

No. 299589

FILED
May 30, 2012
Court of Appeals
Division III
State of Washington

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

BEAU CHARLTON GARDEE,

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF YAKIMA COUNTY, WASHINGTON

THE HONORABLE DAVID A. ELOFSON, JUDGE

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

1. Whether police officers unreasonably and unlawfully seized Mr. Gardee by taking him to the ground and handcuffing him at the scene of an apparent burglary?
2. Whether the officers violated due process by failing to disclose or preserve evidence seized at the time of his arrest, and relevant to his defense?

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. Mr. Gardee was lawfully detained and frisked as the officers had an articulable suspicion that he was involved in the burglary; one can of starter fluid had fallen to the ground near him, and another was in open view on his person.
2. As neither the starter fluid cans themselves, nor their lot numbers, were materially exculpatory, the failure to keep the cans in evidence did not violate Gardee's due process right to a fair trial.

II. STATEMENT OF FACTS

The State does not dispute Gardee's Statement of the Case, but supplements that narrative here. RAP 10.3(b).

After Mr. Gardee was handcuffed by the officers, but before he was frisked, Officer Deccio could see that there was a can of starter fluid in Gardee's pocket. (RP 34-35)

III. ARGUMENT

1. **Gardee was lawfully detained and frisked, as the officers had more than an articulable suspicion, in light of the totality of the circumstances, that he had been involved in the burglary.**

A trial court's conclusions of law in an order pertaining to suppression of evidence are reviewed *de novo*. State v. Carneh, 153 Wn.2d 272, 281, 103 P.3d 743 (2004). Factual findings are reviewed to determine whether they are supported by substantial evidence. State v. Aase, 121 Wn. App. 558, 564 89 P.3d 721 (2004).

A defendant has the burden of proving that a seizure occurred in violation of Article I, sec. 7 of the Washington State Constitution, which provides greater protection than the Fourth Amendment to the U.S. Constitution. State v. O'Neill, 148 Wn.2d 564, 574, 62 P.3d 489 (2003). A person is seized "only when, by means of physical force or a show of authority" his or her freedom of movement is restrained and a reasonable

person would not have believed he or she is (1) free to leave, given all the circumstances, or (2) free to otherwise decline an officer's request and terminate the encounter. State v. Young, 135 Wn.2d 498, 510, 957 P.2d 681 (1998), State v. Thorn, 129 Wn.2d 347, 352, 917 P.2d 108 (1998).

Once a seizure has been established, it is the State's burden to show that the seizure was justified. State v. Potter, 156 Wn.2d 835, 840, 132 P.3d 1089 (2006).

Courts have long recognized that crime prevention and detection are legitimate purposes for investigative stops or detentions. Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). An officer may detain a suspect for an investigative stop even though the officer does not have probable cause to believe the suspect has committed a crime. Id. A *Terry* stop is justified under both the Fourth Amendment and art. I, s. 7 if a police officer is able to "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Id., 392 U.S. at 21; State v. Armenta, 134 Wn.2d 1, 20, 948 P.2d 1280 (1997), *cited in* State v. Mendez, 137 Wn.2d 208, 223, 970 P.2d 722 (1999).

An officer must have a "well-founded suspicion not amounting to probable cause" upon which they may stop a suspect, identify themselves, and ask for identification and an explanation of his or her activities. State

v. Little, 116 Wn.2d 488, 495, 806 P.2d 749 (1991), *citing* State v. White, 97 Wn.2d 92, 105, 640 P.2d 1061 (1982).

The level of articulable suspicion necessary to support an investigative detention is “a substantial possibility that criminal conduct has occurred or is about to occur.” State v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1986).

A court must look at the totality of the circumstances known to the officer at the time of the stop in evaluating the reasonableness of the stop. State v. Glover, 116 Wn.2d 509, 514, 806 P.2d 760 (1991); State v. Duncan, 146 Wn.2d 166, 172, 43 P.3d 513 (2002). Also, a reviewing court takes into account, and gives deference to, an officer’s training and experience when determining the reasonableness of a Terry investigative detention. Glover, 116 Wn.2d at 514.

