

FILED

OCT 26 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 28611-8-III

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

RESPONDENT,

v.

RONALD LEE COLLINS

APPELLANT.

RESPONDENT'S BRIEF

**D. ANGUS LEE
PROSECUTING ATTORNEY
Carole L. Highland, WSBA #20504
Deputy Prosecuting Attorney
Attorney for Respondent**

**PO BOX 37
EPHRATA WA 98823
(509)754-2011**

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TABLE OF CONTENTS

ASSIGNMENT OF ERROR.....1

I. STATEMENT OF THE CASE.....2

A. NATURE OF THE ACTION.....2

B. FACTS.....3

II. ARGUMENT.....6

II. CONCLUSION.....11

TABLE OF AUTHORITIES

State Cases

	Page No.
<i>State v. Aase</i> , 121 Wn.App. 558, 564 89 P.3d 721 (2004).....	8
<i>State v. Armenta</i> , 134 Wn.2d 1, 12 948 P.2d 1280 (1997).....	9
<i>State v. Barnes</i> , 96 Wn.App. 217, 223 978 P.2d 1131 (1999).....	9
<i>State v. Dudas</i> , 52 Wn.App. 832, 834 764 P.2d 1012 (1988).....	9
<i>State v. Mennegar</i> , 114 Wn.2d 304, 310 787 P.2d 1347 (1990).....	9
<i>State v. O'Neill</i> , 148 Wn.2d 564, 62 P.3d 489 (2003).....	10
<i>State v. Thomas</i> , 91 Wn.App. 195, 201 955 P.2d 420 (1998).....	9

Other Jurisdictions

<i>United States v. Mendenhall</i> , 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980).....	9
---	---

Statutes

RCW 69.50.401(1).....	2
RCW 69.50.4013.....	2

ASSIGNMENT OF ERROR

1. The brief interaction between Deputy Ellard and Mr. Collins was no more than a social contact during which the appellant provided information to the deputy which established, in light of all other surrounding circumstances, probable cause for his arrest.....6

I. STATEMENT OF THE CASE

A. NATURE OF ACTION

Appellant Ronald Collins was charged by information on August 10, 2009 of Possession with Intent to Manufacture or Deliver Marijuana in violation of RCW 69.50.401(1). CP 1. An amended information was filed on October 13, 2009 adding a second count of Possession of a Controlled Substance Other Than Marijuana (Psilocyn and/or Psilocybin) in violation of RCW 69.50.4013. CP 33. The charges stemmed from an incident occurring at the Gorge campground in Grant County Washington during a Phish concert event on August 9, 2009. Trial was held on October 21, 2009 before the Honorable Evan E. Sperline, the appellant, Ronald Collins having been represented by defense counsel, Dean F. Terrillion, the State having been represented by Deputy Prosecuting Attorney Carole L. Highland. The jury having found the appellant guilty as charged in the amended information, sentencing occurred on October 26, 2009. CP 47-49, 54. Notice of appeal was timely filed on October 29, 2009. CP 55. Appellant's counsel for appeal is Andrea Burkhart. Respondent's counsel for appeal is Carole L. Highland.

B. FACTS

Deputy Jason Ellard, a reserve deputy with the Grant County Sheriff's Office (GCSO), testified that on August 9, 2009, he and another deputy were in the campground area at the Gorge at around 2 a.m. after the Phish concert. RP 7, 22¹. The deputies were walking in an area commonly referred to as "Vendor Row". RP 7, 21. Deputy Ellard described Vendor Row as being a "ten-foot wide pathway with vendors lined down every side selling various items". RP 7. The deputy estimated that there were over a hundred vendors present, with probably fifty on each side, "give or take". RP 7, 8. Vendors typically sell crystals, "glass art" i.e., marijuana pipes and bongos, as well as food, tie-dyed shirts, and other items one would associate with a street fair. RP 25. As Deputy Ellard was walking, he saw Mr. Collins sitting at a table with individually wrapped brownies, a couple of totes of brownies and a tote of muffins. RP 8. After he had passed Mr. Collins, Deputy Ellard turned from approximately ten feet away to observe the appellant's reaction. RP 8. Deputy Ellard was dressed in a Sheriff's department uniform with complete markings and patches, and was wearing a badge, as well as a gun belt. RP 9. According to the deputy, when he

¹ "RP" refers to Report of Proceedings dated September 16, 2009. "TP" refers to Trial Proceedings October 21 & 22, 2009.

turned and made eye contact with Mr. Collins, the appellant got that “deer-in-the-headlight look” and started packing up, placing one of the totes of brownies into a backpack located at his feet. RP 8, 9, 15, TP 87, 88.

