FILED
Court of Appeals
Division II
State of Washington
7/17/2020 3:47 PM

NO. 54222-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

BRADLEY HAMRICK,

Appellant.

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

The Honorable Michael H. Evans, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

A. ASSIGNMENTS OF ERROR 1

Issues Pertaining to Assignments of Error 1

B. STATEMENT OF THE CASE..... 2

C. ARGUMENT..... 8

THE TRIAL COURT WAS REQUIRED TO SUPPRESS ALL EVIDENCE STEMMING FROM AN UNLAWFUL SEIZURE. 8

D. CONCLUSION 16

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Anaya-Degante
185 Wn. App. 1043, 2015 WL 459327 (2015)..... 12

State v. Benn
120 Wn.2d 631, 845 P.2d 289
cert. denied, 510 U.S. 944, 114 S. Ct. 382, 126 L. Ed. 2d 331
(1993) 14

State v. Broadnax
98 Wn.2d 289, 654 P.2d 96 (1982).....10, 11, 12, 13

State v. Estes
188 Wn.2d 450, 395 P.3d 1045 (2017)..... 15

State v. Hendrickson
129 Wn.2d 61, 917 P.2d 563 (1996)..... 9

State v. Johnson
75 Wn. App. 692, 879 P.2d 984 (1994) 11

State v. Jury
19 Wn. App. 256, 576 P.2d 1302
review denied, 90 Wn.2d 1006 (1978) 15

State v. King
89 Wn. App. 612, 949 P.2d 856 (1998) 9

State v. McGill
112 Wn. App. 95, 47 P.3d 173 (2002) 15

State v. Radka
120 Wn. App. 43, 83 P.3d 1038 (2004) 13

TABLE OF AUTHORITIES (CONT'D)

Page

State v. Smith
145 Wn. App. 268, 187 P.3d 768 (2008).....9, 10, 11, 12, 13

State v. Williams
102 Wn.2d 733, 689 P.2d 1065 (1984) 9

FEDERAL CASES

Arkansas v. Sanders
442 U.S. 753, 99 S. Ct. 2586, 61 L. Ed. 2d 235 (1979) 9

Michigan v. Summers
452 U.S. 692, 705, 101 S. Ct. 2587, 69 L. Ed. 2d 340 (1981)..... 9

Minnesota v. Dickerson
508 U.S. 366, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993) 10

Miranda v. Arizona
384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). 7

Strickland v. Washington
466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984) 14

Terry v. Ohio
392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968) 5

Ybarra v. Illinois
444 U.S. 85, 100 S. Ct. 338, 62 L. Ed. 2d 238 (1979) 10

RULES, STATUTES AND OTHER AUTHORITIES

CrR 3.5 ..... 3, 4, 7, 13

CrR 3.6 .....1, 7, 11, 13, 14, 15

GR 14.1 12

TABLE OF AUTHORITIES (CONT'D)

Page

U.S. Const. Amend. VI 14

U.S. Const. Amend . XIV 8

Wash. Const. art. I, § 7 8

Wash. Const. art. I, § 22 14

A. ASSIGNMENTS OF ERROR

1. The trial court erred when it refused to suppress unlawfully seized evidence and dismiss the criminal charge.

2. The trial court erred when it found that appellant was lawfully seized and searched during execution of a search warrant.

3. Defense counsel was ineffective and contributed to the trial court's error on the motion to suppress, thereby violating appellant's Sixth Amendment rights.

Issues Pertaining to Assignments of Error

1. Appellant was standing outside a home searched pursuant to a warrant. When executing a warrant inside a home, police may not seize individuals located outside unless there are independent factors tying the person to the illegal activities being investigated or raising a reasonable suspicion the person is armed and dangerous. Where police conceded there were no such independent factors supporting appellant's seizure, did the trial court err in finding the seizure justified and refusing to suppress all resulting evidence of the charged crime?

2. Defense counsel failed to file a timely written motion to suppress under CrR 3.6 and, once that motion was eventually made, failed to bring to the judge's attention binding precedent that

required suppression of the evidence used to convict appellant. Was defense counsel ineffective?

