

FILED

AUG 23 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 28969-9-III

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

STATE OF WASHINGTON,

Respondent,

v.

KARL MCEACHRAN

Appellant.

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

The Honorable John Antosz, Judge

OPENING BRIEF OF APPELLANT

DAVID B. KOCH
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied appellant's motion to suppress all evidence gathered as a result of an unlawful warrantless search.¹

2. The trial court erred when it entered conclusion of law 3.1 and those portions of conclusions 3.2 through 3.4 in which the court found a valid search and admitted the resulting evidence.

Issues Pertaining to Assignments of Error

1. Appellant was one of four juveniles standing in a grocery store parking lot when police officers arrived and arrested one of the boys on an outstanding warrant. While still on the scene, one of the officers received information from a probation officer that appellant had previously been involved in a burglary that involved the theft of firearms. Based solely on that information, the officer frisked appellant for weapons and found brass knuckles. Where appellant did nothing at the scene to indicate he might be a threat to the officers, was this a permissible search under the state and federal constitutions?

¹ The trial court's CrR 3.5/3.6 findings of fact and conclusions of law are attached to this brief as an appendix.

2. The trial court found the warrantless search justified because the officer reasonably feared for his safety and refused to suppress the resulting evidence. Did the court err in upholding the search and ruling the evidence admissible?

B. STATEMENT OF THE CASE

a. Procedural Facts

The Grant County Prosecutor's Office charged appellant Karl McEachran with one count of Unlawful Possession of a Dangerous Weapon, a gross misdemeanor, in violation of RCW 9.41.250. CP 1. The State alleged possession of brass knuckles. CP 3.

McEachran moved to suppress all evidence that he possessed the brass knuckles, arguing it was the product of an illegal search. 1RP 8. After a hearing pursuant to CrR 3.5 and 3.6, the court denied the motion, finding that the evidence was properly seized during a Terry investigatory stop. 1RP² 41-48; CP 15-19. Following a bench trial, the court found McEachran guilty and imposed 20 hours' community service and three months'

² This brief refers to the verbatim report of proceedings as follows: 1RP – November 25, 2009; 2RP – December 14, 2009.

community supervision. CP 8, 20-23. McEachran timely filed his notice of appeal. CP 14.

b. The CrR 3.6 Hearing

The trial court's written findings accurately reflect the evidence at the CrR 3.6 hearing. See CP 15-19. In summary, around 11:15 p.m. on July 24, 2009, Moses Lake Police Officer Aaron Hintz was dispatched to the Food Pavilion parking lot. 1RP 15-17. Four juveniles were standing around a parked car with smoke coming from beneath the hood. Hintz knew that one of the young men – Terrell Mclemore – had an outstanding warrant. The warrant was confirmed and Mclemore was taken into custody. 1RP 17-20.

In addition to the warrant, Officer Hintz also believed that Mclemore had a probation curfew. 1RP 18. Hintz called Grant County Probation Counselor Kevin Hake to verify the curfew. Hake asked who else was with Mclemore and Officer Hintz provided the names of the three boys. 1RP 19-20. When Hintz mentioned the name Karl McEachran, Hake indicated that McEachran had been involved in a recent burglary where firearms were stolen and that Hintz should use caution. 1RP 20.

According to Officer Hintz, this information made him concerned for his safety because he believed McEachran could be carrying a firearm. 1RP 20. Hintz hung up the phone and immediately told McEachran to place his hands behind his back. He told McEachran he was not under arrest but he was going to be frisked for weapons. As Hintz began the frisk, he asked if McEachran had any weapons and McEachran said he had a pair of brass knuckles in his right front pants pocket. 1RP 21. Hintz retrieved the brass knuckles, cuffed McEachran, and placed him in the patrol car. 1RP 21-22. McEachran repeatedly asked Hintz not to take him to juvenile detention and explained that he only had the brass knuckles for protection because “things were crazy on the streets of Moses Lake.” 1RP 22.

The State argued, and the court found, that because Officer Hintz reasonably feared for his safety, he was entitled to frisk McEachran for weapons. Therefore, the brass knuckles and McEachran’s statements about them were admissible.³ 1RP 34-

³ The defense called Adrian Flores, one of the juveniles at the scene, to testify at the CrR 3.6 hearing. Flores’ testimony concerning the timing and sequence of events leading to discovery of the brass knuckles differed from Officer Hintz’s. *See* 1RP 24-34. The court found Flores “not altogether credible.” CP 18.

