

FILED
Court of Appeals
Division II
State of Washington
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No. 53983-7

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

STATE OF WASHINGTON,

Respondent,

v.

KYRSTIN WOODCOCK,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. Kyrstin Woodcock was unlawfully seized in violation of article I, section 7.

2. The trial court erred in denying the motion to suppress.

3. The court erred in concluding, “There is simply no testimony or evidence that objectively proves she was not free to walk away from the conversation with Officer Schreier.” CP 20.

4. The court erred in imposing a \$100 DNA collection fee.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. An individual is “seized” for purposes of article I, section 7 when, in view of all of the circumstances, a reasonable person would believe either that she is not free to leave or that she is not free to decline an officer’s request and terminate the encounter. Here, an armed police officer stopped pedestrians Woodcock and her boyfriend Harry Goodrich as they were standing at an intersection waiting for the light to change. Although the officer had no basis to suspect the couple were involved in any criminal activity, the officer asked whether they were “staying out of trouble,” and asked for their identifications so that he could search for arrest warrants. When Goodrich handed the officer his identification card, the officer held onto it while he checked for

warrants. Would a reasonable person in Woodcock's position believe she was not free to leave or free to decline the officer's requests for identifying information and terminate the encounter?

2. If a defendant has a prior Washington felony conviction, a presumption arises that she previously provided a DNA sample. The court may not impose a \$100 DNA collection fee unless *the State* proves that her DNA was *not* previously collected. Here, Woodcock had a prior Washington felony conviction but the trial court placed the burden on her to show that her DNA was previously collected. When she could not make that showing, the court imposed a \$100 DNA collection fee. Did the court err?

C. STATEMENT OF THE CASE

On December 12, 2018, at around midnight, Kyrsten Woodcock and her boyfriend Harry Goodrich were standing on a corner in Port Townsend waiting for the light to change so that they could cross the street. RP 37-39. They had just come from the Penny Saver, where they had bought cigarettes. RP 37-38. Nothing in the record suggests they were involved in any criminal activity or doing anything suspicious.

Port Townsend Police Officer Kolby Schreier was alone in his marked patrol car patrolling the area. RP 6-7. He was in uniform with a

visible firearm on his belt. RP 8. Officer Schreier saw Woodcock and Goodrich standing on the corner and mistakenly thought Goodrich was someone else, a man named Aaron Nolan. RP 11. The two men looked alike. RP 43. Schreier wanted to speak to Nolan because Nolan frequently got into trouble and was known to have outstanding arrest warrants. Schreier frequently contacted him in the course of his police work. RP 26.

Officer Schreier pulled past the couple, parked his car on the shoulder of the road, and got out to talk to them. RP 12, 39. He did not activate his siren or lights. RP 12. He approached the couple and said, “hey, how’s it going.” RP 13. He immediately realized the man was not Nolan. RP 13. But he recognized Goodrich, whom he knew from years earlier when the two had played baseball together as teenagers. RP 13. Schreier and Goodrich made small talk, catching up. RP 14. Goodrich introduced Woodcock to Schreier as his girlfriend. RP 16.

Officer Schreier began questioning Goodrich about something he had heard from Goodrich’s sister, that Goodrich had gotten into trouble while living in Yakima. RP 14, 28. Schreier said, “I’m going to be honest with you, I haven’t necessarily [sic] great things about your time in Yakima.” RP 14. Schreier asked Goodrich if he had “been

staying out of trouble.” RP 14. In response, Goodrich “admitted that he was having some struggles.” RP 14.

Schreier then asked Goodrich if he had any warrants. RP 14, 28. Goodrich said he did not. RP 14. Schreier asked, “do you mind if I check,” and Goodrich responded, “no, go ahead.” RP 14, 28. Schreier asked Goodrich for his identification, which Goodrich provided. RP 14, 28. This surprised Goodrich because Schreier knew who he was; he did not understand why he would ask him for his identification. RP 42.

Goodrich later testified that he did not feel like he could just walk away or terminate the encounter, especially while Schreier was holding onto his identification. RP 40-42. At that point, Goodrich felt like he had been stopped. RP 42. He did not believe a reasonable person would walk away while the officer was holding onto his identification. RP 50-51.

Schreier stood next to Goodrich and Woodcock while he held onto Goodrich’s identification and provided the information to dispatch on his portable radio. RP 15, 29. He confirmed that Goodrich had no warrants. RP 15. He handed his identification back to him. RP 16.

