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Division II
State of Washington

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

STATE OF WASHINGTON,

Respondent,

v.

RACHELLE LEIGH BEARD,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 19-1-00621-18

BRIEF OF RESPONDENT

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court erred in denying Beard's motion to suppress based on an unlawful seizure?
2. Whether the trial court erred in improperly taking judicial notice of a fact that does not appear in the trial court's CrR 3.6 findings?
3. Whether Beard as an indigent offender at sentencing should be assessed a discretionary supervision fee? CONCESSION OF ERROR.

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Rachelle Leigh Beard was charged by information filed in Kitsap County Superior Court with possession of methamphetamine. CP 1.

Beard moved to suppress evidence obtained by search of a car in which she was a passenger and of her person. CP 13. At a CrR 3.6 hearing the state offered police reports (CP 31-38) and police body-cam footage. 1RP 5; 1RP 15 (formally offered and admitted). The defense had no objection to that procedure. 1RP 5. The trial court watched the footage in chambers with the agreement of the defense. 1RP 7.

The trial court denied the motion to suppress. CP 42 (clerk's minutes of oral ruling). The trial court enter findings of fact and conclusions of law. CP 44-51.

Beard submitted the case to the trial court on stipulated facts. CP 53-57. The trial court engaged on-the-record colloquy with Beard assuring her understanding of the process. 1RP 75-76. The trial court found Beard guilty. 1RP 78; CP 57.

A residential drug offender sentence alternative (DOSA)¹ examination was done, finding that Beard qualified for that program. CP 60-63. Beard was sentenced to that program. CP 75. Beard was released to the custody of a licensed treatment provider. CP 88.

Beard timely filed a notice of appeal. CP 89.

B. FACTS

Beard stipulated to the truth of the following facts:

- (1) On April 19, 2019, Defendant was seated in the front passenger seat of a Honda Accord that was parked at the Mobil Gas Station in Poulsbo, Washington located in Kitsap County.
- (2) While the vehicle was parked at the gas station, Officer Craig Keller of the Poulsbo Police Department deployed his canine around the vehicle to sniff for the presence of narcotics.
- (3) Officer Keller's canine alerted to the area of the front passenger seat

¹ RCW 9.94A.660.

where Defendant was sitting.

(4) After the canine alerted, Officer Bell of the Poulsbo Police Department obtained Defendant's information and it was discovered that Defendant had a felony warrant. Defendant was then placed under arrest.

(5) The vehicle was searched by law enforcement after all the occupants were removed and a small bag of suspected methamphetamine was found next to the passenger seat where Defendant was sitting.

(6) As a result of the arrest warrant and the suspected methamphetamine found in the vehicle, Defendant was transported to the Kitsap County Jail. At the jail, Defendant was searched and a bag of suspected methamphetamine was recovered from her person. Defendant was questioned about the suspected methamphetamine found on her person and she admitted that it was given to her by the driver of the Honda Accord.

(7) The substance found on Defendant's person was tested by the Washington State Patrol crime laboratory on July 30, 2019 and found to contain methamphetamine.

CP 53-54.

The trial court's findings of fact on its CrR 3.6 ruling include more detail. Beard challenges the trial court's finding that there was "no show

of force by the officers toward the car or passengers.” CP 47 (finding #20).

Otherwise, Beard does not challenge that the car in which she was a passenger was “parked” when contacted by police. CP 45 (findings ##3, 4). That when the officer contacted the driver, Hernandez, the officer was “on foot.” Id. (finding #10). Beard does not challenge that it was only 60 seconds between the time Hernandez was secured following his arrest and the time the drug dog alerted to the presence of narcotics. CP 48 (finding #26).

