

29958-9-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

FILED
June 28, 2012
Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON, RESPONDENT

v.

BEAU C. GARDEE, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF YAKIMA COUNTY

APPELLANT REPLY BRIEF

Janet G. Gemberling
Attorney for Appellant

JANET GEMBERLING, P.S.
PO Box 9166
Spokane, WA 99209
(509) 838-8585

INDEX

A.	STATEMENT OF THE CASE.....	1
B.	ARGUMENT	2
1.	THE OMISSION OF AN AFFIRMATIVE FINDING OF ARTICULABLE SUSPICION WAS NOT INADVERTENT	2
2.	THE STATE’S ALTERNATIVE ARGUMENTS ARE NOT SUPPORTED BY THE COURT’S FINDINGS OR THE EVIDENCE	4
a.	The Fruit Of An Unlawful Seizure Is Subject To The Exclusionary Rule	4
b.	No Evidence Supports The “Open View” Or “Plain View” Theory	6
E.	CONCLUSION	6

TABLE OF AUTHORITIES

WASHINGTON CASES

STATE V. DUNCAN, 146 Wn.2d 166,
43 P.3d 513 (2002) 5

STATE V. PRESSLEY, 64 Wn. App. 591,
825 P.2d 749 (1992) 3

SUPREME COURT CASES

WONG SUN V. U.S., 371 U.S. 471,
83 S. Ct. 407, 9 L. Ed. 2d 441 (1963)..... 5

A. STATEMENT OF THE CASE

Officer Michael Deccio's testimony relates the facts relevant to the issue on appeal:

A: Mr. Gardee and I had made eye contact. He had a surprised look. He promptly turned around and began to walk back away from us quickly. I advised Officer Madril what I observed. We both jumped out of the vehicle and began moving towards Mr. Gardee. Both of us gave him several verbal commands to stop. He ignored those commands. Officer Madril took hold of him, took him down to the ground at which time we handcuffed him.

Q: Okay and when you hand, you handcuffed him while he was on the ground?

A: Correct.

Q: All right. Did you then subsequently get him back up?

A: Right.

Q: And what did you observe when you got, when you got him back up?

A: We began patting him down. I believe Officer Madril patted him down a can of started fluid identical to the cans inside the store, the photograph depicts were, one was located in his pocket. The other one was on the ground where he had been laying.

Q: All right. Did you then subsequently you said that you were, you placed him in handcuffs?

A: Correct.

(RP 20)

B. ARGUMENT

1. THE OMISSION OF AN AFFIRMATIVE FINDING OF ARTICULABLE SUSPICION WAS NOT INADVERTENT.

The State contends that a finding of reasonable suspicion sufficient to support the investigative detention is implicit in the court's findings:

Gardee asserts on appeal that the court did not make a specific finding that his initial detention was based upon an articulable suspicion that he was involved in criminal activity. However, the court did find that Officer Deccio "suspected" Gardee's involvement in the burglary, which is certainly tantamount to an articulable suspicion.

Resp. Br. At 5. A "suspicion" is not the same as an "articulable suspicion." The court's findings and conclusions appeared to be crafted to avoid any suggestion that the initial detention of Mr. Gardee was predicated on such a reasonable suspicion. Instead, the court expressly indicated the cans were found after Mr. Gardee was taken to the ground and handcuffed, but before any "weapons search":

The officers caught up to defendant, took him to the ground and placed him in handcuffs. Upon getting defendant up off the ground, Officer Deccio observed one can Car Quest brand starter fluid hanging out of defendant's pocket, which he immediately recognized as the type of product that appeared to be missing from within the Wapato Car Quest store. In addition, the officer found one

can of Car Quest brand starter fluid on the ground under where defendant was taken to the ground.

(CP 53) The court predicated its conclusion that evidence relating to the cans was admissible on two alternative theories: first, the can found on the ground under Mr. Gardee was not “obtained via a search” and the discovery of that can provided a legal basis for a “weapons search”; and alternatively, the officers “had a right to be where they were” and the remaining evidence was “obtained through a plain view search.”

(CP 54-55)

It is unlikely the trial court would have predicated its ruling on these two, dubious theories, neither of which is supported by the law or the facts, if the court believed the evidence would support a simple finding that the initial seizure was a valid stop based on an articulable suspicion. Instead, the court appears to have concluded that while the facts known to the officers might have aroused their suspicion, prior to the discovery of a can of started fluid on the ground under Mr. Gardee that suspicion did not rise above a “hunch” and without more was insufficient to justify a search. *See State v. Pressley*, 64 Wn. App. 591, 597, 825 P.2d 749 (1992).

