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Jan 30, 2012
Court of Appeals
Division III
State of Washington

NO. 29895-7-III
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

DARREN R. HOPKINS,

Defendant/Appellant.

APPELLANT'S BRIEF,

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CONSTITUTIONAL PROVISIONS

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ASSIGNMENTS OF ERROR

1. The stop of Darren R. Hopkins on January 14, 2011 by Deputies Williams and Garza was not a social contact.

2. The search of the Altoids container cannot be justified under any exception to the search warrant requirement of the Fourth Amendment to the United States Constitution or Const. art. I, § 7.

3. The juvenile court's Findings of Fact 2.9 and 2.12, insofar as they are negated by its Conclusions of Law 3.4 and 3.5, must not be considered on appeal. (CP 44; Appendix "A").

4. The juvenile court's Conclusions of Law 3.1 and 3.6 are contrary to existing case law. (Appendix "B").

ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Did Deputies Williams and Garza have any justification for stopping Darren R. Hopkins on January 14, 2011?

2. Is there an exception to the search warrant requirement that supports Deputy Williams' search of the Altoids container?

3. Does the juvenile court's determination that a valid search incident to arrest occurred conflict with the current state of the law?

STATEMENT OF CASE

Deputies Williams and Garza of the Kittitas County Sheriff's Office were on duty on January 14, 2011. They observed four males coming from an unlit field near several residences. This particular area had been subject to earlier complaints of partying and property damage. (RP 49, ll. 1-2; ll. 6-10; ll. 15-25; RP 7, ll. 2-3; RP 79 ll. 10-14; RP 79, l. 20 to RP 80 l. 2).

Deputy Williams stopped the patrol car. Both deputies got out of the car and contacted the four males. Mr. Hopkins was one of the individuals. The deputies asked them what they were doing. (RP 50, ll. 2-7; RP 80, ll. 18-20).

Deputy Williams directed his attention to Mr. Hopkins. Deputy Garza had the other three individuals move to the front of the patrol car. (RP 81, l. 24 to RP 82, l.4).

Deputy Williams detected an odor of intoxicants coming from Mr. Hopkins. He was swaying side to side. He initially denied drinking, but later admitted to having two shots. His eyes were extremely glossy. (RP 8, ll. 10-11; ll. 19-21; ll. 23-25; RP 50, ll. 9-10; l. 14; ll. 17-25; RP 51, ll. 18-21; RP 52, ll. 1-4).

Mr. Hopkins continually put his hands into his front pants pockets. Deputy Williams requested consent to do a pat down search. Mr. Hopkins agreed. (RP 9, ll. 2-3; ll. 10-16; RP 52, ll. 6-8; ll. 21-24).

Deputy Williams felt a hard metal container in a back pocket. Mr. Hopkins advised him that it was an Altoids container. Mr. Hopkins later handed the container to the deputy. (RP 10, ll. 7-9; RP 53, ll. 2-4; RP 58, l. 24 to RP 59, l. 1).

The Altoids container measured 1 ½ inches by 2 ½ inches. The deputy admitted that it was a mini-container and could not contain a weapon. (RP 59, ll. 11-15; ll. 17-18; RP 60, ll. 3-8).

Deputy Williams opened the Altoids container and observed three marijuana buds. Mr. Hopkins was then placed under arrest. (RP 53, ll. 7-13; RP 61, l. 24 to RP 62, l. 2).

The deputy did not require Mr. Hopkins to perform any of the standardized field sobriety tests (SFSTs). No PBT test was administered. After contacting juvenile authorities the deputy transported Mr. Hopkins to the Hopkins residence. (RP 60, l. 17 to RP 61, l. 4; RP 62, ll. 5-7).

An Information was filed on January 21, 2011 charging Mr. Hopkins with a violation of RCW 69.44.270(2)(a), as well as possession of marijuana less than 40 grams.

Mr. Hopkins was born on August 15, 1995. The alcohol violation included the alternative of “exhibiting the effects of having consumed liquor in a public place.” (CP 2; RP 73, ll. 18-21).

The juvenile court conducted a suppression hearing on March 24, 2011. The court ruled that Mr. Hopkins was functionally under arrest at the time of the search. The court also ruled that any containers that were

seized were subject to an inventory search. Finally, the court stated that even if no actual arrest occurred the search was still valid. (RP 37, ll. 18-19; RP 39, ll. 2-4; RP 39, ll. 13-17).

Mr. Hopkins filed a Motion to Reconsider the denial of his suppression motion on March 31, 2011. The court entered an order denying the motion on April 5, 2011. (CP 27; CP 35).

No Findings of Fact or Conclusions of Law were entered following the suppression hearing. However, it appears that the juvenile court included Findings of Fact and Conclusions of Law in the Order of Disposition on April 25, 2011. (CP 36).

Mr. Hopkins filed his Notice of Appeal on May 6, 2011. (CP 48).

SUMMARY OF ARGUMENT

...[A]lthough the trial court did not enter written findings and conclusions after the hearing as required by CrR 3.6(b), the court's oral opinion and the findings contained in its order provides sufficient information for review.