Deputy Ellard then approached Mr. Collins, and in a light and friendly tone of voice, asked him “what’s going on? How come you’re packing up?” RP 10, TP 65. Appellant told the deputy that he was tired, that he’d had enough, and that he was going to pack up and go to bed. RP 10, TP 66.

The deputy then responded “well, really? You know what? There’s tons of people out here. I don’t – I don’t see why you’d pack up and go.” RP 10.

The deputy testified that Vendor’s Row was “packed with people elbow to elbow”. RP 10. In his estimation there were “hundreds and hundreds and hundreds, thousands really, of people still up and about”. RP 10. In response to questioning by the Court during the suppression hearing, the deputy stated that the area was “congested with people”. RP 24 . Deputy Ellard continued in his conversation with the appellant, by saying that the reason that he thought Mr. Collins was leaving, was because there was “marijuana or hash in the brownies” and that it was the presence of the police that had led to the appellant’s decision to leave. RP 10, TP 66.

Deputy Ellard testified that he had said to Mr. Collins “I think you’re

packing up because there's marijuana or hash in these brownies and you saw us and you want to" –"you're leaving. What do you think about that?" Mr. Collins responded to this statement by saying "Yeah. You know, actually, it's" – "it's marijuana in the brownies." RP 10, TP 66. It was at this point that Mr. Collins was placed under arrest. RP 17, TP 67.

According to Deputy Ellard, this verbal exchange lasted "maybe a minute". RP 11. The deputy was standing a foot-and-a-half away from the three foot table which separated him and Mr. Collins. RP 11. A second deputy, Deputy Poldevart estimated that Deputy Ellard was seven to eight feet from Mr. Collins. TP 44. Deputy Ellard never asked Mr. Collins for identification, never demanded that he answer the deputy's questions, never touched Mr. Collins or Mr. Collins' property, never made any show of force and never threatened the appellant. RP 11, 12.

Deputy Ellard testified that in addition to himself and Deputy Poldevart, there were approximately an additional four other deputies engaged with a subject five to ten feet away from Mr. Collins. RP 14. The deputy later testified that it may have been fifteen to twenty feet away. RP 19. Other than himself and Deputy Poldevart, there were no other officers present during the brief conversation with Mr. Collins. RP 20. Deputy

Poldevart stood away from Deputy Ellard and Mr. Collins in case Mr. Collins decided to run. TP 38, 39. Deputy Poldevart was not close enough to the two men to hear the conversation between them and estimated that he was standing approximately fifteen feet from the appellant. TP 39, 50, 44, 45. It was not until Mr. Collins was placed into handcuffs that other officers showed up to assist in escorting him out of the area safely. RP 20.

According to Deputy Ellard, the appellant had a clear path by which he could have walked away from the deputies. RP 16, 20. The deputy testified that he wouldn't have been able to do anything if the appellant had not responded to the deputy's enquiry about the possibility of marijuana in the brownies. RP 19. When asked what he would have done if Mr. Collins had just walked off, the deputy stated "Nothing. There's nothing we can do". RP 21.

II. ARGUMENT

1. The brief interaction between Deputy Ellard and Mr. Collins was no more than a social contact during which the appellant provided information to the deputy which established, in light of all other surrounding circumstances, probable cause for his arrest.

The Court found credible the testimony of Deputy Ellard that the exchange between himself and Mr. Collins had been brief and non-intrusive. Deputy Ellard testified that the conversation between the two of them had lasted “maybe a minute”. He further testified that the appellant wasn’t required to respond to the deputy’s statements and enquiries, and that Mr. Collins could have walked away at any time. There was no evidence to suggest that the appellant was seized.

During the course of the suppression hearing, Mr. Collins testified that he was told to remain seated. RP 31. He testified that Deputy Ellard would ask him questions, leave to speak with another officer, and then return to ask more questions and that this process occurred multiple times. RP 30. This was not borne out by the testimony of Deputy Ellard at the suppression hearing, or by either deputy at trial. Mr. Collins told the court that in the fifteen to sixteen hours before he’d had contact with Deputy Ellard, that he’d eaten maybe two of the brownies (which contained marijuana) and smoked a couple of bowls of marijuana. RP 35, 37. The appellant’s ingestion of marijuana prior to his contact with Deputy Ellard casts questions upon his ability to perceive, retain, and narrate, as compared to the deputy, who was not under the influence of illegal substances, and

who had made a record of their encounter close in time to it having occurred. Deputy Ellard testified that Mr. Collins was sitting during his brief contact and conversation with him, making it unnecessary for the deputy to make any request that he do so. RP 17, 43.

