

FILED

AUG 27 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

No. 28969-9-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

KARL MCEACHRAN, APPELLANT

BRIEF OF RESPONDENT

Karen Horowitz
Attorney for Respondent, State of Washington
WSBA # 40513
Grant County Prosecuting Attorney's Office
P.O Box 37
Ephrata, WA 98823-0037
(509) 754-2011

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A. ASSIGNMENTS OF ERROR

The Respondent, State of Washington, asserts that no error occurred in the trial and conviction of the Appellant and respectfully requests that his conviction be affirmed.

B. STATEMENT OF THE CASE

The Appellant, Karl McEachran, was found guilty at an adjudicatory hearing of Unlawful Possession of a Dangerous Weapon under RCW 9.41.250. (CP 5)

Prior to the adjudicatory hearing, a suppression hearing was held, during which the court made the following pertinent findings:

On July 24, 2009 Officer Aaron Hintz of the Moses Lake Police Department was on duty in Moses Lake, WA. (CP 16) Around 11 p.m. that night he went to the parking lot of the Food Pavilion store because he had been told that T.M., a juvenile who was known by Moses Lake officers to have an outstanding warrant, was at that location. (CP 16) T.M. was reportedly standing in the parking lot beside a car which had smoke coming from its hood. (CP 16)

Other officers arrived at the scene and T.M. was arrested on a juvenile warrant. (CP 16) Officer Hintz telephoned Mr. Kevin Hake, Grant County Juvenile Probation Counselor, to inquire about T.M.'s

curfew. (CP 16) Mr. Hake asked Officer Hintz who T.M. was with that night. (CP 16) Immediately prior to being arrested, T.M. had been standing with several other juveniles, including the Appellant, Karl McEachran. (CP 16)

Officer Hintz informed Mr. Hake that Mr. McEachran was present. (CP 16) Mr. Hake then told Officer Hintz to be careful; Mr. Hake stated that Mr. McEachran had allegedly been involved in a burglary where firearms were stolen, and that he may still be in possession of those firearms. (CP 16)

After learning of this information from Mr. Hake, Officer Hintz was concerned for his safety. (CP 16) Officer Hintz and Mr. Hake work together regularly and Officer Hintz generally finds information he receives from Mr. Hake to be reliable. (CP 16) Officer Hintz immediately told Mr. McEachran to place his hands behind his back and that he was not under arrest. (CP 16)

Officer Hintz began to frisk Mr. McEachran. (CP 17) While he was doing so, Officer Hintz asked Mr. McEachran if he had any weapons on his person. (CP 17) Mr. McEachran responded that all he had was a pair of brass knuckles in his right front pants pocket. (CP 17) Officer Hintz then retrieved a pair of brass knuckles from that pocket. (CP 17)

Officer Hintz arrested Mr. McEachran, handcuffed him, and placed him in the back of the patrol car. (CP 17) A short time later Mr. McEachran asked Officer Hintz to release him instead of booking him into the juvenile detention center and stated that he only had the brass knuckles for protection because things are crazy on the streets of Moses Lake. (CP 17) Officer Hintz did not transport Mr. McEachran to the juvenile detention center that evening. (CP 17)

C. STATEMENT OF THE ISSUES

1. After being told by a juvenile probation counselor that Mr. McEachran had been involved in a recent burglary where firearms were stolen and that he should use caution, was Officer Hintz justified in conducting a frisk of Mr. McEachran?

D. ARGUMENT

1. Officer Hintz possessed a reasonable safety concern which justified the protective weapons frisk of Mr. McEachran.

Where Officer Hintz was told by a juvenile probation counselor immediately prior to conducting a protective weapons frisk of Mr. McEachran that Mr. McEachran had been involved in a recent burglary where firearms were taken and that he should use caution as Mr. McEachran may be armed with a firearm, Officer Hintz had a reasonable safety concern which justified the frisk. A nonconsensual protective frisk

for weapons is warranted when a “reasonable safety concern exists ... when an officer can point to ‘specific and articulable facts’ which create an objectively reasonable belief that a suspect is ‘armed and presently dangerous.’” *State v. Harrington*, 167 Wn.2d 656, 667-68, 222 P.3d 92 (2009), quoting *State v. Collins*, 121 Wn.2d 168, 173, 847 P.2d 919 (1993); *Terry v. Ohio*, 392 U.S. 1, 21-24, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). The officer is not required to be completely certain that the individual is armed; instead, the requirement is only that a reasonably prudent person in the same circumstances would be warranted in his belief that his safety, or that of others, was in danger. *Id.*

