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NO. 54222-6-II

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

STATE OF WASHINGTON,

Respondent,

vs.

BRADLEY HAMRICK,

Appellant.

RESPONDENT'S BRIEF

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I. RESPONSE TO ASSIGNMENTS OF ERROR

1. The trial court properly declined to suppress evidence found on Hamrick's person because he was within the immediate vicinity of the house where law enforcement was serving a search warrant.
2. The trial court correctly held that Hamrick's detention was lawful.
3. Defense counsel was not ineffective and Hamrick fails to show prejudice because a suppression motion would not have been granted in this case.

II. STATEMENT OF THE CASE

On March 13, 2019, detectives with the Longview Police Department Street Crimes Unit served a search warrant at 206 24th Avenue in Longview, Washington. RP 122–23. Jeremiah O'Brien was the named target of the search warrant, but there were numerous other people at the residence when law enforcement arrived. RP 123. One of those people was Bradley Hamrick, who was standing just outside the side door of the residence. RP 90, 123–24.

Law enforcement detained Hamrick and all other individuals at the scene when they arrived. RP 88, 90–91. As Detective Hernandez was placing Hamrick in handcuffs, Hamrick stated that "he had a meth pipe on him and a quarter-ounce of meth in his pocket." RP 89, 93. This comment was not in response to any questioning by Detective Hernandez. RP 89. Detective Hernandez then searched Hamrick and located a glass

pipe and two separate baggies containing methamphetamine in his pockets.

The State charged Hamrick with one count of possession of a controlled substance – methamphetamine – in violation of the Uniform Controlled Substances Act. CP 3–4. On the morning of trial, the court held a CrR 3.5 hearing to determine the admissibility of Hamrick’s statement to Detective Hernandez. RP 87. On direct examination, Detective Hernandez testified consistently with the above paragraph. Hamrick’s attorney then questioned Detective Hernandez about where Hamrick was when he was contacted, whether law enforcement had a warrant for his arrest or to search him, and whether law enforcement had reason to believe he may have been armed. RP 90–91.

Hamrick also testified at this hearing, stating that he was sitting on a concrete dike unconnected with the residence when police arrived. RP 96. He also testified that Detective Hernandez asked him if he had any weapons or drugs on him when he was being patted down. RP 96.

The State argued that there was neither custody nor interrogation present when Hamrick made his statement, so it was admissible under CrR 3.5. RP 98. Hamrick’s attorney’s argument focused largely on the justification for Hamrick’s detention as opposed to the admissibility of his statement. RP 99–101. He argued that Hamrick’s detention was a *Terry*

detention and therefore needed a reasonable and articulable suspicion of criminal activity, which was not present. RP 101. Ultimately, he requested that “anything elicited” from Hamrick be suppressed. RP 100. A written suppression motion was never filed.

The trial court suppressed Hamrick’s statement, finding that Hamrick was at the side door of the residence when he was contacted, his freedom was curtailed to the degree of a formal arrest, and that Detective Hernandez asked Hamrick if he had any weapons or drugs on him. RP 105, 107–108.

The court denied the motion to suppress any evidence found on Hamrick pursuant to an unlawful detention, stating that it had not been presented with any authority to indicate officers cannot detain individuals within or in close proximity to a residence to secure the scene of a search warrant. RP 108. The court additionally found that Hamrick was only briefly detained and would have been let go if he did not have any weapons or drugs on his person. RP 108.

Hamrick was found guilty of possession of a controlled substance and now timely appeals. RP 171; CP 29, 45.

III. ARGUMENT

A. **The suppression motion brought in this case was properly denied as the motion was untimely and the evidence was lawfully obtained.**

1. *The trial court did not err in denying Hamrick's suppression motion because the motion was untimely.*

A trial court's determinations regarding admissibility of evidence are reviewed under an abuse of discretion standard. *State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967 (1999). "A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable reasons or grounds." *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003), *citing State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). A trial court's conclusions of law are reviewed de novo. *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996).

Motions to suppress evidence in criminal cases are governed by CrR 3.6, which states:

Motions to suppress physical, oral, or identification evidence, other than motion pursuant to rule 3.5, shall be in writing supported by an affidavit or document setting forth the facts the moving party anticipates will be elicited at a hearing, and a memorandum of authorities in support of the motion. Opposing counsel may be ordered to serve and file a memorandum of authorities in opposition to the motion. The court shall determine whether an evidentiary hearing is required based upon the moving papers. If the court determines that no evidentiary hearing is required, the court shall enter a written order setting forth its reasons.

