Armenta, 134 Wn.2d 1, 11, 948 P.2d 1280 (1997)). In addition, as Division One of this Court recently held, officers may contact an individual for a routine health and safety check and inquire if he needs assistance without necessarily running afoul of the constitution. State v. Harris, 9 Wn. App. 2d 625, 633, 444 P.3d 1252 (2019).

Thus, “not every encounter between a police officer and a citizen is an intrusion requiring an objective justification.” Young, 135 Wn.2d at 511 (quoting United States v. Mendenhall, 446 U.S. 544, 553, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980)). On the other hand, our Supreme Court has embraced a nonexclusive list of police actions that likely result in a 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.” Harrington, 167 Wn.2d at 662 (quoting Young, 135 Wn.2d at 512 (quoting Mendenhall, 446 U.S. at 554-55)).

Washington courts have adopted the federal Mendenhall test for whether a seizure occurred. E.g., State v. Stroud, 30 Wn. App. 392, 394-95, 634 P.2d 316 (1981) (footnote omitted) (citing Mendenhall, 446 U.S. at 554). Washington courts continue to apply the Mendenhall test to state constitutional seizure analysis. See, e.g., Harrington, 167 Wn.2d at 664;

State v. Rankin, 151 Wn.2d 689, 695, 92 P.3d 202 (2004); O’Neill, 148 Wn.2d at 574. Post-Mendenhall, however, the United States Supreme Court held that a Fourth Amendment seizure can occur only where the individual in fact yields to an officer’s show of authority. California v. Hodari D., 499 U.S. 621, 626-28, 111 S. Ct. 1547, 113 L. Ed. 2d 690 (1991). But the Washington state Supreme Court rejected this test for Article I, Section 7 seizure analysis, instead applying a purely objective standard. Young, 135 Wn.2d at 509-11. The Washington test focuses not on whether the individual *perceived* that he was being ordered to restrict his movement but, rather, on whether the officer’s words and actions would have conveyed that meaning to a reasonable person. Id. at 506.

As a general rule, moreover, such stops must be analyzed on a case-by-case basis. State v. Mecham, 186 Wn.2d 128, 138, 380 P.3d 414 (2016) (citing Mendenhall, 446 U.S. at 561 (Powell, J., concurring)).

Here, the trial court characterized Deputy Rickerson’s initial contact as a health and safety check, Conclusion of Law 2, but it did not characterize the interaction between Rickerson and Sum, after Sum awoke, as such. Nonetheless, the court concluded the ensuing interaction was *not* a seizure because Rickerson did not physically seize Sum’s identification. Conclusion of Law 4.

Presumably, then, the court concluded that Rickerson's request for identification was a mere social contact. Washington courts have not "set in stone" a definition for the so-called "social contact." Harrington, 167 Wn.2d at 664. "It occupies an amorphous area in our jurisprudence, resting someplace between an officer's saying 'hello' to a stranger on the street and, at the other end of the spectrum, an investigative detention (i.e., Terry stop)." Harrington, 167 Wn.2d at 664. The question here becomes whether the trial court's presumptive conclusion that Rickerson was merely engaging in social contact with Sum passes muster.

Seizure analysis is a cumulative one, "not a 'divide-and-conquer' analysis." Johnson, 8 Wn. App. 2d 728 (quoting United States v. Arvizu, 534 U. S. 266, 274, 122 S. Ct. 744, 151 L. Ed. 2d 740 (2002); State v. Marcum, 149 Wn. App. 894, 907, 205 P.3d 969 (2009)). "A series of police actions may meet constitutional muster when each action is viewed individually but may nevertheless constitute an unlawful search or seizure when the actions are viewed cumulatively." Carriero, 8 Wn. App. 2d at 657.

An occupant of a vehicle parked in a public place is "constitutionally indistinguishable from a pedestrian." Johnson, 8 Wn. App. 2d at 740. Under the test that applies to both passengers and parked vehicle passengers, Sum was seized. Several cases are instructive.