The Washington Supreme Court has also articulated the standard for a permissible protective frisk by stating, “[C]ourts are reluctant to substitute their judgment for that of police officers in the field. ‘A founded suspicion is all that is necessary, some basis from which the court can determine that the [frisk] was not arbitrary or harassing.’”(Footnote omitted.) *Collins*, 121 Wn.2d at 174, quoting *State v. Belieu*, 112 Wn.2d 587, 601-02, 773 P.2d 46 (1989), quoting *Wilson v. Porter*, 361 F.2d 412, 415 (9th Cir. 1966).

Officer Hintz was told by Mr. Hake, a juvenile probation counselor, that Mr. McEachran had been involved in a recent burglary where firearms were taken. CP 16; 1RP 20. Mr. Hake further told Officer Hintz that he

should use caution as Mr. McEachran may be armed. CP 16; 1RP 20.

Officer Hintz generally found that information he obtained from Mr. Hake was reliable. CP 16; 1RP 21. After speaking with Mr. Hake, Officer Hintz was concerned for his safety as he believed that Mr. McEachran might have a firearm on his person. CP 16; 1RP 20.

Immediately after obtaining this information from Mr. Hake, Officer Hintz hung up the phone and told the Respondent to place his hands behind his back. CP 16; 1RP 21. Officer Hintz then performed a protective weapons frisk of Mr. McEachran. CP 17; 1RP 21. As he performed the frisk, Officer Hintz asked Mr. McEachran if he had any weapons on his person. CP 17; 1RP 21. Mr. McEachran responded affirmatively. CP 17; 1RP 21.

Officer Hintz had a reasonable safety concern after being told by Mr. Hake to exercise caution because Mr. McEachran may be armed with a firearm after having been involved in a recent burglary where firearms were stolen. There is no evidence to indicate that the frisk was arbitrary or harassing; instead, the evidence indicates that Officer Hintz was responding to the information he received from Mr. Hake when he frisked Mr. McEachran. As a result, the protective weapons frisk was lawful.

2. Mr. McEachran's statements to Officer Hintz were properly admitted by the court.

Since the protective weapons frisk of Mr. McEachran was lawful and his statements were not made as the result of a custodial interrogation (CP 18), the Court need not address the appellant's arguments regarding the "fruits of the poisonous tree" doctrine. *See, e.g., Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

E. CONCLUSION

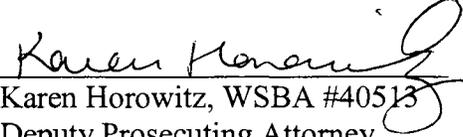
For the reasons set out above, the State respectfully requests that the Court affirm the trial court's convictions.

DATED: August ~~25~~, 2010

Respectfully submitted:

D. ANGUS LEE,

Prosecuting Attorney


Karen Horowitz, WSBA #40513
Deputy Prosecuting Attorney

FILED

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BY _____

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STATE OF WASHINGTON,)	
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Respondent.)	No. 28969-9-III
)	
v.)	
)	
KARL MCEACHRAN,)	DECLARATION OF MAILING
)	
Appellant.)	
_____)	

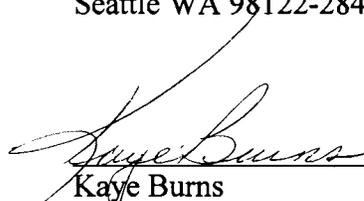
Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

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

Karl McEachran
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Moses Lake WA 98837

Eric J. Nielsen
Nielsen Broman & Koch PLLC
1908 E Madison St
Seattle WA 98122-2842

Dated: August 26, 2010



Kaye Burns

Declaration of Mailing.