B. STATEMENT OF THE CASE

The Cowlitz County Prosecutor's Office charged Bradley Hamrick with one count of possession of a controlled substance: methamphetamine. CP 3-4.

Hamrick was appointed counsel from the Cowlitz County Office of Public Defense. RP 1; CP 45. The Superior Court file reveals that appointed counsel did not file a trial memorandum or any substantive motions on Mr. Hamrick's behalf. See generally RP 7-10, 109-111 (no discussion of any defense motions).

The day before trial was set to begin, Hamrick moved to substitute privately retained counsel, Adam Dean, for his appointed counsel. CP 9-10. Dean requested a trial continuance "to file a Motion to Suppress which will be dispositive." CP 12. Dean indicated that, upon the filing of that motion, should a trial still be necessary, Hamrick would agree to a bench trial. CP 12. Dean also indicated the substitution and continuance were necessary to afford Hamrick due process and effective representation. CP 12. The State objected to any trial continuance, CP 11, and the motion was denied. RP 6; CP 13-14.

At trial, the State intended to use Hamrick's statements to law enforcement, requiring an evidentiary hearing under CrR 3.5. RP 9. At that hearing, the State called one witness: Longview Police Detective Luis Hernandez. RP 87-88.

Detective Hernandez testified that, on March 13, 2019, he was one of several officers assisting with execution of a warrant authorizing a search of Jeremiah O'Brien's residence for suspected narcotics activities. RP 88-90, 92. According to Hernandez, "[w]hen we serve a search warrant on a residence, all persons get detained for safety reasons." RP 88. Because Hamrick was one of several individuals outside but near the residence, Hernandez detained and handcuffed him. RP 88-89. According to Detective Hernandez, Hamrick then volunteered that he had methamphetamine and a pipe in his pocket. RP 89, 93.

On cross-examination, Detective Hernandez testified that he encountered Hamrick just outside a door to O'Brien's residence and that "[h]e was just standing there." RP 90. Although Hernandez "believed" that Hamrick had been inside the residence at some point (he was uncertain about this), he was certain that Hamrick was not inside when contacted. RP 90, 92-93. Officers did not have a warrant for Hamrick, had no reason to believe he had

committed a crime, and had no basis to believe he was armed with a weapon at the time. RP 91-92. But because officers had information that *O'Brien* had weapons inside his home, they chose to detain and pat down everyone, which Hernandez described as a common practice. RP 92.

Hamrick also testified at the CrR 3.5 hearing. RP 95. He confirmed that he was outside O'Brien's residence, indicating he was sitting on a concrete dike near the residence when Detective Hernandez detained him. He denied ever entering the residence before police arrived. RP 96. Hamrick described how Hernandez handcuffed him, patted him down and, without reading him his rights, asked whether he had any weapons or drugs. RP 96. In response, Hamrick told him about the pipe and the methamphetamine. RP 96. Hamrick had no outstanding warrants, was not carrying a weapon, and had not committed any crime. RP 97.

Following witness testimony, the prosecutor argued that Hamrick was not yet in custody when asked whether he had any drugs or weapons and that the question asked was not interrogation. RP 98-99. Defense counsel responded with a broader argument – that officers had no legal justification for

detaining Hamrick and *everything* that flowed from that illegal detention, including his admission about having drugs and the methamphetamine and pipe found in his pocket, had to be suppressed. RP 99-100.

In response to defense counsel's argument, Judge Evans asked defense counsel whether there was legal authority justifying a detention such as the one here. RP 100. Defense counsel responded:

> The results of the law that I've looked at indicate that there should be the least intrusive method. They could let him go. He's not doing anything. He was just there. He can be just there. He doesn't have to – he has to be doing something that they at least have some articulable suspicion that he's involved in some criminal activity. Sitting on the dike is not that. And being in an area where a search warrant is being served for a particular individual and that particular individual's house that he is not in, the officer can't remember if he saw him in the house or not. My client says he never was in the house. There has to be something justifying him being locked up and then held to the point where he would say something like, yes, I've got drugs in my pocket when he was asked.