This Court's decision in State v. Young, 167 Wn. App. 922, 925-26, 275 P.3d 1150 (2012) makes it clear that police need not create a complete obstruction of an individual's movements for the encounter to become a seizure. There, two police officers followed Ms. Young into an alley behind a building, believing she was acting suspiciously. While Young was leaning against a wall, the officers approached her, stood five feet away and asked for the last four digits of her Social Security number. Id. at 926, 928. Using this information, the officers learned Young had an outstanding arrest warrant and then found methamphetamine in a search incident to arrest. Id. at 926-27.

This Court held the police contact amounted to a seizure because “[a]ny reasonable person in Young’s position, with her back to a wall and police officers on either side of her, would not have felt free to walk away without first answering the officers’ questions.” Id. at 931.

Similarly, in Division One’s recent Johnson decision, Johnson was sitting in the driver’s seat of a vehicle parked in a parking lot, with vehicles parked on either side. Johnson, 8 Wn. App. 2d at 742. Two police officers approached Johnson’s vehicle, one standing on each side, which meant neither Johnson nor his passenger could open the car doors without the officers moving. Id. Similar to this case, the officers then asked Johnson questions about the car that suggested they were conducting an ongoing

investigation. Id. at 742-43. Then they inquired about Johnson’s identity, which “further advanced the impression that a police investigation was ongoing and that Johnson was a suspect.” Id. at 743.

This Court held the totality of these circumstances amounted to a seizure. Id. at 744-45. Discussing this Court’s Young decision approvingly, Division One emphasized that “officers need not create a complete obstruction of an individual’s movements in order for the encounter to become a seizure.” Johnson, 8 Wn. App. 2d at 741. The presence of two officers “flanking the vehicle” afforded Johnson limited movement; putting his car in reverse would likely “constitute an aggressive move.” Id. at 744. Combined with the questioning, which suggested an ongoing criminal investigation, a reasonable person would not have considered “ignoring the officer’s requests, terminating the encounter, or leaving the scene” to be “viable options.” Id. Indeed,

the request for proof of Johnson’s identity⁸ became the tipping point at which the weight of the circumstances transformed a simple encounter into a seizure. At that stage of the encounter, a reasonable innocent person in Johnson’s position would not have felt free to leave the scene, to disregard the officer’s requests, to ignore the officers, or to otherwise terminate the encounter.

⁸ When Johnson stated that he had an identification card, both officers became suspicious that his license might be suspended. While one officer checked on Johnson’s identification, another officer noticed a handgun placed between the driver’s seat and the door. Id. at 734.

Id.

This Court distinguished the situation in Thorn, 129 Wn.2d at 349, where a single police officer approached a parked vehicle and asked Thorn a single question (“Where is the pipe?”). Johnson, 8 Wn. App. 2d at 740-41. Likewise, in State v. Mote, 129 Wn. App. 276, 292, 120 P.3d 596 (2005), no seizure occurred where a single officer approached a car parked in a public place and asked the passenger, Mote, for his name. A check of Mote’s name revealed a warrant, which led to a search incident to arrest. Id. at 281.

As noted in Johnson, the Supreme Court in Armenta also indicated no seizure occurred at the point when a police officer engaged the defendant in a public place and asked for identification.⁹ The Supreme Court found it significant, however, that the request for identification was “for some purpose *other than* investigating criminal activity.” Armenta, 134 Wn.2d at 11 (emphasis added).

Other cases are instructive by analogy. A police encounter may ripen into a seizure when, for example, a police officer retains property such that the defendant is not free to leave or becomes “immobilized.” Id.

⁹ However, this did not end the inquiry, because the Supreme Court found the contact later ripened into a seizure: “We believe, though, that the Court of Appeals was correct in concluding that a seizure occurred when Officer Randles placed Armenta and Cruz’s money in his patrol car.” Armenta, 134 Wn.2d at 12.

at 6, 12 (seizure did occur when police officer placed defendant's money in patrol car 'for safe keeping'); State v. Thomas, 91 Wn. App. 195, 198, 200-01, 955 P.2d 420 (1998) (seizure occurred when officer, while retaining defendant's identification, took three steps back to conduct warrants check on his hand-held radio); State v. Dudas, 52 Wn. App. 832, 834, 764 P.2d 1012 (1988) (seizure occurred under Fourth Amendment when deputy took identification card and returned to patrol car); State v. Crespo Aranguren, 42 Wn. App. 452, 456, 711 P.2d 1096 (1985) (seizure when an officer took defendants' identification documents to vehicle to write names down and run warrants checks).