As the term “articulable suspicion” cannot encompass all the myriad factual situations which may arise, a court must look to the totality of circumstances in determining whether an investigative stop is lawful. State v. Stroud, 30 Wn. App. 392, 398, 634 P.2d 316 (1981). *See, also*, United States v. Cortez, 449 U.S. 411, 66 L. Ed.2d 621, 101 S. Ct. 690, 695, (1981). Further, a court must weigh “(1) the gravity of the public concern, (2) the degree to which the seizure advances the public interest,

and (3) the severity of the interference with individual liberty.” *Id.*, at 397.

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. **(CP 58, No. 5)**

Substantial evidence supports that finding, as well as the findings that Mr. Gardee was at the scene of the burglary 20 minutes after the officers arrived, that he ignored the officers’ verbal commands to stop, and that the officers knew that he had a history of huffing starter fluid from empty Pepsi bottles, based upon both past involvement with Mr. Gardee, as well as information gleaned from a domestic incident involving him that very evening. **(CP 57-58)** The officers also knew that a window had been broken at the store, and Officer Deccio observed that cans of starting fluid had been disturbed, suspecting that some were missing. **(CP 58)**

Under the totality of circumstances known to them, the officers conducted a lawful investigative detention, and the court did not err in so concluding. Mr. Gardee was attempting to flee the scene, and it was necessary to gain control of his person in order for the officers to continue their investigation.

Mr. Gardee also asserts on appeal that the cans of starter fluid which were retrieved by the officers were obtained by means of an unlawful weapons frisk of his clothing and person. He argues that no one testified that the starter fluid was flammable, or that starter fluid could be used as a weapon, and thus a protective weapons frisk was not justified.

However, as the court found, and the evidence indicates, one can of starter fluid was found on the ground where Mr. Gardee was handcuffed by the officers, a second was in plain view of the officers in one of his pockets, and a third was found later behind the store. They 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.

The trial court entered alternative conclusions as to a Pepsi bottle containing starter fluid, as well as the can of starter fluid which was in Gardee’s pocket. Specifically, the court concluded that they were both seized pursuant to a valid *Terry* frisk, but they were also in “plain view” of the officers. **(CP 60, Conclusions 6 and 7)**

The State would submit that application of the “open view” doctrine is more applicable on these facts than the “plain view” doctrine. 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. State v. Thompson, 151 Wn.2d 793, 807-808, 92 P.2d 228 (2004), *citing* State v. Seagull, 95 Wn.2d 898, 901, 632 P.2d 44 (1981). The State is entitled to argue any grounds supported by the record to sustain the trial court’s order. State v. Bubic, 140 Wn.2d 250, 257-58, 996 P.2d 610 (2000).

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. The court did not err in denying the motion to suppress.

2. There was no *Brady* violation, as neither the cans nor the lot numbers were materially exculpatory evidence.

Gardee claims that the State violated his due process rights, and the rule that exculpatory information must be provided to the defense pursuant to Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 368 (1970).

It is true that a prosecutor's failure to comply with discovery requirements, which causes prejudice to the defendant, deprives a defendant of a fair trial. Brady, 373 U.S. at 87; In re Rice, 118 Wn.2d 877, 887, 828 P.2d 1086 (1992).

In order to establish a *Brady* violation, a defendant must demonstrate the existence of each of three necessary elements: “(1) The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued.” State v. Mullen, 171 Wn.2d 881, 895, 259 P.3d 158, (2011), *quoting* Strickler v. Greene, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999). As the Washington Supreme Court has observed, the *Brady* analysis not only involves its discrete elements, but also the “animating purpose” to preserve the fairness of criminal trials. Id., *quoting* Morris v. Yist, 447 F.3d 735, 742 (9th Cir. 2006). With respect to the first element of the analysis, a prosecutor is required only to disclose evidence “favorable to the accused, that, if suppressed, would deprive the defendant of a fair trial.” Id., *quoting* Morris, 447 F.3d at 742, and United v. Bagley, 473 U.S. 667, 675, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985).