CrR 3.6. The computation of time for filing motions under CrR 3.6 is governed by CR 6. CrR 8.1. “A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court.” CR 6(d).

Cowlitz County Superior Court has also adopted a local court rule governing hearings under CrR 3.6. At the time of this trial, LCR 3.9 stated that no hearings pursuant to CrR 3.6 may be noted for hearing until the moving party files the motion, affidavit, and memorandum of authorities with the court and provides notice to the opposing party. The rule additionally required these documents to be filed at least 10 days prior to any set readiness hearing. LCR 3.9.

These court rules serve to enforce the mandate that motions to suppress must be timely made. *State v. Baxter*, 68 Wash.2d 416, 423, 413 P.2d 638 (1966) (exclusion of improperly obtained evidence is a privilege and can be waived if defendant does not seasonably object); *State v. Lemons*, 53 Wash.2d 138, 141, 331 P.2d 862 (1958) (to be preserved, constitutional rights of individual must be timely asserted); *State v. Robbins*, 37 Wash.2d 431, 432, 224 P.2d 345 (1950) (defendant desiring to suppress evidence must move for suppression within a reasonable time before case is called for trial); *State v. Gant*, 6 Wash. App. 263, 266, 492

P.2d 571 (1971) (alleged error not properly preserved when defendant interposed no pretrial motion to suppress).

In Hamrick's case, a written motion to suppress evidence was never filed by defense counsel. Instead, defense counsel orally raised a CrR 3.6 suppression issue in the middle of his argument regarding the admissibility of Hamrick's statement. The State was unable to adequately respond to the motion as the prosecutor was unaware that Hamrick's detention was going to be challenged until the morning of trial. This is evidenced by the prosecutor's statement that, "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." RP 103. If the suppression issue had been timely raised, the State could have obtained the relevant case law and asked the relevant questions at a hearing on the suppression motion. As it was, the State's questioning of Detective Hernandez were focused only on the admissibility of Hamrick's statements under CrR 3.5 and *Miranda v. Arizona*. Given the delayed motion to suppress, the trial court could have declined to consider the motion altogether. Denying the motion (albeit on other grounds) was therefore not improper.

2. *The trial court did not err in denying Hamrick's suppression motion because the evidence was lawfully obtained.*

Warrantless searches are unreasonable per se under article I, section 7 of the Washington Constitution unless the search falls into one of the “carefully drawn and jealously guarded exceptions.” *State v. Byrd*, 178 Wn.2d 611, 616, 310 P.3d 793 (2013). The State bears the burden of showing that a warrantless seizure falls under one of these exceptions. *State v. Smith*, 145 Wn. App. 268, 275, 187 P.3d 768 (2008). One such exception is that “it is reasonable for an officer executing a search warrant at a residence to briefly detain occupants of that residence, to ensure officer safety and an orderly completion of the search.” *Id.*, quoting *State v. King*, 89 Wn. App. 612, 618–19, 949 P.2d 856 (1998). Such a detention does not require probable cause or even a reasonable suspicion of criminal activity. *Id.* Additionally, where reasonable under the circumstances, handcuffs may be used to accomplish this brief detention. *Muehler v. Mena*, 544 U.S. 93, 99, 125 S. Ct. 1465 (2005).

The issue in this case seems to rest on the definition of “occupant.” Hamrick argues that, because he was immediately outside the side door of the residence when law enforcement arrived, he was not an occupant and his detention was unlawful. However, the United States Supreme Court has made a distinction between individuals within the “immediate

vicinity” of a residence and those without. *Bailey v. United States*, 568 U.S. 186, 133 S. Ct. 1031 (2013). “Immediate vicinity” can be defined as “within or immediately outside a residence at the moment the police officers are executing the search warrant.” *Id.* at 193. Therefore, those within the immediate vicinity are considered occupants, as they can reasonably be understood to be *occupying* the residence. It is important to note that “occupant” does not necessarily mean the owner of the residence.

Some factors a court may consider when determining if a person was within the immediate vicinity of a residence include: the lawful limits of the premises, whether the person was within the line of sight of the residence, and the ease of entry from the person’s location. *Id.*

Here, Hamrick was in the immediate vicinity of the residence where law enforcement was serving the search warrant. Detective Hernandez testified that Hamrick was immediately outside the side door of the house. This fact is uncontested on appeal. Hamrick was within sight of the residence and could easily have taken the couple steps to the doorway to enter the home. Therefore, he could lawfully be detained in handcuffs for a brief period of time to secure the scene of the search warrant. Because Hamrick was lawfully seized, the trial court did not err in denying the motion to suppress.