36, 39-41, 47-48; CP 18. The court relied on both to find McEachran guilty as charged. CP 21-23.

McEachran now appeals to this Court.

C. ARGUMENT

THE TRIAL COURT ERRED WHEN IT DENIED MCEACHRAN'S MOTION TO SUPPRESS.

Under the Fourth Amendment to the United States Constitution and article 1, § 7 of the Washington Constitution, warrantless searches are per se unreasonable unless they fall within one of the "jealously and carefully drawn exceptions" to the warrant requirement. State v. Hendrickson, 129 Wn.2d 61, 70, 917 P.2d 563 (1996)(quoting Arkansas v. Sanders, 442 U.S. 753, 759, 61 L. Ed. 2d 235, 99 S. Ct. 2586 (1979)). One of those exceptions is the protective frisk, or "Terry stop," discussed in detail in Terry v. Ohio, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968).

In State v. Collins, 121 Wn.2d 168, 847 P.2d 919 (1993), the Washington Supreme Court explained under what circumstances a Terry stop will satisfy constitutional requirements for warrantless searches:

(1) the initial stop must be legitimate; (2) a reasonable safety concern must exist to justify a protective frisk for weapons; and (3) the scope of the frisk must be limited to the protective purpose.

Collins, 121 Wn.2d at 173 (citing Adams v. Williams, 407 U.S. 143, 146, 32 L. Ed. 2d 612, 92 S. Ct. 1921 (1972)). The State bears the burden of demonstrating these requirements. Hendrickson, 129 Wn.2d at 71; Collins, 121 Wn.2d at 172. This Court reviews the lower court's legal conclusions de novo. State v. Setterstrom, 163 Wn.2d 621, 625, 183 P.3d 1075 (2008).

Step 2, the reasonable safety concern, is at issue in this appeal. A reasonable safety concern exists, and a frisk is justified, only "when an officer can point to 'specific and articulable facts' which create an objectively reasonable belief that a suspect is 'armed and presently dangerous.'" Collins, 121 Wn.2d at 173 (quoting Terry, 392 U.S. at 21-24). Although an officer need not be absolutely certain that an individual is armed before conducting a search, the circumstances must be such that "a reasonably prudent [person] in the circumstances would be warranted in the belief that his [or her] safety or that of others was in danger." Collins, 121 Wn.2d at 173 (quoting Terry, 392 U.S. at 27).

Both this Court and the Supreme Court have rejected arguments that a Terry frisk was necessary or authorized in the absence of specific information indicating a present threat. See,

e.g., State v. Harrington, 167 Wn.2d 656, 669, 222 P.3d 92 (2009); Setterstrom, 163 Wn.2d at 626-628; State v. Smith, 102 Wn.2d 449, 451-53, 688 P.2d 146 (1984); State v. Cole, 73 Wn. App. 844, 850, 871 P.2d 656, review denied, 125 Wn.2d 1003 (1994); State v. Feller, 60 Wn. App. 678, 681-682, 806 P.2d 776, review denied, 117 Wn.2d 1005 (1991).

In contrast, State v. Collins provides an example of sufficient evidence to warrant a pat-down search. Police stopped Collins, who was 6' 3" tall, at 4:00 a.m. for nonfunctioning brake lights. The officer involved immediately recognized Collins because he had arrested Collins on a felony warrant just two months earlier. The officer also specifically recalled that at that time, Collins possessed a large amount of ammunition, a holster, and a set of handcuffs in his vehicle. Collins, 121 Wn.2d at 171. Based on these circumstances – where it was apparent Collins made a practice of keeping ammunition and other items associated with violence close at hand – the Supreme Court held that there was sufficient evidence indicating that Collins might be armed and dangerous to justify a pat-down search, which revealed a knife and a bag containing methamphetamine. Collins, 121 Wn.2d at 171-78.

The Collins court held that where an officer has reliable information indicating an individual might have a firearm, “when combined with other circumstances that contribute to a reasonable safety concern, such information could lead a reasonably careful officer to believe that a protective frisk should be conducted to protect his or her own safety and the safety of others.” Collins, 121 Wn.2d at 177. Those “other circumstances” included the time of the stop (in the wee hours of the morning when few people would see an act of violence against the officer) and Collins’ recent arrest on a felony warrant. Id. at 174-177.