100-101.

The prosecutor responded:

> Just briefly, your Honor. I would say that this isn't – the defendant wasn't detained pursuant to a Terry[1] stop. So there doesn't need to be any

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

> articulable suspicion to detain or pat him down. He was detained because he was directly outside of the door of the structure where law enforcement was serving the search warrant, and in order to control the scene and ensure everyone's safety everybody was detained and patted down.
>
> There's clear case law that I don't have at my fingertips because I didn't expect to be arguing a suppression motion during the 3.5 hearing, that says that officers have the ability to control the scene of a search warrant.
>
> Detective Hernandez testified that contrary to what the defendant said, he was in fact right outside the door of the structure, he was there with other individuals, and he would have been let go had he been detained, patted down, everything was secured and safe. He would have been free to leave.
>
> This is not a situation where he was in custody that breached the level of a formal arrest, and he was not asked any questions, so the statements come in, and the arguments about the legality of the stop are not properly before the court at this time.

102-103.

Judge Evans found that Hamrick was outside a side door to O'Brien's home when contacted by Detective Hernandez. RP 104-105. A multitude of officers were present for execution of the search warrant and, as Hernandez placed Hamrick in handcuffs, other officers detained everyone else on the scene. RP 104-105.

On the CrR 3.5 motion, Judge Evans found that because Hamrick was in cuffs, asked a question reasonably likely to elicit an incriminating response, and not yet read his Miranda[2] rights, his admission about the pipe and drugs had to be suppressed. RP 105-109.

On the CrR 3.6 motion, Judge Evans ruled:

> And as far as the – if there was a 3.6 motion contained within this, I've not been presented with facts nor authority that says that officers cannot go to a home to serve a search warrant and detain individuals, either within or in close proximity to the home in making sure it's safe to execute the warrant. There's no showing here that there was an undue delay of keeping Mr. Hamrick. Actually, the argument was that Detective Hernandez had indicated that, you know, if he didn't have weapons or drugs he's on his way or if he doesn't have weapons he's on his way. So as far as a 3.6 motion to suppress, I'll deny that based on being not shown any authority that says otherwise that officers do not – that officers don't have the authority to search a home and make sure it's safe before doing so which includes checking the residence therein for weapons, so.

RP 108-109.

At trial, Detective Hernandez testified that, while serving the search warrant at O'Brien's home, he detained Hamrick, searched his pockets, and found a pipe with residue and two separate

[2] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

baggies containing suspected methamphetamine. RP 122-125. A forensic scientist from the Washington State Patrol Crime Lab testified that she tested the substance found in one of the baggies and it contained methamphetamine. RP 138-143. Hamrick testified he was outside O'Brien's house, talking with friends, when police arrived and held them at gunpoint. RP 153-154. He was thrown to the ground, handcuffed, and searched before being arrested. RP 154-156.

Jurors found Hamrick guilty, Judge Evans imposed a 17-month standard range sentence, and Hamrick timely filed his Notice of Appeal. RP 171; CP 29, 37, 45-59.

C. ARGUMENT

THE TRIAL COURT WAS REQUIRED TO SUPPRESS ALL EVIDENCE STEMMING FROM AN UNLAWFUL SEIZURE.

Under the Fourth Amendment to the United States Constitution and article 1, § 7 of the Washington Constitution,[3] a warrantless search and seizure is per se unreasonable unless the State demonstrates that it falls within one of the jealously and carefully drawn exceptions to the warrant requirement. State v.

[3] The Fourth Amendment provides, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." Article 1, § 7 provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

Hendrickson, 129 Wn.2d 61, 70, 917 P.2d 563 (1996) (quoting Arkansas v. Sanders, 442 U.S. 753, 759, 99 S. Ct. 2586, 61 L. Ed. 2d 235 (1979)). The State bears the burden of showing that a search or seizure falls within one of these narrow exceptions. State v. Williams, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984).