This case is distinguishable from *Broadnax* and *Smith*. In *Broadnax*, the defendant was merely present inside a residence where a search warrant was being served. *State v. Broadnax*, 98 Wn.2d 289, 304, 654 P.2d 96 (1982). He was lawfully detained by placing his hands on his head and officers had no reason to believe he was armed and dangerous. *Id.* at 292–93. Nevertheless, officers searched the defendant by reaching into his pocket where they located a baggie of heroin. *Id.* at 293. The Washington Supreme Court held that searches for individuals not named in a search warrant must be based on a reasonable suspicion that the person is armed and dangerous. *Id.* at 296.

In this case, however, Hamrick was detained in handcuffs. As he was being cuffed, he volunteered to law enforcement that he had drugs on his person. He was not searched until after this admission. RP 89. Any search done was based on the reasonable suspicion that Hamrick had drugs on his person, given his admission.

In *Smith*, law enforcement was just about to search a home pursuant to a search warrant when an SUV pulled into the driveway. *State v. Smith*, 145 Wn. App. 268, 271, 187 P.3d 768 (2008). Two men got out of the vehicle and went to the door while the defendant and another woman stayed in the car. *Id.* Police surrounded the vehicle and ordered the women out at gunpoint. *Id.* At some point, officers entered the

vehicle to retrieve the women's purses and methamphetamine was discovered inside. *Id.* at 272. The Court of Appeals reversed the defendant's conviction, finding that she was not in the immediate vicinity of the residence, was not an occupant, and was not considered a danger to law enforcement. *Id.* at 276–77. Therefore, she was unlawfully seized.

Here, on the other hand, Hamrick was an occupant of the residence as he was in the immediate vicinity and had some connection to it. He was detained, as is allowed, under *Smith, Broadnax, King, Muehler, and Bailey*. He was not searched until after officers had reasonable suspicion, based on his own admission, that he was in possession of controlled substances. RP 89. Therefore, his conviction should be affirmed.

B. Hamrick fails to show that trial counsel was deficient or that he suffered prejudice as a result; therefore, his ineffective assistance of counsel claim fails.

To establish ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficiency prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984); *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). There is a strong presumption of effectiveness that a defendant must overcome. *Strickland*, 466 U.S. at 689. Deficient performance exists only if counsel's actions were "outside the wide range of professionally competent assistance." *Id.* at 690. The court must

evaluate whether, given all the facts and circumstances, the assistance given was reasonable. *Id.* at 688.

If counsel's performance is found to be deficient, the defendant still must show prejudice. This requires the defendant to show "a reasonable probability that, but for the counsel's errors, the result of the proceeding would have been different." *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). In order to prove deficient performance or prejudice in the context of the failure to bring a motion, a defendant must show that the motion would have been granted. *State v. Gerds*, 136 Wn. App. 720, 727, 150 P.3d 627 (2007).

1. *Trial counsel was not ineffective.*

In order to prove that trial counsel was ineffective, Hamrick must show that a motion to suppress would have been granted. As argued above, the motion was properly denied. At the time of the search warrant, Hamrick was immediately outside the side door of the residence and was therefore considered an occupant. Occupants of a residence may be briefly detained to ensure officer safety and orderly completion of the search warrant. Because the untimely motion to suppress was properly denied, Hamrick fails to show that counsel was ineffective.

2. *Hamrick fails to show prejudice.*

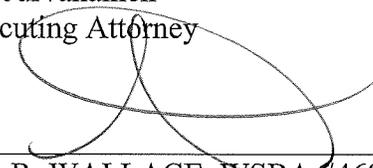
Similarly, in order to prove prejudice, Hamrick must show that a motion to suppress would have been granted, thereby changing the outcome of the case. Because the untimely motion to suppress was properly denied, Hamrick fails to show that he was prejudiced by any action by trial counsel.

IV. CONCLUSION

Because the suppression motion was untimely and Hamrick fails to prove ineffective assistance of counsel, his conviction for possession of a controlled substance should be affirmed.

Respectfully submitted this 15th day of September, 2020.

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By: 

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CERTIFICATE OF SERVICE

I, Julie Dalton, do hereby certify that RESPONDENT'S BRIEF was filed electronically via the Washington State Appellate Courts' Portal and which will automatically cause such filing to be served on the opposing counsel listed below:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on September 16, 2020.



Julie Dalton

COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

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