In reviewing the denial of a defendant's motion to suppress evidence, the Court of Appeals determines whether the factual findings are supported by substantial evidence and reviews *de novo* the trial court's conclusions of law. *State v. Aase*, 121 Wn.App. 558, 564, 89 P.3d 721 (2004). The *Aase* court went on to say: "(w)here the trial court's findings of fact and conclusions of law are supported by substantial but disputed evidence, we will not disturb its ruling. Credibility determinations are for the trier of fact and are not subject to our further review". *Aase* at 564, cites omitted.

Contrary to appellant's assertion, there was no evidence that either deputy prevented Mr. Collins from leaving, or made any attempt to prevent him from leaving. Additionally there is no support in the record that the deputy "argued" with Mr. Collins' explanation that he was going to bed.

Not every encounter between a law enforcement officer and a citizen rises to the level of a seizure. A law enforcement officer does not

seize a person by simply striking up a conversation or asking questions. *State v. Mennegar*, 114 Wn.2d 304, 310, 787 P.2d 1347 (1990). An encounter between a citizen and the police is consensual or permissive if a reasonable person under the totality of the circumstances would feel free to walk away. *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980), *State v. Mennegar*.

A social contact may be transformed into a seizure if the officer uses coercive or directive language, e.g., “wait right here”, *State v. Barnes*, 96 Wn.App. 217, 223, 978 P.2d 1131 (1999). A social contact may be transformed into a seizure if an officer insists that the individual answer his or her questions. A social contact may be transformed into a seizure when an officer retains control of an individual’s identification, *State v. Thomas*, 91 Wn.App. 195, 201, 955 P.2d 420, *review denied*, 136 Wn.2d 1030 (1998); *State v. Dudas*, 52 Wn.App. 832, 834, 764 P.2d 1012 (1988), *review denied* 112 Wn.2d 1011 (1989), or if an officer places any of the individual’s possessions in a patrol car, *State v. Armenta*, 134 Wn.2d 1, 12, 948 P.2d 1280 (1997).

In this particular matter, Deputy Ellard engaged in a brief conversation with the appellant while the two of them were in an open

venue. It was the appellant's voluntary response to the deputy's enquiry which led to Mr. Collin's arrest. There was no indication of constraint, restriction, coercion, or physical control of either the appellant or his belongings. There was no indication of either a command or a demand. Mr. Collins was unrestrained. He was free to leave, and free to choose whether or not to speak with the deputy, and once having chosen to speak to Deputy Ellard, was free to choose what he would say to him.

In *State v. O'Neill*, 148 Wn.2d. 564, 62 P.3d 489 (2003), the defendant was asked to step out of the car for a pat down for identification. The court found this show of authority, and demand for information, to constitute a seizure of the defendant. However, the court also noted that no seizure occurs if an officer simply approaches a person in public and engages them in conversation, or requests information from the person, so long as the person is not required to answer and is free to walk away. There is no indication that Mr. Collins was required to answer Deputy Ellard, or was prohibited in any manner from simply going on his way. Had he in fact done so, a seizure might have occurred at that point, but that is merely speculation, and does not reflect the factual situation which actually occurred in this case.

A social contact is a distinct and discrete act which differs from a community caretaking concern. As there are only limited situations in which it may be appropriate for officers to utilize community caretaking, the State does not feel, nor argue, that the situation in Mr. Collins' case would fall under that exception.

III. CONCLUSION

For the foregoing reasons, the State would ask that the Court find that no seizure of the appellant occurred, but rather that Deputy Ellard engaged in a brief social contact during which the appellant acknowledged his involvement in criminal activity, and that it was this acknowledgment which led to the arrest of Mr. Collins. The trial court's denial of appellant's motion to suppress was proper and should be upheld, as should his convictions for Possession of Marijuana with Intent to Distribute and Possession of Psilocyn and/or Psilocybin.

Submitted this 25th day of October, 2010.

Carole L. Highland
D. ANGUS LEE, Prosecuting Attorney
By: Carole L. Highland, WSBA #20504
Deputy Prosecuting Attorney

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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent.)	No. 28611-8-III
)	
v.)	
)	
RONALD COLLINS,)	DECLARATION OF MAILING
)	
Appellant.)	
_____)	

Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the Appellant and his attorney containing a copy of the *Respondent's Brief* in the above-entitled matter.

Ronald Collins
PO Box 11
Startex, SC 29377

Andrea Burkhart
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PO Box 946
Walla Walla WA 99362

Dated: October 25, 2010.



Kaye Burns

Declaration of Mailing.