These cases demonstrate that Deputy Rickerson's initial health and safety check had fully metamorphosed to investigative detention—not mere social contact—by the time he asked Sum for his identification while making it clear he was doing so to investigate a crime.

Although, as the trial court correctly noted, Rickerson did not retain Sum's identification, the situation was analogous to the above cases in which identification (or property) was retained. This is because, viewed objectively, a person in Sum's position would not have felt free to simply drive away in light of the pending criminal investigation. Rickerson told Sum (whom he had just awoken by appearing at his car window) that the car was in an area known for stolen cars and that Sum's answer regarding

ownership of the car was unsatisfactory. 2RP 25-27; Findings of Fact 10, 12. In essence, Rickerson told Sum he was under investigation related to vehicle theft. Several cases make it clear that notification of criminal investigation is a critical factor in determining whether a person has been seized. Armenta, 134 Wn.2d at 11; Johnson, 8 Wn. App. 2d at 742. Indeed, such notification “indicat[es] that compliance with the officer’s request might be compelled.” Harrington, 167 Wn.2d at 662. Considering what Rickerson told Sum about the investigation, a reasonable person in Sum’s position would not have felt free to start the car and drive away rather than identify himself. Young, 167 Wn. App. at 925-26.¹⁰ And under

¹⁰ In a recent concurrence, Judge Fearing also criticized appellate courts’ “mistaken and arrogant” approach in “adjudg[ing] themselves capable, with only input from other courts, to assess when a reasonable person deems himself seized, on the one hand, or free to leave the presence of a law enforcement officer, on the other hand.” Carriero, 8 Wn. App. 2d at 667 (Fearing, J., concurring). He continued:

This approach further distances the law from laypeople and reality, particularly the reality experienced by disadvantaged people. Appellate judges, who occupy an isolated, privileged campanile, are the last persons to understand the thinking of any person, let alone a reasonable person, who inhabits an inner city neighborhood labeled by law enforcement as a high-crime area. Appellate judges, unlike laypeople, understand their constitutional right to ignore law enforcement officers under many circumstances. Appellate judges, except in a rare instance of a traffic stop, will not be confronted by law enforcement officers and thereby can avoid the experience of a jittering heart or pressure in the hollow of the stomach to comply with officer requests.

Id.

Washington law, the fact that Sum ultimately left the scene does not indicate that he was not seized at the relevant time. Young, 135 Wn.2d at 509-11.

In summary, Rickerson’s statements, viewed objectively, informed Sum he was being investigated for vehicle theft. In such a context, the deputy’s request for identification—explicitly linked to such investigation—constituted a seizure rather than mere social contact.

4. But Deputy Rickerson lacked reasonable suspicion to seize; he acted on a hunch.

As demonstrated, Sum was seized. But Deputy Rickerson lacked reasonable suspicion to seize Sum. Rather, he acted on a hunch.

“The Supreme Court embraced the Terry rule to stop police from acting on mere hunches.” State v. Doughty, 170 Wn.2d 57, 63, 239 P.3d 573 (2010). To evaluate the reasonableness of an officer’s suspicion, this Court looks at the totality of the circumstances known to the officer including the officer’s training and experience, the location of the stop, the conduct of the person detained, the purpose of the stop, and the amount of physical intrusion on the suspect’s liberty. State v. Weyand, 188 Wn.2d 804, 811-12, 399 P.3d 530 (2017). The circumstances at the stop must suggest a substantial possibility that the person has committed a specific crime or is about to do so. State v. Martinez, 135 Wn. App. 174, 180, 143

P.3d 855 (2006). “Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction.” Terry, 392 U.S. at 22.

Washington courts have repeatedly held that a person’s presence in a high-crime area (even late at night) does not, by itself, give rise to a reasonable suspicion to detain that person. E.g. Fuentes, 183 Wn.2d at 161; Doughty, 170 Wn.2d at 62; Larson, 93 Wn.2d at 645; State v. Crane, 105 Wn. App. 301, 312, 19 P.3d 1100 (2001), overruled on other grounds by O’Neill, 148 Wn.2d 564; State v. Ellwood, 52 Wn. App. 70, 74, 757 P.2d 547 (1988).