State v. Radka, 120 Wn. App. 43, 48, 83 P. 3d 1038 (2004).

The juvenile court's Findings of Fact do not support its Conclusions of Law.

There was an invalid stop of Mr. Hopkins, as well as an illegal search of the Altoids container.

The Order of Disposition should be vacated and the case dismissed.

ARGUMENT

A. ILLEGAL STOP

Deputy Williams maintained that the only reason for contacting Mr. Hopkins and his friends was a social contact. (RP 56, ll. 2-5).

The deputies were aware that there had been complaints of parties, loud noise and property damage in the area they were patrolling. The record does not indicate how recent the complaints were made.

The fact that four teenage males are walking in a residential area at 9:30 at night does not give rise to any indication of criminal activity.

“Innocuous facts do not justify a stop. The officer may, however, rely on experience in evaluating arguably innocuous facts.” *State v. Martinez*, 135 Wn. App. 174, 180, 133 P. 3d 855 (2006).

Neither Deputy Williams nor Deputy Garza provided any testimony to support an inference that their experience was involved in the stop of the four teenagers. They did not observe any out-of-the-ordinary behavior by the boys.

...[T]he officers must have articulable grounds for a stop at its inception. ...The police may not stop and question citizens on the street simply because they are unknown to the police or look suspicious, or because their “purpose for being abroad is not readi-

ly evident.” *Terry*, [*Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)] at 14 n.11 (quoting **PRESIDENT’S COMM’N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, TASK FORCE REPORT: THE POLICE, 184 (1967)**).

State v. Martinez, supra., 181.

Mr. Hopkins contends that it is clear from the record that the purpose of the stop was not a social contact. The purpose was to find out why the four individuals were walking from a darkened field in a residential area.

Mr. Hopkins compares the facts in his case to the facts in *Martinez* and *State v. Ellwood*, 52 Wn. App. 70, 756 P. 2d 547 (1988).

The officer in *Martinez* was patrolling a parking lot because of past vehicle prowls in the area. There was no crime in progress report. He did not have a description or any other information linking Mr. Martinez to a vehicle prowler at any time. He stopped Mr. Martinez and had him sit on a nearby utility box while he ran a warrants check.

In the *Ellwood* case the officer saw two individuals at a late hour in an area with a history of burglaries and assaults. They were standing near an alley. He contacted them to find out what they were doing in the area.

The *Martinez* Court concluded that the stop was unconstitutional. It ruled at 181-82:

The problem here is not with the officer's suspicion; the problem is with the absence of a *particularized* suspicion. ...That is, there must be some suspicion of a particular crime or a particular person, and some connection between the two. ...General suspicions that Mr. Martinez may had been up to no good are not enough to warrant the stop here.

The *Ellwood* Court concluded at 74:

The State admits that Detective Deckard could not point to any articulable and objective facts that would have reasonably caused him to believe that either Ellwood or his companion was involved in criminal activity. As the trial court found, Detective Deckard decided to detain Ellwood merely because of the late hour and Ellwood's presence in an area with a history of burglaries and assaults. These reasons do not meet the minimal constitutional requirement that a police officer have a reasonable suspicion founded on specific and articulable facts before detaining a person. ... Thus, Ellwood's detention was illegal.

See also: State v. Doughty, 170 Wn. 2d 57, 62 (2010).

Mr. Hopkins argues that since the stop was not justified, that any evidence obtained during the course of that stop must be suppressed as the fruit of the poisonous tree. *See: Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed 2d 441 (1963).

B. ILLEGAL SEARCH

Even if the Court should determine that a social contact occurred,

Mr. Hopkins asserts that in the course of that contact it became a detention and the search exceeded constitutional bounds.

Washington courts have not set in stone a definition for so-called social contact. It 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... .

State v. Harrington, 167 Wn. 2d 656, 664, 222 P. 3d 92 (2009).

The facts in the *Harrington* case are eerily similar to the facts in Mr. Hopkins case. The officer did not activate emergency lights or siren. He approached him on foot. A second police officer arrived. A request was made to have Mr. Harrington remove his hands from his pockets. A request to conduct a patdown search then followed.

The *Harrington* Court noted at 667:

...[A]sking a person to perform an act such as removing hands from pockets adds to the officer's progressive intrusion and moves the interaction further from the ambit of valid social contact... .

Deputy Williams had already noted the order of intoxicants on Mr. Hopkins. He had observed indications of impairment. Any "social contact" was now a detention.

Even if a detention had not yet occurred, the request to conduct a patdown search removed any doubt that the "social contact" was still ongoing. *See: State v. Harrington, supra*, 669.

Once Deputy Williams performed the patdown search, he asked Mr. Hopkins about the metal container in his back pocket. Mr. Hopkins told him it was an Altoids container. The container was eventually handed to the deputy.

When it became obvious that the container was not a weapon, and could not contain a weapon, the deputy had no authority to open the container.

As clearly set forth in *State v. Hudson*, 124 Wn. 2d 107, 112-13, 874 P. 2d 160 (1994):

The purpose for this limited search is not to discover evidence of a crime, but to allow the officer to pursue his investigation without fear. *Adams v. Williams*, 407 U.S. 143, 145-46, 32 L. Ed. 2d 612, 92 S. Ct. 121 (1972).