III. ARGUMENT

A. THE TRIAL COURT PROPERLY DENIED BEARD’S MOTION TO SUPPRESS EVIDENCE.

Beard argues that the discovery of the drugs that support the conviction resulted from a search was unlawful because she was unlawfully seized. Beard was not seized by being a passenger in a parked car when the driver, who was out of the car to pump gas, was contacted by police. Beard remained at the scene as the driver was investigated for and arrested for driving on a suspended license. After that, Beard was properly detained and identified when police formed a reasonable

suspicion of the presence of illegal drugs. The discovery of a warrant for her arrest properly followed from that reasonable suspicion and identification and the discovery of the subject methamphetamine properly followed from the arrest. The trial court did not err in denying Beard's motion to suppress.

Under the Fourth amendment "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . ." Article I, section 7 of the Washington Constitution declares: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." The seizure of Beard that lead to the discovery of the drugs in her possession implicates these constitutional protections.

The person challenging police action bears the burden of establishing an unlawful seizure. *State v. Young*, 135 Wn.2d 498, 510, 957 P.2d 681 (1998). Review of whether that burden has been met is a mixed question of law and fact. *State v. Harrington*, 167 Wn.2d 656, 662, 222 P.3d 92 (2009). The trial court's findings are accorded great deference but "the ultimate determination of whether those facts constitute a seizure is one of law and is reviewed de novo." *Harrington*, 167 Wn.2d at 662 (internal quotation omitted). On a showing of a warrantless seizure, "the State has the burden of justifying it." *State v. Gantt*, 163 Wn.App.

133, 138, 257 P.3d 682 (2011) *review denied* 173 Wn.2d 1011 (2012).

A seizure of the person occurs when

considering all the circumstances, an individual's freedom of movement is restrained and the individual would not believe he or she is free to leave or decline a request due to an officer's use of force or display of authority.

Harrington, 167 Wn.2d at 663, *quoting State v. Rankin*, 151 Wn.2d 689, 694, 695, 92 P.3d 202 (2004). Some circumstances evincing a seizure include

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. . . .In the absence of some such evidence, otherwise inoffensive conduct between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person

Harrington, 167 Wn.2d at 664 (internal citation omitted), *quoting State v. Young, supra*, 135 Wn.2d at 512.

Social or inoffensive contact between citizens and police do not offend the constitutions:

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.

Harrington, 167 Wn.2d 665 (internal quotation omitted) (alteration by the Court); *but see State v. Rankin*, 151 Wn.2d 689, 699, 92 P.3d 202(2004) (seizure occurs when police ask passenger for identification while lacking

articulable suspicion of criminal activity).

Unchallenged findings of fact made by a trial court at a suppression hearing will be treated as verities on appeal, while challenged facts are also binding on appeal if there is substantial evidence in the record to support them. *State v. Gentry* (1995) 125 Wn.2d 570, 888 P.2d 1105, *certiorari denied* 116 S.Ct. 131, 516 U.S. 843, 133 L.Ed.2d 79, *post-conviction relief denied* 137 Wash.2d 378, 972 P.2d 1250, as amended. “Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding.” *State v. Hill*, 123 Wash.2d 641, 644, 870 P.2d 313 (1994).

1. There was no traffic stop because the car was parked and the officer’s intentions are irrelevant to the question.

Beard argues that “The car in which Ms. Beard was a passenger is was parked under circumstances different from cases in which officer approached a stationary, lawfully parked car.” Brief at 16. This because “the officer’s intent was to stop the vehicle.” *Id.* And, later, the officer “turned around and followed the car with intent to stop the car and contact the driver.” Brief at 18. Moreover, because the driver, Hernandez, knew he had committed an infraction, the officer performed a traffic stop,

“albeit a stop effectuated before the officer to turn on his overhead lights.”
Id.

The first quoted sentence admits that the car was “parked” but then asserts that such parking was somehow different from stationary, lawful parking.² The car was stopped or “stationary.” The driver had alighted to pump gas. Beard makes no argument that it was “unlawful” to park at the gas pump. These considerations are secondary, argues Beard, to the intention of the officer to conduct a traffic stop.

