

FILED
JUN 15 2011
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
B:

NO. 29671-7-III

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

STATE OF WASHINGTON,

Respondent,

v.

ULISES I.G., a minor,

Appellant.

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

BRIEF OF APPELLANT

JAN TRASEN
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. ASSIGNMENTS OF ERROR.

1. The trial court erred in failing to suppress the fruits of a warrantless search.

2. The trial court erred in finding the stop was not a seizure.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Article I, Section 7 protects against the disturbance of private affairs without lawful authority. Warrantless searches and seizures are prohibited, and this rule is subject to a few narrowly drawn and jealously guarded exceptions. Here, Ulises was stopped and asked to turn his pockets inside out by an armed, uniformed police officer. Did this intrusion constitute a seizure?

2. A social contact may escalate into a seizure based upon subsequent police actions, including progressive commands requiring compliance. Did the officer's request that the youths empty their pockets constitute a progressive intrusion into Ulises's privacy sufficient to elevate the stop from a social contact to a seizure under Article I, Section 7?

C. STATEMENT OF THE CASE.

At approximately 7:55 a.m. on September 14, 2010, Yakima Police Officer Ben Graves was on duty at Eisenhower High School, where he serves as a School Resource Officer (SRO). RP 2.

Although he is assigned to the high school, Officer Graves was in full Yakima Police Department uniform and in a marked patrol car. RP 8-9.

Officer Graves was a few blocks from the high school when he saw three young men walking away from the school. RP 3. Noting that it was unlikely that these youths would make it back to school in time for class, he followed them in his patrol car. RP 3-5. Officer Graves exited his vehicle and informed the youths that he believed they were skipping school to go and smoke marijuana. RP 6.¹ Officer Graves then asked the juveniles to show him the contents of their pockets. RP 6.

Officer Graves directed each young man to individually empty his pockets, one at a time, and to “bunny ear” each pocket so that the officer could view the full contents. RP 11.² When Ulises emptied his pockets, he removed a plastic baggie along with his school identification card. RP 7. When Officer Graves asked him what the baggie contained, he answered, “Bud.” RP 7. Ulises

¹ Officer Graves testified that he had previously arrested juveniles for smoking marijuana in the location where the youths were walking. RP 3.

² The trial court found that to “bunny ear” a pocket means to expose the inside lining of the pocket. CP 44 (Finding of Fact 21).

refused to get into Officer Graves's patrol car, and was handcuffed.

RP 7.

A suppression hearing was conducted, after which the trial court denied Ulises's motion to suppress. RP 32. Ulises then agreed to proceed by a bench trial on a stipulated record before the Honorable James Gavin. RP 53. Ulises was found guilty of possession of marijuana. RP 9-12.

D. ARGUMENT

THE COURT ERRED IN DENYING ULISES'S
MOTION TO SUPPRESS, AS THE
WARRANTLESS SEARCH AND SEIZURE
VIOLATED ARTICLE I, SECTION 7.

a. Constitutional principles prohibit unreasonable searches and seizures. The state and federal constitutions protect citizens from unlawful searches and seizures. U.S. Const. amend. 4; Const. art. I, § 7. The Fourth Amendment of the United States Constitution, made applicable to the states through the Fourteenth Amendment, guarantees: "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, . . . and no warrants shall issue, but upon probable cause." U.S. Const. amend. 4; U.S. Const. amend. 14; Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

Under the Washington Constitution, “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Const. art. I, § 7.

Washington courts have long recognized that article I, section 7 provides even greater protections to citizens’ privacy rights than those afforded by the Fourth Amendment of the federal constitution. See, e.g., State v. Rankin, 151 Wn.2d 689, 694, 92 P.3d 202 (2004); State v. O’Neill, 148 Wn.2d 564, 584, 62 P.3d 489 (2003); State v. Jones, 146 Wn.2d 328, 332, 45 P.3d 1062 (2002). The Washington provision “is not limited to subjective expectations of privacy, but, more broadly protects ‘those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.’” State v. Parker, 139 Wn.2d 486, 494, 987 P.2d 73 (1999) (quoting State v. Myrick, 102 Wn.2d 506, 511, 688 P.2d 151 (1984)).

A warrantless search is generally considered per se unreasonable. Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); State v. Walker, 136 Wn.2d 678, 682, 965 P.2d 1079 (1998). Thus, a warrantless search is presumed unlawful unless the search meets one of the narrowly

drawn and jealously guarded exceptions to the warrant requirement. State v. Williams, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). The State bears the burden of demonstrating whether a search fits within one of these exceptions. Id. (citing State v. Houser, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980)).

In the instant case, the trial court characterized the interaction between Officer Graves and Ulises as a social contact. RP 32; CP 46.

b. The warrantless search of Ulises was a seizure -- not a social contact. A social contact, under Washington law, occupies “an amorphous area in our jurisprudence, resting someplace between an officer’s saying ‘hello’ to a stranger on the street and, at the other end of the spectrum, an investigative detention (i.e., Terry stop). See generally Terry v. Ohio, 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).” RP 52-57. State v. Harrington, 167 Wn.2d 656, 664, 222 P.3d 92 (2009).

Every interaction between police officers and individuals does not rise to the level of a seizure, and effective law enforcement techniques may require interaction with citizens on the streets. Harrington, 167 Wn.2d at 665. However, subsequent police conduct may escalate an interaction that began as a social

contact, into a seizure. Id. at 666; State v. Soto-Garcia, 68 Wn. App. 20, 22, 841 P.2d 1271 (1992).

