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OCT 11 2010
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
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NO. 283097

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MARLOWE CLAUDE OLNEY

Appellant.

BRIEF OF RESPONDENT

David B. Trefry WSBA #16050
Special Deputy Prosecuting Attorney
Attorney for Respondent

JAMES P. HAGARTY
Yakima County Prosecuting Attorney
128 N. 2d St. Rm. 329
Yakima, WA 98901-2621

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

1. Does the record support the findings of fact and conclusions of law?
2. Did Officer Walls have a specific articulable suspicion based on the facts before him to justify a warrantless detention of the Olney?

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. The record reviewed by the trial court supports the findings of fact and conclusions of law.
2. Officer Walls did have specific articulable facts to support his actions.

II. STATEMENT OF THE CASE

The substantive and procedural facts have been adequately set forth in appellants brief therefore, pursuant to RAP 10.3(b); the State shall not set forth an additional facts section. The State shall refer to specific areas of the record.

III. ARGUMENT.

The issues presented pertain to the findings of fact and conclusions of law which were presented to and adopted by the

court. The court found there were sufficient articulable facts to support the actions of the deputy. The court found that the facts set forth by both parties by way of their submissions to the court were sufficient to allow the court to deny the motion to suppress.

The trial court indicates in the letter opinion “I have closely reviewed the submissions of both parties in an effort to determine whether testimony from Officer Wells will be needed to assist the court in deciding the issue presented by the defendant’s motion. Because there does not appear to be a material difference between the narratives offered by the defendant and the plaintiff, the officer’s testimony will not add to the debate and the court will consider the issues without further testimony.

The actions of the trial court were clearly discretionary in nature. The court followed the court rule, CrR 3.6, requested and received briefing from all parties and upon that information as well as testimony from one officer made a discretionary decision with regard the suppression of the search in this case. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971) is applicable “Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment

exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously.Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” (Citations omitted.)

1. The trial consideration and review of the entirety of the record clearly support the findings and conclusions which were entered.

On appeal Olney states at pages 7-8 of his brief “[t]he italicized portions of these findings are not supported by the defense counsel’s affidavit nor by Officer Kingman’s testimony, which was the only evidence considered by the trial court in deciding this motion.” (CP 6; 50-53; 05/05/09 RP 9-12).

This is and incorrect statement. On more than one occasion the court specifically states it used all of the pleadings that were filed not just the affidavit if the defense attorney to come to the decision to deny the motion to suppress:

THE COURT: Well, first off, it seems to me that both the plaintiff and the defendant in this case are spinning things a bit. I note Mr. Knittle’s memorandum was kind of a dragnet (inaudible) in its tone, I guess, but I think perhaps Mr. Hagarty does have a point as to whether or not there are critical issues here that are critical factual issues that aren’t

already going to be repeated in an oral form at the time of the hearing. It seems to me that we should proceed in this matter in kind of a hybrid fashion. The critical issue for -- at least from my standpoint, is what did Officer Kingman see and what were the circumstances of that and as I understand Officer Kingman is present, so perhaps we can take care of that by having Officer Kingman testify on that particular issue and I will review the balance of the submissions and make a determination as to whether further -- a further evidentiary hearing is warranted...(RP 05/05/09 7-8)

I have closely reviewed the submissions of both parties in an effort to determine whether testimony from Officer Walls will be needed... Because there does not appear to be a material difference between the narratives offered by the defendant and the plaintiff, the officer's testimony will not add to the debate and the court will consider the issues without further testimony. (CP 37)

THE COURT: Well, as I recall the circumstances, we -- Officer Walls wasn't here, Officer Kingman was. I took Officer Kingman's testimony and -- which I considered and then I took the matter under advisement indicating I believe at that time that I would consider whether we could conclude the matter without the necessity of Officer Walls testifying or not at that point. And then reviewing -- further reviewing the paperwork, the prepared pleading presented by the parties, it was my judgment that there wasn't any dispute about what Officer Walls would testify about. There simply wasn't -- it was not a matter in dispute as to what he saw or what he said he saw or -- it wasn't necessary for the court to hear his testimony because the facts were straight forward and the law was clear. So, on that basis, I made my decision after having taken the matter under advisement, made my decision and as I stated, I have closely

reviewed the submissions of both parties enough to determine whether testimony from Officer Walls was needed to assist the court in deciding the issue presented by the defendant's motion because there does not appear to be a material difference between the narratives offered by the defendant and the plaintiff. The officer's testimony would not add to the debate and the court will consider the issues without further testimony. That was my decision. That was my judgment. I believe under Rule 3.6, I can do that and I did, so I believe the matter was properly considered by the court.

I will sign the proposed judgment -- or excuse me, the proposed findings of fact and conclusions of law presented by Mr. Knittle. **I've reviewed them and they do appear to accurately reflect the court's findings and judgment.** (7/1/09 RP 4-5)
(Emphasis mine.)