This contention is directly contrary to the often-stated standard under article I, section 7 for determining the seizure of a person. As Beard puts it “This standard is a purely objective one, looking to “the officer’s actual conduct and whether the conduct appears coercive.”” Brief at 13 (quoting *State v. Harrington*, 167 W.2d 656, 662, 222 P.3d 92 (2009)). The trial court reached the same conclusion stating that “The subjective intent of the police is irrelevant in determining whether a seizure occurred, unless conveyed in person. *United States v. Mendenhall*, 446 U.S. at 554 n. 6.”³ CP 49 (conclusion of law #3).

As Beard notes, the objective fact is that Hernandez was “standing by a gas pump,” not driving, when contacted by the officer. Brief at 18.

² Beard also admitted that the car was “parked” in her submission of the case on stipulated facts. CP 53.

Moreover, the contact occurred after “the officer parked and walked over to him.” *Id.* As the Supreme Court has held “where a vehicle is parked in a public place, the distinction between a pedestrian and the occupant of a vehicle dissipates.” *State v. O’Neill*, 148 Wn..2d 564, 579, 62 P.3d 489 (2003).

The objective facts make clear that Hernandez was not “pulled over” or in any way subject to a coercive stopping of his car. Plumbing the depths of the officer’s intentions and predicting that he would have shown force and conducted a stop is contrary to the constitutional standards and not an objective circumstance of the case. There was no traffic stop in this case. Therefore, the passengers were not seized by such a stop. *See Gantt*, 163 Wn.App. at 142 (traffic stop or not the issue is “was display of authority sufficient to constitute a seizure?”).

2. *Beard was not seized by the on-foot police contact with Hernandez, the use of a spotlight, or the arrival of additional officers separately or taken together.*

The question of traffic stop or no traffic stop may be academic given Beard’s position in this case. Beard admits the core fact, saying “Perhaps a reasonable passenger in the Honda would have felt free to leave at this point as Officer Keller engaged Mr. Hernandez.” Brief at 18.⁴

³ 446 U.S, 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980).

⁴ Beard cites this sentiment as regarding “CL 13.” There are only 10 conclusions of law.

Beard admits that when Officer Keller “engaged” Hernandez, he was not objectively coercive in a manner that would communicate to the passengers, including Beard, that they were not free to leave. The passengers were not seized.

At the same time, Beard admits that her challenge to the trial court’s finding of fact 20 is not well taken. The trial court found that

The conversation between the passengers and the officers was casual in nature, the officers did not demand anything from the passengers, and there was no show of force by the officers toward the car or passengers.

CP 47. Beard accepts that the conversations were casual and that the officers demanded nothing from the passengers, arguing only that there was a show of force. The reasonable belief that a person in Beard’s position would feel free to leave while Officer Keller dealt with Hernandez changed, Beard argues, because the circumstances include the use of a patrol-car spotlight and the arrival of two additional police officers.

A spotlight was shined at the car but this circumstance was known when a reasonable person would have known she could leave. CP 46 (finding #10) (spotlight deployed while Officer Keller checked Hernandez’s identification). But the car was in a well-lit public gas station. In *Young, supra*, the shining of a spotlight directly on the person

did not amount to such a show of authority a reasonable person would have believed he or she was not free to leave, not free simply to keep on walking or continue with whatever activity he or she was then engaged in, until some positive command from [Officer] Carpenter issued.

Young, 135 Wn.2d at 513-14 (page break omitted) (alteration added); *cf.* *Gantt*, 163 Wn.App. at 142 (seizure where officer parked behind van with emergency lights on and questioned behavior of Gantt without reasonable suspicion or probable cause) *review denied* 173 Wn.2d 1011 (2012).

Beard fails to point to any coercive behavior toward her by police following the seizure of Hernandez and before the alert of the dog. Beard argues that the arrival of additional officers makes the difference. But Beard alleges no behavior by these late arrivals other than that they stood outside of the Honda. In *Harrington*, the arrival of more police was a factor in the finding of a seizure but it was not alone dispositive. Harrington was questioned about his activities and travel, the second arriving officer asked him to remove his hands from his pockets, and he was subjected to a frisk. 167 Wn.2d at 669.