Weyand is instructive. There, during the wee hours of the morning, a police officer saw, near a home in Richland with an extensive drug history, a car parked that had not been there 20 minutes earlier. Weyand, 188 Wn.2d at 807. The officer ran the license plate and it revealed nothing of consequence. The officer parked his car and saw Weyand and a friend leave the home. As the men walked quickly toward the car, they looked up and down the street. The driver looked around a second time before getting into the car. Weyand got into the passenger seat. Based on these observations and the officer’s knowledge of the extensive drug history of the home, the officer conducted an investigative detention. Id. at 807. The

state Supreme Court held that the even late hour, the men's short stay at the house with "extensive drug history," and their glances up and down the street did not justify investigative detention. Id. at 812.

Here, as demonstrated, Sum was seized when Rickerson appeared at Sum's window and asked for his identification while making it clear to Sum he was under investigation for stealing the Honda. But the seizure was based on a mere hunch. Further, it was not even designed to investigate the crime Rickerson identified.

Rickerson lacked reasonable suspicion. Rickerson testified the area was known for stolen cars, though he was only able to provide a single example. But even before contacting Sum, Rickerson determined the Honda had *not* been reported stolen and that the plates matched the VIN. 2RP 19-21.

Rickerson initially found Sum asleep in the car. 2RP 17-18, 21-22. Rickerson's testimony did not draw any association between that activity (or lack thereof) and criminal activity. Nor would it have been appropriate to do so. See Harris, 9 Wn. App. 2d at 634 (sleeping in a parked car should not necessarily be considered unusual; many people are obliged to live in their cars, and many people simply need to nap in their cars).

After Rickerson woke Sum and started asking questions, Sum said he did not own the car but provided the first name of the owner. 2RP 25.

Deputy Rickerson seemed to find Sum's provision of only a first name less reassuring than a full name. But Rickerson did not clarify for the trial court whether (1) he had asked for a full name in the first instance or (2) whether his training and experience indicated that failure to provide a full name when asked suggests the presence of a stolen vehicle. 2RP 25; cf. Weyand, 188 Wn.2d at 811 (totality of circumstances to be considered by reviewing court includes officer's relevant training and experience).

Considering that the car was not reported stolen, the provision of only a first name may have led to a hunch. But the record supports no more than this. Relatedly, the Oregon sales report did not provide an owner's name, so Sum's identity would provide no more than an opportunity to fish for information—not on the car or its status—but on Sum. But even if Rickerson was suspicious of Sum generally, that is not enough. See Martinez, 135 Wn. App. at 182-83 (“The problem here is not with the officer's suspicion; the problem is with the absence of a particularized suspicion . . . [T]hat is, there must be some suspicion of a particular crime or a particular person, and some connection between the two.”). Of course, Sum did not know this; he was told he needed to give his name because Rickerson was investigating vehicle theft.

Finally, among its findings of fact, the trial court also listed Sum's claim that he was visiting someone who lived across the street. Finding of

Fact 7. The court further indicated there was a single house across the street and the owner had complained about unknown cars. Finding of Fact 8. But, as indicated above, Finding 8 is not supported by substantial evidence because the record reveals there are several houses located across the street. Pretrial Exs. 1, 2. The effect of this finding is somewhat opaque, considering that it is not mentioned in Conclusion of Law 3, where it might be expected to appear. Regardless, considering that the finding is not supported by substantial evidence, this Court should consider it of no value in determining whether the facts supported the conclusion that an investigative detention was warranted.

In summary, the trial court erred when it determined investigative detention was warranted. Conclusion of Law 3. Rickerson was acting on a mere hunch when he asked Sum for identification under the pretense of investigating whether the car was stolen.

5. The remedy is suppression of Sum's statement to Rickerson, which will require reversal of the false statement charge.

As shown, Deputy Rickerson seized Sum on a hunch, in violation of the constitution. The trial court erred in entering Conclusions of Law 3 and 4. The remedy is suppression of the fruit of the seizure, that is, Sum's statement misidentifying himself. Larson, 93 Wn.2d at 645. The likely

result will be dismissal of the charge. State v. McKee, 193 Wn.2d 271, 279, 438 P.3d 528 (2019).