One of the narrowest of exceptions to the warrant requirement – relied upon by the State in Hamrick's case – is that "without probable cause or reasonable suspicion of criminal activity, it is reasonable for an officer executing a search warrant at a residence to briefly detain *occupants* of the residence, to ensure officer safety and an orderly completion of the search." State v. Smith, 145 Wn. App. 268, 275, 187 P.3d 768 (2008) (quoting State v. King, 89 Wn. App. 612, 618-619, 949 P.2d 856 (1998) (emphasis added) citing Michigan v. Summers, 452 U.S. 692, 702-703, 705, 101 S. Ct. 2587, 69 L. Ed. 2d 340 (1981)). Notably, "this exception is limited in its application to occupants of the residence being searched . . . [and does not] justify the detention of persons outside of a residence in which the search is to be conducted." Smith, 145 Wn. App. at 275.

Indeed, it has long been the rule that, "while an occupant may be detained during the execution of a residential search

warrant, this limited exception to the probable cause requirement does not extend to those merely present on the premises." State v. Broadnax, 98 Wn.2d 289, 304, 654 P.2d 96 (1982), overruled on other grounds by Minnesota v. Dickerson, 508 U.S. 366, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993). Instead, "there must be 'presence plus' to justify the detention or search of an individual, other than an occupant, at the scene of a valid execution of a search warrant." Smith, 145 Wn. App. at 276 (quoting Broadnax, 98 Wn.2d at 301). "The 'plus' consists of independent factors, other than arrival at the scene, tying the person to the illegal activities being investigated or raising a reasonable suspicion that the person is armed and dangerous." Id. (citing Broadnax, 98 Wn.2d at 296, 300-301); see also Ybarra v. Illinois, 444 U.S. 85, 92-94, 100 S. Ct. 338, 62 L. Ed. 2d 238 (1979) (those present during search may not be individually frisked unless police have reasonable suspicion to believe the person is armed).

In Smith, the defendant arrived at a home about to be searched pursuant to a warrant, police seized her at gunpoint, and that seizure produced a methamphetamine pipe and her confession that she had been smoking the substance. Smith, 145 Wn. App. at 271-272. At a hearing on a defense motion to suppress this

evidence, a detective conceded that police were unaware of why Smith was on the premises and had no information that she was then armed and dangerous. Id. at 276-278. This Court found the "presence plus" test unmet, ruled the warrantless seizure unlawful, suppressed the resulting evidence, and reversed Smith's conviction for possessing methamphetamine. Id. at 276-278.

Broadnax and Smith control the outcome in Hamrick's case.

Judge Evans never entered written findings of fact and conclusions of law on his CrR 3.6 ruling. "Failure to enter findings and conclusions is error, but it is harmless if the trial court's oral findings are sufficient to permit appellate review." Smith, 145 Wn. App. at 274 (citing State v. Johnson, 75 Wn. App. 692, 698 n.3, 879 P.2d 984 (1994)). Oral findings are more likely to suffice where the parties do not dispute the essential facts and the issues on review are legal. Id. Judge Evans' oral ruling is sufficient to review the issues here.

The pertinent facts are not in dispute. On March 13, 2019, Longview police had a warrant authorizing a search of O'Brien's residence for narcotics and related contraband. RP 88, 90. When confronted by Detective Hernandez, Hamrick was *outside* O'Brien's home and "[h]e was just standing there." RP 90. Detective

Hernandez did not have a warrant for Hamrick, had no reason to believe Hamrick had committed a crime, and he had no basis to believe Hamrick was armed with a weapon at the time. RP 91-92. Detective Hernandez conceded that Hamrick was detained for the same reason everyone on the property was detained (whether inside or outside the home): it is the department's practice to detain everyone on the premises for "safety reasons." RP 88-89, 90-92.