It is clear that the court considered the facts as set forth by the State based on the content of the letter opinion. While not saying red clothes or Norteno gang member the court stated the following in the second paragraph:

“Given the circumstances presented to Officer Walls, his detention of the vehicle and its occupants was reasonable. A belief that criminal activity was afoot was justified by the time and location of the contact, the actions of other persons in fleeing contact with the police, the furtive movement of the backseat passenger and the clothing of the suspects, which clearly identified them as members of a criminal enterprise. (CP 37)

Appellant challenged the findings at trial not on the basis that they did not accurately reflect the information supplied to the

court but because defense counsel did not believe the hearing had been concluded in a satisfactory manner. Defense counsel states; “It’s my position that the hearing was never essentially concluded and it had not been finished appropriately and for these reasons I would take exception to the entry of the findings and conclusions in this matter, and if it’s not already a part of the record, I would ask that the court place the record -- the letter that the court wrote May 6th and make an exhibit of that and put it in the file.” (RP 07/01/09, 3-4)

The findings of fact and conclusions of law were not disputed there was an exception lodged as to them in total. There was an objection as to form and entry. There was never any claim by the defendant that the findings were not accurate, the dispute was the hearing was not properly concluded.

As indicated in State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999), overruled on other grounds by Brendlin v. California, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007) “We review findings of fact on a motion to suppress under the substantial evidence standard. State v. Hill, 123 Wash.2d 641, 647, 870 P.2d 313 (1994). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of

the finding. *Id.* at 644, 870 P.2d 313. We review conclusions of law in an order pertaining to suppression of evidence de novo. State v. Johnson, 128 Wash.2d 431, 443, 909 P.2d 293 (1996).”

This court has before it all of the information which was considered by the trial court. As set forth in CrR 3.6 the court did not have to take additional information or testimony if that which had been supplied was sufficient for a proper determination and if there was no material dispute.

The parties in this matter submitted briefing, the facts which were later used for the findings of fact and conclusions of law were drawn from those documents as well as the testimony of the one officer. The letter opinion from the court states “I have closely reviewed the submissions of both parties in an effort to determine whether testimony from Officer Walls will be needed to assist the court in deciding the issue presented by the defendant’s motion. Because there does not appear to be a material difference between the narrative offered by the defendant and the plaintiff, the officer’s testimony will not be added to the debate and the court will consider the issues without further testimony.” (CP 37)

CrR 3.6 SUPPRESSION HEARINGS--DUTY OF COURT

(a) Pleadings. 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.

(b) Hearing. If an evidentiary hearing is conducted, at its conclusion the court shall enter written findings of fact and conclusions of law.

The findings of fact and conclusions of law were prepared and presented by the deputy prosecutor. He is also the trial attorney who authored the written response to the motion to suppress. It is clear from reading the findings of fact that these facts are an amalgam of the information in the defendant's motion to suppress, the state's respond to the motion and the live testimony of the one officer.

This court need look no farther than the response of the State, listed as CP 39-48 to find those "facts" which Olney claims were not before the court. It would appear that appellant would have the trial court and this court consider only those "facts" which were set forth in the "Motion to Suppress and Dismiss" listed as CP 49-53 within which this court will find the fact which appellant

agrees where before the court. CrR 3.6 does not mandate a hearing. The court sets forth the reason it did not require further testimony.

It is unclear to the State how the facts contained in the document authored by defense counsel are appropriate to include in the findings of fact and conclusions of law while the facts set forth in the State's response are not to be included. The trial court reviewed all of the documents and found that there was no material discrepancy and stated on the record after defense counsel excepted to the findings and conclusions, not on the basis of the content thereof, but because of a perceived procedural shortcoming. Counsel for Olney never addresses the actual verbiage of the findings and conclusions.

As stated by the trial court judge; **I've reviewed them and they do appear to accurately reflect the court's findings and judgment.** (7/1/09 RP 4-5)

Therefore the information was present in the record and the findings should stand as adopted by the court.

2. Officer Walls had an articulable set of facts which support the validity of his actions.

The entirety of this second allegation rests on the presumption by the appellant that this court will strike portions of three of the findings entered by the court.

As indicated above there were sufficient facts before the court upon which the court could and did sustain the initial contact and subsequent search. The court indicated in the letter opinion that the facts which it had considered and which still stand before this court for review, were sufficient to allow the officer to make contact with the vehicle and thus Olney;

“The first issue identified by the defendant is whether there was an illegal seizure of the defendant by Officer Walls which preceded and ultimately led to the discovery of the handgun by Officer Kingman. Given the circumstances presented to Officer Walls, his detention of the vehicle and its occupants was reasonable. A belief that criminal activity was afoot was justified by the time and location of the contact, the actions of other persons in fleeing contact with the police, the furtive movement of the backseat passenger and the clothing of the suspects, which clearly identified them as members of a criminal enterprise. Under these

circumstances, an investigatory detention and investigation was warranted under Terry v. Ohio, 382 U.S. 1, 88 S.Ct. 1886, 20 L.Ed.2d 889 (1968)” (CP 37)

Next the court entered Findings of Fact and Conclusions of Law that while “excepted” to appellant never objected to a single word. During the oral argument presented at the trial court Olney never disputed the facts set forth in the State’s response. The following is the only mention of disputed facts;

MR. RABER: Well, I think there are, Judge, for the reason that the basis for the officer to make the seizure of Mr. Olney and his companions there certainly raises questions and we’ve interviewed Officer Walls and I think that his testimony here and his motivation for getting out of the car, particularly after he ran the plates and discovered the car wasn’t stolen. He did that before he got out of the car, coming out of the car with his gun drawn and the motivation for that. Certainly, I think that that gives rise to a need to have the testimony of the officer to see what was going on to see whether he actually had a reasonable articulable suspicion here or whether this was just harassment of gang members who he knew to be gang members in an area frequented by gang members, and I think that that is our position that that was his motivation for doing this and for those reasons I believe that Officer Walls’ presence here is necessary. We would ask that the Court require that he be here so we can take the testimony from him.