The circumstances in McEachran’s case fall short of those deemed sufficient in Collins. Officer Hintz testified that he had dealt with Kevin Hake in the past and “generally” found his information credible. 1RP 20-21. Therefore, arguably, Hake can be considered a reliable source. But, unlike the officer’s information in Collins, Hake’s information was vague. He merely indicated that McEachran had “been involved” in a “recent burglary” where firearms were stolen. 1RP 20. There is no indication that Hake provided information to Hintz on what constituted “recent” or McEachran’s level of involvement in the burglary. Nor is there any indication anyone had ever seen McEachran in possession of a

firearm or items associated with firearms. The court expressed disappointment that Hake was not called as a witness at the CrR 3.6 hearing. 1RP 42.

But even assuming Hake's vague information established that McEachran previously had access to a firearm, the Collins court also required that such information be "combined with other circumstances that contribute to a reasonable safety concern" to justify a protective safety frisk. Collins, 121 Wn.2d at 177. And in McEachran's case, there were no "other circumstances." In addition to Officer Hintz, there were other officers on the scene. See 1RP 17 (an officer initially spotted group and other officers "all arrived at the same time"). The car was parked in a public area (Food Pavilion Parking lot). 1RP 17. It was before midnight. 1RP 17. The individual who caught officers' attention – Terrell Mclemore – had already been arrested on the outstanding warrant. 1RP 18. And there is no indication McEachran was anything but cooperative, even telling Officer Hintz the location of the brass knuckles when asked during the frisk. 1RP 21. Ultimately, McEachran was merely given a ticket and released to his mother. 1RP 29.

The information that McEachran had previously been involved in a burglary involving the theft of firearms, without more, does not rise to “specific and articulable facts which create an objectively reasonable belief that a suspect is armed and presently dangerous.” Collins, 121 Wn.2d at 173. It was the State’s burden to justify the search and seizure. It failed to do so. The trial court’s conclusions of law indicating that Officer Hintz had a reasonable safety concern and that the search and subsequent arrest were valid are erroneous.

Under the Fourth Amendment, all fruits of an illegal search must be suppressed. This includes all statements obtained as a result of that search. State v. Byers, 88 Wn.2d 1, 7-9, 559 P.2d 1334 (1977), overruled in part on other grounds, State v. Williams, 102 Wn.2d 733, 741 n.5, 689 P.2d 1065 (1984); State v. Gonzales, 46 Wn. App. 388, 401, 731 P.2d 1101 (1986). Therefore, all evidence of the brass knuckles, including McEachran’s statements about them, should have been suppressed.

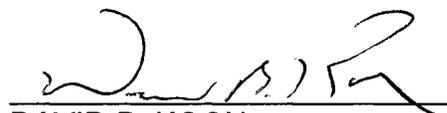
D. CONCLUSION

The court erred when it denied McEachran's motion to suppress evidence of the brass knuckles, which was obtained during an illegal search. McEachran's conviction should be reversed and the case dismissed.

DATED this 20th day of August, 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to read 'D. B. Koch', written over a horizontal line.

DAVID B. KOCH
WSBA No. 23789
Office ID No. 91051

Attorneys for Appellant

APPENDIX

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- 2.1 Officer Aaron Hintz of the Moses Lake Police Department (MLPD) was on duty in Moses Lake, Grant County, WA on the night of July 24, 2009.
- 2.2 Officer Hintz respondent to the parking lot of the Food Pavilion, located at 911 N. Stratford Rd., at approximately 11 p.m.
- 2.3 Officer Hintz went to that location because he had been advised that a juvenile, T.M., was at that location standing next to a car which had smoke coming from its hood. T.M. was known by officers of the MLPD to have a warrant.
- 2.4 T.M. was arrested on a juvenile warrant after Officer Hintz and other officers arrived at the Food Pavilion parking lot.
- 2.5 T.M. was with several other juveniles, including Adrian Flores and the Respondent, immediately prior to being arrested.
- 2.6 Shortly thereafter, Officer Hintz telephoned Kevin Hake on Officer Hintz's cellular phone. Officer Hintz wanted to inquire about T.M.'s curfew status.
- 2.7 Kevin Hake is a Juvenile Probation Counselor with Grant County.
- 2.8 Kevin Hake asked Officer Hintz who was with T.M. When Officer Hintz responded that Karl McEachran, the Respondent, was with T.M. Kevin Hake advised Officer Hintz to be careful. Kevin Hake stated that Karl McEachran had allegedly been involved in a burglary where firearms were stolen, and that he may still be in possession of those firearms. Officer Hintz interacts regularly with Kevin Hake and generally finds information obtained from Kevin Hake to be reliable.
- 2.9 After learning of this information from Kevin Hake, Officer Hintz was concerned for his safety. Officer Hintz immediately told the Respondent to place his hands behind his back. Officer Hintz advised the Respondent that he was not under arrest. Officer Hintz

1 began to frisk the Respondent, or pat down the exterior of the Respondent's clothing.