2. THE STATE'S ALTERNATIVE ARGUMENTS ARE NOT SUPPORTED BY THE COURT'S FINDINGS OR THE EVIDENCE.

a. The Fruit Of An Unlawful Seizure Is Subject To The Exclusionary Rule.

The State suggests that evidence discovered in the course of an unlawful seizure is admissible unless it is the fruit of an impermissible search:

[The cans] were not seized as a result of a weapons frisk at all. Indeed, the exclusionary rule will bar from trial only “physical, tangible materials obtained either during or as a *direct result* of an unlawful invasion.” *Won Sun v. United States*, 371 U.S. 471, 485, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963)(emphasis added), *see also*, *State v. Duncan*, 146 Wn.2d 166, 176, 43 P.3d 513 (2002). The first two cans were observed by the officers before any search could occur, and were therefore not subject to exclusion.

...

Even if the seizure of items from Gardee’s pocket was unlawful, the only pieces of evidence that could have conceivably been subject to exclusion would have been the photographs of the Pepsi bottle and can; the officers would have still been able to describe the can visible in public, and the jury would have still seen the photographs of the other two cans.

Resp. Br. At 6.

The cases the State cites do not support the conclusion that evidence derived from an impermissible seizure is admissible unless found in an unlawful search. In *Duncan*, the court did not limit the exclusionary rule to evidence obtained in the course of a search: “The exclusionary rule

mandates the suppression of evidence gathered through *unconstitutional means*.” *State v. Duncan*, 146 Wn.2d 166, 176, 43 P.3d 513 (2002).

Nor do these cases support any claim that exclusionary rule applies only to *objects* found in the course of an impermissible seizure. In *Wong Sun* the Court expressly undertook to ensure that the exclusionary rule extends not only to physical, tangible materials evidence, but to all evidence derived from an unconstitutional seizure, even testimony to matters seen and heard by the officers:

[T]he Fourth Amendment may protect against the overhearing of verbal statements as well as against the more traditional seizure of ‘papers and effects.’ Similarly, testimony as to matters observed during an unlawful invasion has been excluded in order to enforce the basic constitutional policies. *McGinnis v. United States*, 1 Cir., 227 F.2d 598. Thus, verbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest as the officers’ action in the present case is no less the ‘fruit’ of official illegality than the more common tangible fruits of the unwarranted intrusion.”

Wong Sun v. U.S., 371 U.S. 471, 485-486, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). The officers here were permitted to testify to matters they observed after they had physically intruded on Mr. Gardee’s physical liberty to an extraordinary degree. The State offered into evidence photographs of the objects that they discovered in the course of physically forcing Mr. Gardee to the ground and handcuffing him. Under *Wong Sun*, none of that evidence was admissible.

b. No Evidence Supports The “Open View” Or “Plain View” Theory.

The State suggests that the evidence was admissible because it was visible to the officers before they accosted Mr. Gardee:

Rather than being in an otherwise protected area, the officers were in an area open to the public and perceived, and recognized, the starting fluid can from that vantage point.

Resp. Br. At 7. The “open view” theory is simply not supported by the evidence or findings. The record is devoid of any suggestion that the cans or Pepsi bottle were visible to, observed by, or recognized by the officers prior to the time they seized Mr. Gardee, threw him to the ground and handcuffed him. Thereafter, whether they were in plain view or open view is not relevant. The evidence was the product of the unlawful seizure.

C. CONCLUSION

Mr. Gardee’s conviction rests upon evidence obtained through an unconstitutional seizure of evidence and should be reversed.

Dated this 28th day of June, 2012.

JANET GEMBERLING, P.S.


Janet G. Gemberling #13489
Attorney for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 29958-9-III
)	
vs.)	CERTIFICATE
)	OF MAILING
BEAU C. GARDEE,)	
)	
Appellant.)	

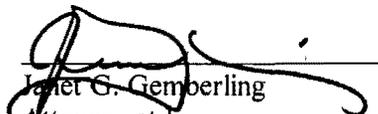
I certify under penalty of perjury under the laws of the State of Washington that on June 28, 2012, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

Kevin Eilmes
kevin.eilmes@co.yakima.wa.us

I certify under penalty of perjury under the laws of the State of Washington that on June 28, 2012, I mailed a copy of the Appellant's Brief in this matter to:

Beau C. Gardee
#850467
Coyote Ridge Correction Center
PO Box 769
Connell, WA 99326

Signed at Spokane, Washington on June 28, 2012.


Janet G. Gemberling
Attorney at Law