Officer Schreier then turned to Woodcock and asked if she was staying out of trouble. RP 16. He asked to see her identification. RP 16.

He later explained that he often asks random people for their identifications while talking to them on the street because he “like[s] to know who’s in my community.” RP 30-31. Woodcock said she did not have any identification on her. RP 16. Schreier asked for her name and birth date. RP 17. Woodcock provided the information, which Schreier wrote down on his notepad. RP 17, 32. Schreier then wished the couple a good night and got back into his car. RP 17. Goodrich and Woodcock walked away, crossing the street. RP 17, 20.

In his car, Officer Schreier provided Woodcock’s information to dispatch and learned that she had an arrest warrant out of Yakima. RP 20, 33. He turned his car around and contacted Woodcock again, telling her she had a warrant. RP 20. He made her wait while he confirmed the warrant, then he arrested and handcuffed her. RP 21, 34.

Officer Schreier drove Woodcock to jail. RP 21, 309-11. At the jail, he opened the passenger door to let her out and saw a small baggie of methamphetamine on the floorboard next to her foot. RP 320.

Woodcock was charged with one count of possession of a controlled substance, methamphetamine. CP 1-2.

Prior to trial, Woodcock moved to suppress the methamphetamine, arguing she had been unlawfully seized. CP 6-12.

After a hearing, the court denied the motion. CP 18-20. The court concluded Woodcock was not “seized” until after the officer determined she had an arrest warrant. CP 18-20.

The jury found Woodcock guilty as charged. CP 39.

Woodcock had a prior Washington felony conviction from 2018. CP 41. Defense counsel requested that the court waive the \$100 DNA collection fee because Woodcock already provided a DNA sample pursuant to her 2018 conviction. RP 558, 560. The court insisted that Woodcock prove she had already provided a DNA sample. RP 564. Because Woodcock could not prove it, the court imposed the \$100 DNA collection fee. RP 564; CP 44.

D. ARGUMENT

1. Woodcock was unlawfully seized in violation of article I, section 7, requiring that the methamphetamine be suppressed.

- a. A person is “seized” for purposes of article I, section 7, when a police officer’s conduct would communicate to a reasonable person that she is not free to leave or otherwise decline the officer’s requests and terminate the encounter.

Article I, section 7 of the Washington Constitution commands that “[n]o person shall be disturbed in his private affairs . . . without authority of law.” It is well-established that article I, section 7 provides

greater protection of privacy rights than the Fourth Amendment. State v. Winterstein, 167 Wn.2d 620, 631, 220 P.3d 1226 (2009).

The “authority of law” required by article I, section 7 is generally a warrant, issued upon probable cause that is established by sworn affidavit. State v. Chenoweth, 160 Wn.2d 454, 465, 158 P.3d 595 (2007).

A seizure without a warrant is presumed unconstitutional. State v. Rankin, 151 Wn.2d 689, 699, 92 P.3d 202 (2004). Exceptions to the warrant requirement are narrow and “jealously and carefully drawn.” State v. Doughty, 170 Wn.2d 57, 61, 239 P.3d 573 (2010) (internal quotation marks and citation omitted).

Not all interactions between police officers and citizens is a “seizure” for constitutional purposes. United States v. Mendenhall, 446 U.S. 544, 552, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980). A “seizure” occurs for purposes of article I, section 7 when, in view of all of the circumstances surrounding the incident, a reasonable person would believe either that she is not free to leave or that she is not free to decline an officer’s request and terminate the encounter. State v. O’Neill, 148 Wn.2d 564, 574, 62 P.3d 489 (2003). The test is “purely objective.” State v. Harrington, 167 Wn.2d 656, 663, 222 P.3d 92

(2009). That is, determining whether a reasonable person would feel free to leave is based on the officer's conduct. Id.

A seizure does not necessarily occur where an officer approaches an individual in public and requests to talk to her, engages in conversation, or requests identification, so long as the person involved need not answer and may walk away. O'Neill, 148 Wn.2d at 581. But a permissible social contact "may 'mature' or 'transform' into a seizure if the officer's actions ultimately create a situation where the individual no longer feels free to leave." State v. Carriero, 8 Wn. App. 2d 641, 657, 439 P.3d 679 (2019).

No single discrete act by officers necessarily constitutes a seizure. Id. at 655. A person may be seized by a show of authority as well as by physical force. Mendenhall, 446 U.S. at 553. A seizure occurs not only when the citizen feels compelled to remain still but also when the citizen deems herself obliged to respond to the officer's requests. Id.