...A valid weapons frisk is strictly limited in its scope to a search of the outer clothing; a patdown to discover weapons which might be used to assault the officer. ... “[O]nce it is ascertained that no weapon is involved, the government’s limited authority to invade the individual’s right to be free of police intrusion is spent” and any continuing search without probable cause becomes an unreasonable intrusion into the individual’s private affairs. *Allen* [*State v. Allen*, 93 Wn. 2d 170, 606 P. 2d 1235 (1980)] at 173.

Deputy Williams candidly admitted the Altoids container could not contain a weapon. Yet, he opened the container and observed three buds of marijuana. The opening of the container and the observation of the ma-

rijuana do not fall within any recognized exception to the search warrant requirement.

As a general rule, warrantless searches and seizures are per se unreasonable. *Coolidge v. New Hampshire*, 403 U.S. 443, 29 L. Ed 2d 564, 91 S. Ct. 222 (1971). Nonetheless, there are a few “jealously and carefully drawn’ exceptions” to the warrant requirement which “provide for those cases where the societal cost of obtaining a warrant, such as danger to law officers or the risk of loss or destruction of evidence, outweigh the reasons for prior recourse to a neutral magistrate.” *Arkansas v. Sanders*, 442 U.S. 753, 759, 61 L. Ed. 2d 235, 99 S. Ct. 2586 (1979).

State v. Houser, 95 Wn. 2d 143, 149, 622 P. 2d 1218 (1980).

The juvenile court ruled that the search of the container was a valid search incident to arrest. Yet, Mr. Hopkins had not yet been placed under arrest by Deputy Williams.

The Altoids container, similar to the cigarette package in *State v. Horton*, 136 Wn. App. 29, 136 P. 3d 1227 (2006), was not subject to a search at that time in the absence of a warrant.

The *Horton* Court stated at 38: “[B]ut if the officer withdraws the cigarette pack under this rational, the justification for the intrusion ends once he determines it is not a weapon. “

Mr. Hopkins position gains greater support from *State v. O’Neill*, 148 Wn. 2d 564, 62 P.3d 489 (2003). The *O’Neill* Court ruled at 585-86:

There must be an actual custodial arrest to provide the “authority” of law justifying a

warrantless search incident to arrest under article I, section 7.

...[I]t is the arrest, not probable cause to arrest, that constitutes the necessary authority of law for a search incident to arrest.

The juvenile court specifically stated that since Deputy Williams had probable cause to arrest, the search was permissible. The juvenile court's ruling is totally contrary to *O'Neill*.

Finally, as stated in **12 WASHINGTON PRACTICE, CRIMINAL PRACTICE AND PROCEDURE**, § 2720: "The exception only applies when the officer intends to remove the defendant to the police station." (discussing the search incident to arrest exception).

CONCLUSION

The deputies made an illegal stop of Mr. Hopkins and his companions. The stop was not a "social contact."

The illegality of the stop requires suppression of any and all evidence acquired during Deputy Williams detention of Mr. Hopkins.

Alternatively, if it is determined that a social contact occurred, then the search of the Altoids container far exceeded the scope of any exception to the search warrant requirement. The marijuana seized from the container should still be suppressed.

Mr. Hopkins respectfully requests that the adjudication that he committed MIP and possession of less than 40 grams of marijuana be reversed and dismissed.

Alternatively, the possession of marijuana less than 40 grams should be reversed and dismissed.

DATED this 30th day of January, 2012.

Respectfully submitted,

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NO. 29895-7-III

COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	KITTITAS COUNTY
Plaintiff,)	NO.11 8 00006 5
Respondent,)	
)	CERTIFICATE OF
)	SERVICE
v.)	
)	
DARREN R. HOPKINS,)	
)	
Defendant,)	
Appellant.)	

I certify under penalty of perjury under the laws of the State of Washington that on this 30th day of January, 2012, I caused a true and correct copy of the *APPELLANT'S BRIEF* to be served on:

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CERTIFICATE OF SERVICE

APPENDIX "A"

2.9 When asked what was in the tin the defendant said "Altoids" to which the Deputy asked "Just Altoids?" to which the Defendant said "Altoids and 'bud'"

2.12 The father of the Defendant testified that the Defendant admitted to having been caught by the police with marijuana on him. The father also testified that he was present when the Defendant was born on 8-15-1995.

3.4 The state failed to prove that the Defendant had been informed of his Miranda rights and so all subsequent statements by the defendant to the officers were suppressed and not considered by the Court. This included his admissions to drinking, possessing marijuana and date of birth.

3.5 The fathers statement that the Defendant admitted to having marijuana on him when he was caught by the police was suppressed and not considered by the Court as the State failed to prove that the statements were voluntary.

APPENDIX "B"

3.1 The Defendant is guilty of Possession of less than 40 grams of Marijuana and of Minor in possession or consumption of alcohol.

3.6 The search of the Defendant where the marijuana was discovered was a lawful search incident to arrest.