D. CONCLUSION

For the foregoing reasons, the evidence supporting the charge of making a false or misleading statement to a public servant should be suppressed. The conviction must therefore be reversed.

DATED this 31st day of January, 2020

Respectfully submitted,

NIELSEN KOCH, PLLC



JENNIFER WINKLER

WSBA No. 35220

Office ID No. 91051

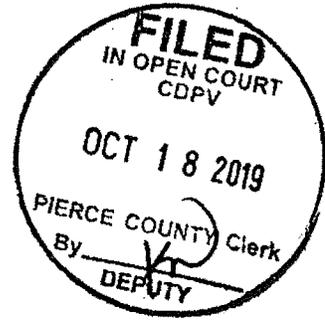
Attorneys for Appellant

APPENDIX

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10/22/2019



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 19-1-01329-1

vs.

PALLA SUM,

FINDINGS OF FACT AND
CONCLUSIONS OF LAW REGARDING
CrR 3.5 AND 3.6 HEARINGS

Defendant.

THIS MATTER having come on before the Honorable Frank E. Cuthbertson, judge of the above-titled court, for hearings pursuant to CrR 3.5 and CrR 3.6, the defendant having been present and represented by his attorney Mikk Lukk, and the State being represented by Deputy Prosecuting Attorney Brian Wasankari, the Court makes the following Findings of Fact and Conclusions of Law.

I. FINDINGS OF FACT:

A. Undisputed Facts:

1. On April 9, 2019, Pierce County Sheriff's Deputy Mark Rickerson was on patrol in a Sheriff's vehicle when he observed a 1988 Honda Civic parked on East 71st Street, just east of East L Street in Pierce County, Washington.

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1 2. Rickerson noticed that the defendant was slumped over and appeared to be
2 unconscious in the driver's seat of that Honda Civic at what was then 9:15 in the morning.

3 3. Rickerson parked his patrol vehicle to the east of the Honda Civic, making
4 sure to leave enough room so as not to block the Honda Civic or prevent it from leaving.

5 4. Rickerson then conducted a records check of the Honda's Oregon license
6 plate, which indicated the Vehicle Identification Number (VIN) for the Honda Civic and that a
7 report of sale had been filed pertaining to that vehicle.

8 5. After obtaining the VIN, Rickerson approached the Honda Civic and, as he did
9 so, noticed that it was also occupied by a second man, who was located in the front passenger
10 seat; both men appeared to be unconscious and did not notice Rickerson approach.

11 6. Rickerson knocked on the driver's-side window, causing Defendant to slowly
12 move and then look at Rickerson.

13 7. Rickerson asked Defendant what he and the passenger were doing, and
14 Defendant replied that they were visiting a friend across the street.

15 8. There was one residence located across the street, and Rickerson had
16 previously been contacted by the owner of that residence, who had complained to him about
17 suspicious vehicles parking where the Honda Civic was then parked.

18 9. Rickerson was also aware that the area in which the Honda Civic was parked
19 was a high-crime area, and that stolen vehicles had previously been located in the area.

20 10. Rickerson asked Defendant to whom the Honda Civic belonged, and
21 Defendant replied with the given name, but not the surname, of an individual.

22 11. Rickerson then inquired if Defendant and his passenger had identification that
23 he could see, and Defendant asked him why he wanted it.
24
25

1 12. Rickerson explained that the two men were sitting in an area known for stolen
2 vehicles and that Defendant did not appear to know to whom the vehicle he was sitting in
3 belonged.

4 13. Defendant then gave Rickerson a false name and date of birth, stating that his
5 name was San K. Sum and that his date of birth was August 25, 1987. The passenger gave the
6 deputy his true name and date of birth.

7 14. Rickerson walked back to his vehicle and began to enter the information he
8 was given into his computer when he heard Defendant start the engine of the Honda Civic.
9 Defendant then quickly backed up and drove away.

10 15. Rickerson and fellow Pierce County Sheriff's Deputy Scott Mock, who had
11 arrived via separate vehicle to assist, signaled Defendant to stop by activating their respective
12 patrol vehicles' emergency lights and sirens, but Defendant did not stop the Honda Civic.