The second *Brady* element requires proof that the State actually suppressed evidence favorable to the defense in the possession or control

of either the prosecutor or law enforcement. Mullen, 171 Wn.2d at 895, (citations omitted)

Further, where “a defendant has enough information to be able to ascertain the supposed *Brady* material on his own, there is no suppression by the government.” Mullen, 171 Wn.2d at 896, *quoting* United State v. Aichele, 941 F.2d 761, 764 (9th Cir. 1991).

Third, evidence is prejudicial “if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” Mullen, 171 Wn.2d at 897, *quoting* Bagley, 473 U.S. at 682.

Here, Officer Deccio testified that departmental policy prohibited the tagging of flammable items into evidence, and that the starting fluid cans were either destroyed or left to the store manage to dispose of, after photographs were taken and those photographs were kept in evidence. **(RP 28, 341)** Gardee maintains that the cans, as well as the lot number information on the cans, should have been preserved and made available to the defense.

First, Gardee’s reliance upon State v. Luvene, 127 Wn.2d 690, 903 P.2d 960 (1995), is misplaced. In that case it was the State which sought to introduce lot number evidence on liquor bottles in order to tie the defendant to a particular liquor store where a murder had occurred, and

eliminate the store where the defendant claimed he had purchased liquor which had been found in his possession. The Supreme Court held that the trial court did not abuse its discretion in admitting such lot number information under ER 401 and ER 403. Luvene, at 706-07.

That such evidence may be admissible if relevant, and weighed under ER 403, does not mean that the State must not only preserve lot numbers found on seized evidence, but also seek out those numbers in store inventories. At the time that the burglary was investigated, the officers would have had no reason to record the lot numbers, given that they had retrieved three cans altogether, three cans were missing from the Car Quest inventory in Wapato, and lot numbers could not be tied to a particular store. **(RP 10-11)**

Gardee further argues on appeal that if, indeed, the cans were returned to Mr. Gangle, the cans could have been retrieved and used in Gardee's defense. How those three cans could have been specifically identified and retrieved from the store, assuming they had not been thrown away by Mr. Gangle or sold, is not clear. The cans were disposed of, and gone for good, regardless of the method; they were not suppressed by law enforcement or the prosecution.

It should also be noted that at trial, defense counsel was able to cross-exam Officer Deccio about the fact that the cans were disposed of,

that they were not emptied and themselves kept in evidence, and that the officers did not take fingerprints from the cans. **(RP 348-50)** Given that the jury heard that testimony, and still returned verdicts of guilty, Gardee cannot now meet his burden of showing that the result of the proceeding would have been different. Strickler, 527 U.S. at 280.

Further, neither the cans themselves nor the lot numbers constituted material exculpatory evidence under State v. Wittenbarger, 124 Wn.2d 467, 880 P.2d 517 (1994), and California v. Trombetta, 467 U.S. 479, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984).

In order to be considered ‘material exculpatory evidence’, the evidence must both possess an exculpatory value that was *apparent before it was destroyed* and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.

Wittenbarger, 124 Wn.2d at 475, *citing* Trombetta, 104 S. Ct. at 2534. (emphasis added).

Even if evidence *might* have exonerated the defendant, that is not enough to be deemed “materially exculpatory”. Id., at 475. In any event, the record here does not demonstrate that any value attached to the lot numbers should have been apparent to the officers before the cans were disposed of pursuant to department policy.

Neither the cans nor the lot numbers were “potentially useful evidence”, as defined in Arizona v. Youngblood, 488 U.S. 51, 109 S. Ct.

333, 337, 102 L. Ed. 2d 281 (1988). For many of the reasons stated above, there is no indication that the officers acted in bad faith, and this is not one of “those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant.” Id. To the contrary, the circumstances under which the cans were retrieved were documented by the officers, and photographs taken to show that they matched those in the store. The trial court did not err in denying the motion to dismiss.

IV. CONCLUSION

Based upon the foregoing arguments, this Court should affirm the convictions.

Respectfully submitted this 30th day of May, 2012.

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Certificate of Service

I, Kevin G. Eilmes, hereby certify that on this date I served copies of the foregoing upon counsel for the Appellant via electronic filing with the court, by agreement, and pursuant to GR 30(B)(4), and upon the Appellant via U.S. Mail.

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Dated at Yakima, WA this 30th day of May, 2012

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