Whether police have seized a person is a mixed question of law and fact. State v. Johnson, 8 Wn. App.2d 728, 737, 440 P.3d 1032 (2019).

- b. Woodcock was “seized” when the officer quizzed her about her possible involvement in criminal activity, requested that she and Goodrich provide him with identification, and held onto Goodrich’s identification while checking for warrants.

Generally, an encounter between a police officer and a citizen rises to the level of a seizure where the officer’s “use of language or tone of voice indicat[es] that compliance with the officer’s request might be compelled.” State v. Young, 135 Wn.2d 498, 512, 957 P.2d 681 (1998).

An officer’s mere request for identification is not necessarily a seizure. But it “may ripen into a seizure in circumstances, for example, where the police officer retains the identification such that the defendant is not free to leave or becomes immobilized.” State v. Beito, 147 Wn. App. 504, 509, 195 P.3d 1023 (2008); see also State v. Crane, 105 Wn. App. 301, 19 P.3d 1100 (2001), overruled on other grounds by O’Neill, 148 Wn.2d 564.

In Crane, for example, a police officer was monitoring a house when he observed a car pull into the driveway. Crane, 105 Wn. App. at 304. Crane was a passenger in the car and he and two other men exited the car and walked toward the house. Id. The officer pulled his patrol car into the driveway behind the car, exited, walked toward the men,

and asked them where they were going and for their identifications. Id. The officer stood with the three men, holding their identification cards, while he checked for warrants. Id. at 305.

The Court held Crane was seized when the officer held onto his identification while checking for warrants. Id. at 311. “This was not a casual contact on a public street.” Id. Although the officer did not tell Crane he could not leave or must wait during the warrants check, “the circumstances would cause a reasonable person to conclude that he was not free to leave or to terminate contact until the officer completed the warrants check and found the detainee had a clear record.” Id. Although the officer did not walk away with the identification card while checking for warrants, that did not undermine the conclusion that a seizure occurred. “In fact, a detainee might well feel more intimidated and less free to leave when the officer is close at hand.” Id.

Similarly, in Beito, two police officers observed two individuals sitting in a parked car in the parking lot of a convenience store at night. Beito, 147 Wn. App. at 507. The officers parked behind the car and one officer approached the driver while the other approached the passenger, Beito. Id. The officer asked Beito what he was doing, said he thought Beito’s stories were suspicious, and asked for identification. Id. Beito

did not have identification so the officer asked for his name and birth date. Id. The officer continued to stand outside the passenger door while checking for warrants over his radio. Id. The Court held this was a seizure because, “[u]nder the totality of the circumstances, a reasonable person would not have felt free to terminate the encounter or refuse to answer Officer Brasch’s questions.” Id.

Here, like in Crane and Beito, Woodcock was seized when Officer Schreier approached her and Goodrich, asked them for identification, and questioned them about their possible involvement in criminal activity, suggesting he believed they were up to something suspicious. Schreier pointedly asked Goodrich about rumors he had heard about some trouble Goodrich had gotten into in Yakima, and asked whether he had “been staying out of trouble.” RP 14. With absolutely no justification, Schreier also asked Woodcock whether she had “been staying out of trouble.” RP 16. Schreier reinforced the impression that he was conducting an investigation when he asked the two for identification so that he could check for arrest warrants. RP 14, 17, 28. When Goodrich provided Schreier with his identification, the officer held onto it while he checked for warrants, suggesting that

Goodrich could not leave until the officer had completed his investigation. RP 15, 29, 40-42, 50-51.

Under the totality of the circumstances, a reasonable person would not feel free to refuse to respond to the officer's questions or to terminate the encounter and walk away. "This was not a casual contact on a public street." Crane, 105 Wn. App. at 311. An officer who stops an individual on the street, questions her about whether she is staying out of trouble, and asks for her identification so that he can check for arrest warrants, is not engaging in a casual social contact. Woodcock was minding her own business, behaving in an entirely appropriate, innocent manner. Officer Schreier's actions of accosting her for no reason, vaguely accusing her, and then requesting her identifying information so that he could check for warrants, created an accusatory situation where a reasonable person would not feel free to disregard the officer's requests or terminate the encounter and leave. See Carriero, 8 Wn. App. 2d at 657.