13 16. Defendant continued to flee from deputies at a high speed in that Honda
14 Civic, without stopping at a stop sign for three red lights, before crashing into the front yard of
15 804 South 72nd Street in Pierce County, Washington.

16 17. Defendant exited the vehicle after it crashed and began to flee on foot, but fell
17 down, at which point Deputy Rickerson placed Defendant in handcuffs and read him the
18 **Miranda** warnings.

19 18. After acknowledging that he understood the **Miranda** warnings, Defendant
20 gave Rickerson his true name and date of birth. Defendant denied that he had outstanding
21 warrants, and when asked why he fled, told Rickerson he did not know. When asked about the
22 Honda Civic, Defendant stated that he had bought it several weeks before.
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1 19. Deputy Mock observed a firearm on the floorboard in front of the driver's
2 seat in which Defendant had been sitting.

3 20. During a search incident to the arrest, Mock found a small holster on the
4 inside of Defendant's pants.

5 21. On April 10, 2019, Deputy Mock obtained a search warrant for the Honda
6 Civic, which he served on April 11, 2019, and, in so doing, found, among other things, a Taurus
7 pistol, loaded with three rounds in the magazine and one in the chamber.

8 B. Disputed Facts:

9 There were no disputed facts.

10 From the foregoing Findings of Fact, the Court makes the following

11 II. CONCLUSIONS OF LAW:

12 A. Conclusions as to Disputed Facts:

13 There are no disputed facts.

14 B. Conclusions as to Admissibility of Defendants' Statements and Other Evidence:

15 1. The Court has jurisdiction over the parties and the subject matter.

16 2. Deputy Rickerson's initial contact with Defendant, who was apparently
17 unconscious in the driver's seat of a Honda Civic parked on East 71st Street, was not a seizure,
18 but a reasonable check on health and safety because the public's interest in confirming the
19 defendant's safety at the time outweighed Defendant's interest in freedom from police
20 interference.
21

22 3. The facts that Defendant then told Rickerson that the vehicle in which he was
23 sitting did not belong to him, that he could not fully identify the owner of that vehicle, and, to a
24 lesser extent, the fact that the location in which Defendant had parked was a high-crime area
25

1 from which stolen vehicles had been recovered, were specific and articulable facts which would lead
 2 one to believe that there was a substantial possibility that criminal conduct had occurred, and hence,
 3 justified a *Terry* stop¹ of Defendant which rendered Rickerson's request for Defendant and his passenger
 4 to identify themselves lawful and reasonable.

5 4. Because Rickerson did not retain Defendant's physical identification to
 6 conduct his records check, Defendant was not seized when Rickerson asked him to identify
 7 himself, and Defendant's present motion to suppress evidence obtained thereafter as the product
 8 of an unlawful seizure is therefore denied, and such evidence is admissible.

9 5. Because Defendant was not in custody while parked in his Honda Civic on
 10 East 71st Street, the statements he made to Deputy Rickerson at that time were not the result of
 11 custodial interrogation, and because they were otherwise voluntary, are admissible in the trial of
 12 this case.

13 6. Deputy Rickerson did seize Defendant when he placed Defendant in handcuffs
 14 after Defendant crashed at 804 South 72nd Street in Pierce County, Washington.

15 7. Deputy Rickerson thereafter properly administered the *Miranda* warnings to
 16 Defendant prior to any subsequent interrogation or the making of any statements by Defendant.

17 8. Defendant then made a knowing, intelligent, and voluntary waiver of his rights
 18 when he spoke to Deputy Rickerson, and because his statements were voluntary and not
 19

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

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otherwise the product of coercion, they are admissible in the trial of this case.

DONE IN OPEN COURT this 18TH day of October, 2019.

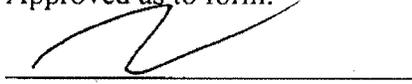

Frank E. Cuthbertson
JUDGE, Pierce County Superior Court

Frank E. Cuthbertson

Presented by:


Brian Wasankari
Deputy Prosecuting Attorney
WSBA No. 28945

Approved as to form:


Mikk Lukk
Attorney for Defendant
WSBA No. 46408



NIELSEN KOCH P.L.L.C.

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Transmittal Information

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