As in Smith, the "presence plus" test was unmet, and all evidence obtained following Hamrick's unlawful detention should have been suppressed. See also State v. Anaya-Degante, 185 Wn. App. 1043, 2015 WL 459327 (2015) (drug evidence properly suppressed following warrantless detention and search of defendants based on officers' intent to search any Hispanic male arriving at the apartment during execution of warrant inside residence).[4]

Based on Broadnax and Smith, Judge Evans quite clearly erred when he relied on officers' authority to control the scene inside the O'Brien residence to permit the detention and search of Hamrick outside the residence.

[4] Under GR 14.1(a), Hamrick cites this unpublished decision for whatever persuasive authority this Court deems appropriate.

One last issue merits discussion. There is no question Hamrick's appointed counsel let him down in the trial court. Unlike the private attorney Hamrick hoped would represent him – who recognized there was a dispositive suppression motion to be filed in his case – appointed counsel failed to file a written CrR 3.6 motion, waiting instead until the CrR 3.5 evidentiary hearing to make a motion to suppress.[5]

While defense counsel eventually and correctly argued there was no lawful authority permitting Hamrick to be detained and searched outside the residence, he failed to cite Broadnax or Smith, undoubtedly contributing to denial of his motion to suppress. See RP 108 ("I've not been presented with facts nor authority that says that officers cannot go to a home to serve a search warrant and detain individuals, either within or in close proximity to the home . . . . So as far as a 3.6 motion to suppress, I'll deny that based on not being shown any authority that says otherwise . . . .").

Both the federal and state constitutions guarantee the right to effective representation. U.S. Const. Amend. VI; Wash. Const.

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[5] Judge Evans properly exercised his discretion to consider and decide the CrR 3.6 motion despite counsel's failure to file a timely written motion under CrR 3.6(a). See State v. Radka, 120 Wn. App. 43, 47-48, 83 P.3d 1038 (2004) (affirming decision to address defense motion to suppress made for the first time during CrR 3.5 hearing).

art. 1, § 22. A defendant is denied this right when his or her attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)), cert. denied, 510 U.S. 944, 114 S. Ct. 382, 126 L. Ed. 2d 331 (1993).

To the extent defense counsel contributed or waived the constitutional challenge to Hamrick's detention and search by failing to timely file a written motion and/or failing to bring binding precedent to Judge Evans' attention, this denied Hamrick his constitutional right to effective representation.

Solely by examining Detective Hernandez's probable cause statement, defense counsel would have been alerted that those detained at the scene included "several subjects inside and outside the residence." CP 1. After speaking with Hamrick and confirming that he fell in the latter group, the necessity of a CrR 3.6 motion should have been obvious. Yet, no written motion was filed.

Moreover, competent counsel must conduct research and stay abreast of current law. State v. Estes, 188 Wn.2d 450, 460,

395 P.3d 1045 (2017) (holding that effective assistance includes responsibility to research and understand applicable law); accord State v. Jury, 19 Wn. App. 256, 263, 576 P.2d 1302, review denied, 90 Wn.2d 1006 (1978). "A trial court cannot make an informed decision if it does not know the parameters of its decision-making authority" due to defense counsel's failure to cite pertinent case law. State v. McGill, 112 Wn. App. 95, 102, 47 P.3d 173 (2002).

No reasonable attorney would have failed to file a written CrR 3.6 motion or, when eventually bringing that motion, failed to cite binding precedent requiring suppression of the State's evidence. Assuming counsel's deficiencies in any way prevent Hamrick's success on this issue, he has suffered prejudice and reversal is still necessary based on a violation of his Sixth Amendment rights.

D. CONCLUSION

Hamrick was unlawfully seized and searched. All evidence subsequently obtained must be suppressed and his conviction reversed.

DATED this 17th day of July, 2020.

Respectfully submitted,

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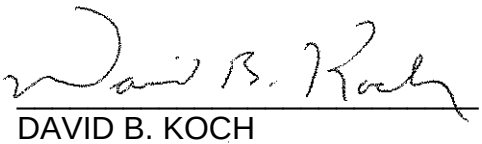

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July 17, 2020 - 3:47 PM

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Superior Court Case Number:	19-1-00313-5

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