In sum, Woodcock was "seized" for purposes of article I, section 7. Carriero, 8 Wn. App. 2d at 657; Beito, 147 Wn. App. at 509; Crane, 105 Wn. App. at 311.

- c. The seizure was unlawful because the officer had no basis to suspect Woodcock was engaged in criminal activity; the methamphetamine must be suppressed.

The warrantless seizure of Woodcock was unlawful in violation of article I, section 7, unless the State can establish that it fell under one of the “jealously and carefully drawn” exceptions to the warrant requirement. Doughty, 170 Wn.2d at 61; State v. Grande, 164 Wn.2d 135, 141, 187 P.3d 248 (2008).

A “Terry” stop is a brief investigatory seizure that is a narrow exception to the warrant requirement. Doughty, 170 Wn.2d at 61-62; Terry v. Ohio, 392 U.S. 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). A Terry stop requires a well-founded suspicion that the person seized is engaging in criminal conduct. Doughty, 170 Wn.2d at 61-62. The officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion. Id.; Terry, 392 U.S. at 21.

The State cannot establish that the seizure of Woodcock was a lawful Terry stop. The officer was aware of no facts or circumstances that would suggest that Woodcock was engaged in criminal conduct. When she was seized, she was peacefully standing with her boyfriend on the corner at an intersection in Port Townsend, waiting for the light

to change so that she could cross the street. RP 37-39. The two had just come from the Penny Saver, where they had gone to buy cigarettes. RP 37-38. The record contains no information to suggest that either Woodcock or Goodrich was behaving in a suspicious manner.

Physical evidence obtained as the direct result of an unlawful seizure is “tainted” by the illegality and must be suppressed. State v. Duncan, 146 Wn.2d 166, 176, 43 P.3d 513 (2002); Wong Sun v. United States, 371 U.S. 471, 484-85, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

The methamphetamine was obtained as a direct result of Woodcock’s unlawful seizure and must be suppressed.

2. The court erred in imposing a \$100 DNA collection fee.

At sentencing, the court imposed a \$100 DNA collection fee. CP 44. Woodcock had a prior 2018 felony conviction from Douglas County. CP 41. She told the court she had already provided a DNA sample pursuant to that conviction. RP 558, 560. But the court insisted she *prove* she had already provided a DNA sample. RP 564. Because she did not present such proof at the sentencing hearing, the court required her to pay another \$100 DNA collection fee. RP 564; CP 44. The court erred in placing the burden on Woodcock to establish she had already provided a DNA sample.

The statute requires the collection of a DNA sample from every adult or juvenile convicted of a felony. RCW 43.43.7541. A \$100 DNA collection fee is mandatory “unless the state has previously collected the offender’s DNA as a result of a prior conviction.” RCW 43.43.7541; State v. Ramirez, 191 Wn.2d 732, 747, 426 P.3d 714 (2018); State v. Catling, 193 Wn.2d 252, 257-58, 438 P.3d 1174 (2019). If the State previously collected the offender’s DNA pursuant to a prior felony conviction, the trial court may not impose the DNA collection fee. State v. Houck, 8 Wn. App. 2d 636, 651, 446 P.3d 646 (2019).

Where an offender has a prior Washington felony conviction, a presumption arises that the State previously collected a DNA sample. State v. Van Wolvelaere, 8 Wn. App. 2d 705, 710, 440 P.3d 1005 (2019). The *State* bears the burden to rebut that presumption. Houck, 8 Wn. App. 2d at 651 n.4.

If the offender has a prior felony conviction and the record is silent as to whether the State previously collected the offender’s DNA, the remedy is to remand to the trial court to determine whether the State previously collected a DNA sample. Id. at 651. On remand, the trial

court must strike the DNA collection fee unless the State demonstrates the DNA was *not* collected. Id.

Woodcock has a prior Washington felony and the record is silent as to whether the State previously collected her DNA. CP 41. This Court must remand to the trial court to strike the DNA collection fee unless the State proves that Woodcock did not already provide a DNA sample. Houck, 8 Wn. App. 2d at 651.

E. CONCLUSION

Woodcock was unlawfully seized in violation of article I, section 7. The methamphetamine must be suppressed. Also, the case must be remanded to strike the DNA collection fee unless the State can demonstrate that Woodcock did not already provide a DNA sample.

Respectfully submitted this 13th day of February, 2020.

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)	NO. 53983-7-II
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)	
KYRSTIN WOODCOCK,)	
)	
Appellant.)	

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