...

MR. RABER: Our motion -- by the motion itself is setting him on notice that there are disputed facts, that this was not a stop that was above board. It's a motion suppress (sic) because the arrest was illegal. That's what the basis is here, that he had no articulable suspicion."

(RP 05/05/05, 4-6)

It is noteworthy that on appeal Olney states that there is nothing in the record regarding gang members and yet his trial counsel acknowledges that the people who were involved in this stop were gang members; "Certainly, I think that that gives rise to a need to have the testimony of the officer to see what was going on to see whether he actually had a reasonable articulable suspicion here or whether this was just harassment of gang members who he knew to be gang members in an area frequented by gang members..." (RP 05/05/09, 5)

This is not actually a dispute of the facts it is a dispute as to whether what was observed by the Officer on the night in question are such that they establish an articulable suspicion. Obviously the court felt that after; "reviewing -- further reviewing the paperwork, the prepared pleading presented by the parties, it was my judgment that there wasn't any dispute about what Officer Walls would testify about (07/01/09, 4).... Given the

circumstances presented to Officer Walls, his detention of the vehicle and its occupants was reasonable. A belief that criminal activity was afoot was justified by the time and location of the contact, the actions of other persons in fleeing contact with the police, the furtive movement of the backseat passenger and the clothing of the suspects, which clearly identified them as members of a criminal enterprise. Under these circumstances, an investigatory detention and investigation was warranted under Terry v. Ohio, 382 U.S. 1, 88 S.Ct. 1886, 20 L.Ed.2d 889 (1968)” (CP 37)

Olney narrows the question too far. He indicates at page 12 of his brief that “Officer Walls had not particularized suspicion that Olney had been or would be engaged in criminal activity.” This is not a situation where the officer needed a “particularized suspicion of criminal activity” with Olney alone. This was a situation where a group of individuals at night in an alley fled after the officer merely turned into an alley and turned on his spot light. A person, now known to be the appellant, made furtive movements in the back of a car from which these other person’s fled and the fleeing individuals were wearing clothing which clearly identified them as members of a criminal enterprise. The valid Terry stop

was on the car AND the occupants. It was from this valid stop and from a legitimate vantage point that Officer Kingman was able to see the gun which was located on the floorboards in the back seat of the car. (CP 37)

State v. Barnes, 85 Wn. App. 638, 658,932 P.2d 669 (1997):

Evidentiary rulings are within the sound discretion of the trial court and a reviewing court will not disturb these rulings absent a showing of abuse of discretion. State v. Stubsjoen, 48 Wn. App. 139, 147, 738 P.2d 306, review denied, 108 Wn.2d 1033 (1987). Abuse "occurs when the ruling of the trial court is manifestly unreasonable or discretion was exercised on untenable grounds." State v. Gatalski, 40 Wn. App. 601, 606, 699 P.2d 804, review denied, 104 Wn.2d 1019 (1985); State ex rel. Carroll v. Junker, 79 Wn.2d 12, 482 P.2d 775 (1971). The defendant bears the burden of proving abuse of discretion. State v. Hentz, 32 Wn. App. 186, 190, 647 P.2d 39 (1982), rev'd on other grounds, 99 Wn.2d 538, 663 P.2d 476 (1983)

V. CONCLUSION

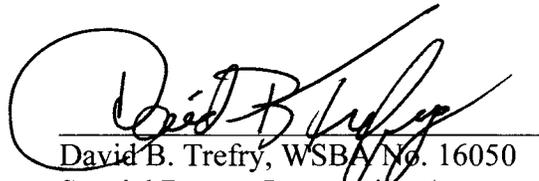
The assignments of error raised in this appeal were factual in nature, well within the trial courts discretion, or were clearly controlled by settled law.

The appellant has failed meet his burden. The claim that portions of Finding of Fact I, II and III were not before the court is incorrect. The court was fully apprised of all of the facts it needed to render a decision and it did just that.

There fact which were presented to the court and adopted by the court were fully supported and support the ruling of the court that the officers had a reasonable articulable suspicion of criminal activity which would allow them to approach the car when they see a car in an alley at night in a gang area and when a light is placed on the car numerous persons flee and were there was still indications of person or persons still in the area, where one occupant of the car is making furtive movements, not just between his feet to put down his beer but to the right were the gun is later found in plain sight.

The actions of the trial court should be upheld and this appeal should be dismissed.

Respectfully submitted this 16th day of October 2010.



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