Officer Keller looked into the car, surveilled Beard and the others with a flashlight and asked Beard if she had won playing the lottery tickets. He accused no one. He ordered no one. He did not draw a weapon. He did not order them to keep their hands in sight. He did not demand or request identification. He did not question them as to their

activities or travel. There's no record that Officer Keller implied that they could not leave. There is no record that the officer's tone of voice was demanding or confrontational. In fact, the officer had engaged in preparing them to leave by ascertaining whether any of them had a driver's license. And, of course, the trial court saw these actions, or lack of actions, on the body camera footage.

Beard challenges neither application nor reaction of the drug sniffing dog. Beard concedes that her circumstances quickly changed at that point in time. Under all the circumstances, Beard was not seized until that occurrence. The motion to suppress was properly denied.

B. THE TRIAL COURT DID NOT FIND THE DISPUTED FACT IN ITS CRR 3.6 FINDINGS.

Beard next claims that the trial court took improper judicial notice. This claim is without merit because the trial court did not incorporate any of the disputed information in its written findings of fact.

During the trial court's oral ruling on the motion to suppress, the court and defense counsel compared notes on the makeup of the surrounding neighborhood. 1RP 47-49. The trial court remarked that the road on which the incident occurred was a "very well-traveled road in an urban area." 1RP 47. The defense attorney responded "I agree it is a busy

road.” Id. But counsel had some concern about the idea of an urban area and expressed those concerns. Id.

The discussion of the scene had no impact on the trial court’s findings. The trial court found that “The area where the Honda parked was well-lit by the lighting from the gas station.” CP 45(finding of fact #4). There are no other descriptions of the scene in the findings and conclusions. The trial court’s legal conclusions show no reliance on the physical surroundings of the incident.

The discussion of the neighborhood between the trial court and defense counsel had no part in the decision of the case. CrR 3.6(b) requires “written” findings of fact and conclusions of law. Thus,

A trial court's oral opinion and memorandum opinion are no more than oral expressions of the court's informal opinion at the time rendered. *State v. Mallory*, 69 Wash.2d 532, 533, 419 P.2d 324 (1966). An oral opinion “has no final or binding effect unless formally incorporated into the findings, conclusions, and judgment.” Id. at 533-34, 419 P.2d 324; accord *State v. Dailey*, 93 Wash.2d 454, 458-59, 610 P.2d 357 (1980).

State v. Head, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998); see also *State v. Witherspoon*, 60 Wn.App. 569, 572, 805 P.2d 248 (1991) (appellate court declines to review oral ruling where rule requires written findings).

The trial court did not make the finding of which Beard complains. There was no error.

C. DISCRETIONARY COSTS SHOULD NOT HAVE BEEN IMPOSED.

Beard next claims that the trial court erred by imposing a discretionary supervision fee because Beard was indigent at the time of sentencing. The state has no contrary information and concedes that Beard was and is indigent. As indigent, Beard should not be subject to discretionary legal financial obligations. RCW 10.01.160(3) (“The court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent. . .”). The state agrees that as waivable conditions, supervision fees here imposed are discretionary. *See* Brief at 33.

The state respectfully requests that this court order the trial court to amend the judgment and sentence by striking the supervision fee.

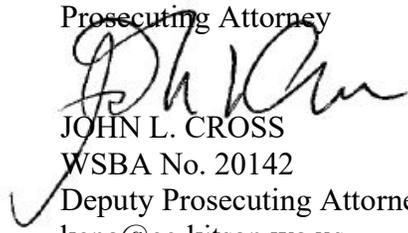
IV. CONCLUSION

For the foregoing reasons, Beard’s conviction and sentence should be affirmed but the supervision fee should be stricken.

DATED September 24, 2020.

Respectfully submitted,

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