

FILED
Jan 22, 2013
Court of Appeals
Division III
State of Washington

NO. 307000-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

KYLE KEITH TRAPP, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 11-1-00539-2

BRIEF OF RESPONDENT

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I. STATEMENT OF FACTS

On May 15, 2011, at approximately 3:45 p.m., City of Richland police officer Sergeant Curtis Smith responded to a dispatch which sent him to the 7-Eleven store located at 415 Wright Avenue. (RP 5). The reporting party said that there might be a health problem with a person in the store parking lot. (RP 5). Sergeant Smith ran the license plate and it came back to the defendant who was listed as having been convicted of a violent offense. (RP 5-6, 32). The officer arrived to find the defendant in his car slumped motionless behind the steering wheel. (RP 6). In fifteen years of law enforcement, the Sergeant had never seen a person napping in a parking lot slumped over a steering wheel at three in the afternoon. (RP 25). The defendant showed no signs of life. (RP 7). Upon seeing no movement at first, the officer thought there might be a medical issue. (RP 7). The Sergeant waited for his cover officer to arrive. (RP 7). The officer stopped his police vehicle a little ways behind the defendant's vehicle. (RP 6). Mr. Trapp then "came to life" and started his car, placed it in gear, and moved the car a foot or two before the officer directed him to stop. (RP 8). The officer approached the defendant who rolled the window down part way. (RP 8). The defendant appeared slow and lethargic, did not know what time it was, and appeared to be under the influence of a narcotic. (RP 8-10). The defendant did not know what the

date was, and could not tell the officer the day of the week. (RP-10). The officer now felt he had probable cause to arrest the defendant for Driving Under the Influence. (RP 10-11). The officer was concerned that the defendant would drive in his impaired condition. (RP 11). Officer Smith commanded the defendant to keep his hands on the steering wheel and to keep them there. (RP 14). The defendant did not comply, and the officer became concerned for his safety and removed the defendant from the car by reaching in, grabbing the defendant, and pulling him from the car. (RP 14-15). The officer could see into the defendant's bank bag and saw what he believed to be a heroin cook spoon and a cap to a hypodermic syringe. (RP 15). The officer later applied for a search warrant for the defendant's car and removed from it drug paraphernalia and a "cook spoon" which contained heroin residue. (CP 43; RP 19).

The court denied the defendant's motion to suppress the evidence based on the defendant's contention that he had been illegally seized. (CP 12-17; RP 74).

The defendant was sentenced based on an offender score of four. (CP 53-54).

The defendant appealed, complaining that his offender score was improperly computed and that his seizure was unlawful. (CP 65-66).

II. ARGUMENT

1. The stopping of the defendant's vehicle was not a seizure.

Washington and a number of other jurisdictions have held that contact with a vehicle where the driver is slumped over the wheel and appears incapacitated is not a seizure. *State v. Knox*, 86 Wn. App. 831, 840 FN 1, 939 P.2d 710 (1997); *State v. Zubizareta*, 122 Idaho 823, 839 P.2d 1237 (1992) (no seizure where officer approached parked vehicle and requested motorist to roll down window and turn off engine); *Matter of Clayton*, 113 Idaho 817, 748 P.2d 401 (1988) (officer's actions to determine whether driver slumped forward in slumber in vehicle with its motor running and lights on was prudent and within officer's caretaking function); *People v. Murray*, 137 Ill.2d 382, 148 Ill.Dec. 7, 11-12, 560 N.E.2d 309, 313-14 (1990) (no seizure where officer approached a car in which an individual was sleeping and tapped on window or asked the individual to roll down window; request that driver who just woke up provide identification or step out of car for purpose of determining ability to drive is proper); *State v. Kersh*, 313 N.W.2d 566, 568 (Iowa 1981)

(survey of cases from other jurisdictions regarding the propriety of police opening a vehicle to determine whether an unconscious or disoriented person is in distress); *Com. v. Leonard*, 422 Mass. 504, 663 N.E.2d 828, *cert.denied*, 117 S.Ct. 199 (1996) (no seizure where officer opened unlocked door of car parked in breakdown area adjacent to highway after driver failed to respond to attempts to get his attention).