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3 While doing so, Officer Hintz asked the Respondent if he had any weapons on him.

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5 The Respondent indicated that all he had was a pair of brass knuckles in his right front
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7 pants pocket.

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10 2.10 Officer Hintz retrieved a pair of brass knuckles from the right front pants pocket of the
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12 Respondent. Officer Hintz recognized the object to be brass knuckles by touch and
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14 without manipulating the object.

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16 2.11 Officer Hintz then placed the Respondent under arrest, handcuffed him, and put the
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18 Respondent in the back of his patrol car.

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20 2.12 Officer Hintz did not ask any questions of the Respondent at this time. The Respondent
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22 spontaneously asked Officer Hintz not to book him into the juvenile detention center
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24 and indicated that he only had the brass knuckles for protection because things are
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26 crazy on the streets of Moses Lake.

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29 2.13 Officer Hintz did not transport the Respondent to the juvenile detention center that
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31 evening.

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33 2.14 Adrian Flores testified that he was the owner of the vehicle which was parked in the
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35 Food Pavilion parking lot with smoke coming from its hood. Adrian Flores indicated
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37 that he saw Officer Hintz speaking on his cell phone shortly after the arrest of T.M.
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39 Adrian Flores indicated that immediately afterwards Officer Hintz handcuffed the
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41 Respondent and placed him into the back of his patrol car. Adrian Flores indicated that
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43 no conversation took place at this time and the Respondent was not frisked. He stated
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45 that approximately 10 minutes later Officer Hintz retrieved the Respondent from the
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1 patrol car and searched him, finding the brass knuckles at that time. The Respondent
2 was then released.
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5 2.15 Adrian Flores testimony was not altogether credible. It is against common knowledge
6 of police procedure to believe that an officer would place a suspect in his patrol car
7 without first verifying that the suspect did not possess weapons.
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11 2.16 The Court finds the above facts have been proven beyond a reasonable doubt.
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13 III. CONCLUSIONS OF LAW

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16 3.1 After being cautioned by Kevin Hake that the Respondent may have been in possession
17 of stolen firearms, Officer Hintz reasonably believed that his safety or that of others
18 was endangered. Officer Hintz conducted a valid frisk of the Respondent. The brass
19 knuckles are not suppressed.
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25 3.2 *Miranda* warnings were not required when Officer Hintz asked the Respondent if he
26 had any weapons. The Respondent was not under arrest at that time. The Respondent's
27 statement that he had a pair of brass knuckles in his pocket may be admitted.
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31 3.3 Officer Hintz had probable cause to arrest the Respondent after locating brass knuckles
32 on Respondent's person. He completed a valid arrest.
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36 3.4 The Respondent's statement that he only had the brass knuckles for protection was not
37 the result of a custodial interrogation. Officer Hintz did not ask any questions of the
38 Respondent. This statement may be admitted.
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40 IV. ORDER OF THE COURT

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45 These Findings and Conclusions are entered to support the oral findings and rulings
46 previously made by this court.
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49 DATED: 14 10
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Judge/Court Commissioner

Presented by:

Karen Horowitz, WSBA #40513
Deputy Prosecuting Attorney

FINDINGS OF FACT
CONCLUSIONS OF LAW

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 28969-9-III
)	
KARL MCEACHRAN,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 20TH DAY OF AUGUST, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] D ANGUS LEE
GRANT COUNTY PROSECUTOR'S OFFICE
P.O. BOX 37
EPHRATA, WA 98823-0037

[X] KARL MCEACHRAN
1985 ROAD O SE
MOSES LAKE, WA 98837

SIGNED IN SEATTLE WASHINGTON, THIS 20TH DAY OF AUGUST, 2010.

x *Patrick Mayovsky*