In Harrington, the defendant was stopped by one police officer who did not activate his emergency lights or siren, and who asked for permission to speak to the defendant; this initial approach was deemed a social contact. 167 Wn.2d at 665. The Court held that subsequent events “quickly dispelled the social contact, however, and escalated the encounter to a seizure.” Harrington, 167 Wn.2d at 666. The factors that a court may consider when determining whether a seizure has occurred include, but are not limited to, the arrival of additional police officers; the request to remove hands from ones pockets; the display of a weapon; the request to search or frisk; and the request for identification. Id. at 667-68; State v. Young, 135 Wn.2d 498, 512, 957, P.2d 681 (1998) (embracing nonexclusive list of police actions likely resulting in seizure) (quoting United States v. Mendenhall, 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980)).

The Harrington Court noted that asking a person to perform an act such as removing his hands from his pockets “adds to the officer’s progressive intrusion and moves the interaction further from the ambit of valid social contact.” 167 Wn.2d at 667. Police

actions which may meet constitutional muster when viewed individually may nevertheless constitute an unlawful search or seizure when the actions are viewed cumulatively. Id. at 668; State v. Soto-Garcia, 68 Wn. App. 20, 22, 841 P.2d 1271 (1992), abrogated on other grounds by State v. Thorn, 129 Wn.2d 347, 917 P.2d 108 (1996).

Here, under Harrington, the initial contact with Ulises and the other youths might be viewed as a social contact. Officer Graves stated that he asked the youths what they were doing and they replied that they were going for a walk. RP 4-5. However, at this point, the character of the interaction between the youths and the officer changed dramatically. Officer Graves immediately informed them that he believed they were actually skipping school and going to smoke marijuana. RP 6. It was at this point of the contact that the officer asked each young man to empty his pockets. RP 6. Not only did Officer Graves direct each young man to empty his pockets, but he gave each juvenile precise instructions concerning exactly how to perform the search – one person at a time, forming a “bunny-ear” of the pocket, and emptying the contents into his own hands so the officer could examine it.

As the Supreme Court held in Harrington, a reasonable person would not have felt free to leave at this point, or indeed, free to refuse the request to turn out his pockets, after Officer Graves's display of authority and particularly his accusations concerning the youths' skipping school and marijuana use. 167 Wn.2d at 670. The violation of Ulises's privacy here is indistinguishable from that in Harrington, where the Court stated:

We note this progressive intrusion, culminating in seizure, runs afoul of the language, purpose, and protections of article I, section 7. Our constitution protects against disturbance of private affairs – a broad concept that encapsulates searches and seizures. Article I, section 7 demands a different approach than does the Fourth Amendment; we look for the forest amongst the trees.

Id. at 670.

As in Harrington and Soto-Garcia, although the initial contact with police may have been social, Officer Graves escalated the contact into a seizure by both his words and his actions, negating the element of consent.⁷ Harrington, 167 Wn.2d at 670; Soto-Garcia, 68 Wn. App. at 29 (noting that officer asked direct questions or accusations concerning drug use or possession).

c. Ulises was searched in violation of constitutional principles, requiring suppression of the evidence and reversal of his conviction. Where police unconstitutionally seize an individual prior to arrest, the exclusionary rule calls for suppression of evidence obtained via the government's illegality. State v. Garvin, 166 Wn.2d 242, 254, 207 P.3d 1266 (2009) ("The exclusionary rule mandates the suppression of evidence gathered through unconstitutional means.").

The warrantless search of Ulises violated Article I, Section 7. Because Ulises's consent to search was obtained through the exploitation of an illegal seizure, exclusion of the evidence and reversal of Ulises's conviction is required.

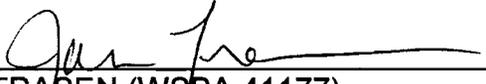
⁷ See also David K. Kessler, Free to Leave? An Empirical Look at the Fourth Amendment's Seizure Standard, 99 J.Crim. L. & Criminology 51 (2009) (noting "people feel compelled to comply with authority figures," and "most people would not feel free to leave when they are questioned by a police officer on the street").

E. CONCLUSION

For the foregoing reasons, Ulises respectfully requests this Court reverse his conviction and remand the case for further proceedings.

DATED this 13th day of June, 2011.

Respectfully submitted,



JAN TRASEN (WSBA 41177)
Washington Appellate Project (91052)
Attorneys for Appellant

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DIVISION THREE**

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	COA NO. 29671-7-III
)	
ULISES G.,)	
)	
JUVENILE APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 13TH DAY OF JUNE, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	JAMES HAGARTY, DPA YAKIMA CO PROSECUTOR'S OFFICE 128 N 2 ND STREET, ROOM 211 YAKIMA, WA 98901-2639	(X) () ()	U.S. MAIL HAND DELIVERY _____
[X]	DAVID BRIAN TREFRY ATTORNEY AT LAW PO BOX 4846 SPOKANE, WA 99220-0846	(X) () ()	U.S. MAIL HAND DELIVERY _____
[X]	U. G. (JUVENILE) 1514 S 16 TH ST YAKIMA, WA 98901	(X) ()	U.S. MAIL HAND DELIVERY

SIGNED IN SEATTLE, WASHINGTON THIS 13TH DAY OF JUNE, 2011.

X _____ 