2. The facts in the instant case gave rise to a permissible *Terry*¹ stop.

In the instant case, the officer can point to specific and articulable facts, which taken together with rational inferences from those facts reasonably warrant intrusion. The scope of such an investigatory stop is determined by considering (1) the purpose of the stop, (2) the amount of physical intrusion on the suspects liberty, and (3) the length of time of the seizure. *State v. Laskowski*, 88 Wn. App.858, 950 P.2d 950 (1997), *review denied*, 135 Wn.2d 1002 (1998). In the instant case, the defendant was unconscious or dead in his vehicle at a time and place that was unusual. (RP 7). The defendant then attempted to drive, giving the officer the right to further access the defendant's condition, medical or otherwise. (RP 8).

¹ *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct 1868, 20 L. Ed. 889 (1968).

The court must take into account the officer's training and experience when determining the reasonableness of a *Terry* stop. *State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 760 (1991).

Under the totality of the circumstances test for investigatory stops, an officer may rely on a combination of otherwise innocent observations to briefly pull over a suspect. *U.S. v. Arvizu*, 534 U.S. 266, 122 S. Ct. 744, 151 L. Ed. 2d 740 (2002). Even an error regarding some of his facts will not render a *Terry* stop unreasonable. *State v. Seagull*, 95 Wn.2d 898, 908, 632 P.2d 44 (1981). A stop is not rendered unreasonable solely because the officer did not rule out all possibilities of innocent behavior before initiating the stop. *State v. Anderson*, 51 Wn. App. 775, 780, 755 P.2d 191 (1988).

A. *The time expended to either verify or dispel the officer's suspicion was slight.*

The officer came to a very quick conclusion that the defendant was under the influence of narcotics. He is, however, entitled to be mistaken about the degree of the defendant's impairment. *Anderson*, supra.

B. *The amount of physical intrusion involved in the officer's detention of the defendant was slight.*

The physical intrusion must be limited to that necessary to effect the stop in a safe and effective manner. *State v. Wheeler*, 108 Wn.2d 230,

235, 737 P.2d 1005 (1987). In the instant case, the defendant was stopped, spoken to briefly, and the officer immediately determined that the defendant was under the influence of narcotics before removing the defendant from his car for the officer's safety. Removing the defendant from his vehicle during such an encounter is permissible. *State v. Watkins*, 76 Wn. App. 726, 729, 887 P.2d 492 (1995).

3. The defendant's range of four points was properly computed.

The defendant's range of four points was properly computed. Defendant contends that his criminal record shows that the defendant went more than five years in the community without a criminal offense; however, his criminal history reveals the following offenses:

Date	Offense	Number	Jurisdiction	Finding
05.23.2006	Operating vehicle without ignition interlock	R00019101	Richland Benton County District	Guilty
08.08.2006	Trespass second	R00019360	Richland Benton County District	Guilty
08.08.2006	Theft third degree	R0098907	Richland Benton County District	Guilty

Mr. Trapp's 2006 convictions keep his offenses alive into 2011. The State understands that Defendant's misdemeanor criminal history is

not part of the record, and if the Court wants to remand to the trial court for a hearing on this basis, the State will not object.

III. CONCLUSION

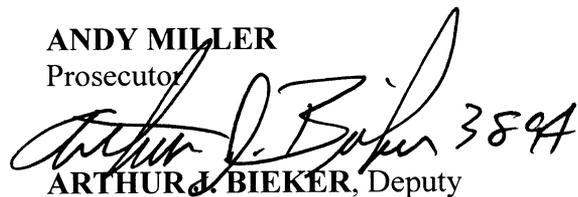
If there was a seizure in the instant case, it occurred after the officer found probable cause to arrest the defendant for driving under the influence. The approach of the defendant was at first permissible under a community caretaking function which later developed into a permissible *Terry* stop, which then gave way to probable cause to search the defendant's automobile.

The defendant's standard range is correctly calculated based on the defendant's local criminal District Court history.

The conviction of the defendant and his sentence should be affirmed.

RESPECTFULLY SUBMITTED this 22nd day of January 2013.

ANDY MILLER
Prosecutor

Handwritten signature of Arthur J. Bieker in black ink, with the number 3894 written to the right of the signature.

ARTHUR J. BIEKER, Deputy
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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

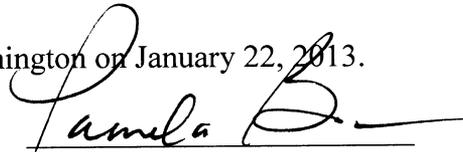
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