

FILED
JUNE 09, 2014
Court of Appeals
Division III
State of Washington

NO. 31587-8-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ALEXIS M. ARVAYO,

Appellant.

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant makes one assignment of error. It can be summarized as follows;

1. The trial court erred when it did not suppress evidence seized from the person of the Appellant.

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. There was no error by the court when it refused to suppress the evidence seized from the person of Appellant.

II. STATEMENT OF THE CASE

The substantive and procedural facts have been adequately set forth in appellants brief therefore, pursuant to RAP 10.3(b); the State shall not set forth an additional facts section. The State shall refer to the record as needed.

III. ARGUMENT.

The issues presented are covered factually by the brief testimony and the findings of fact and conclusions of law which were presented to and adopted by the trial court. The court found there were sufficient facts and well settled case law to support the actions of the officer

The court determined that the report of the Appellant as a “runaway” “triggered” the officer’s duties under RCW 13.32A.050, this

Conclusion of Law was not challenged at the trial court nor has it been challenged in this court, therefore it is a verity. State v. O'Neill, 148 Wn.2d 564, 571, 62 P.3d 489 (2003); “The findings of fact entered following the suppression hearing are unchallenged. The rule in Washington is that challenged findings entered after a suppression hearing that are supported by substantial evidence are binding, and, where the findings are unchallenged, they are verities on appeal.” Further, the court determined that this was a civil detention not a criminal detention and citing State v. Dempsey, 88 Wn.App. 918, 924, 947 P.2d 265 (1997) and State v. Lowrimore, 67 Wn.App. 949, 956-7, 841 P.2d 779 (1992) The trial court adopted a lengthy set of findings and conclusions none of the findings or conclusions were challenged at the trial court.

The actions of the trial court were clearly discretionary in nature. The court followed court rule, CrR 3.6, received briefing from all parties and based on that information as well as testimony from the arresting officer. It then made a discretionary decision with regard the suppression of the search of Appellant. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971) is applicable “Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously.

....Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” (Citations omitted.) The defendant bears the burden of proving abuse of discretion. State v. Hentz, 32 Wn. App. 186, 190, 647 P.2d 39 (1982), rev'd on other grounds, 99 Wn.2d 538, 663 P.2d 476 (1983).

RESPONSE TO ASSIGNMENT OF ERROR ONE.

The trial court did not err when it determined that the search of Appellant was legal. The actions of the court were well reasoned, based on the facts presented in the suppression hearing and existing case law. The trial court determined, as set forth in report of proceedings and the conclusions of law that the factual situation in this case was akin to that set forth in both State v. Dempsey, 88 Wn.App. 918, 924, 947 P.2d 265 (Wn.App. Div. 3 1997) and State v. Lowrimore, 67 Wn.App. 949, 956-7, 841 P.2d 779 (1992). RP 29-33, CP 51-57.

There was only one person who testified at this hearing, Officer Cesar Escamilla; appellant did not take the stand. Therefore the statements of the officer are unrefuted. The findings of fact and conclusions of law entered in this case are extensive and were not objected to in the trial court. There were twenty-one findings of fact and twenty-

two conclusion of law entered in this case. Appellant challenges only one Finding of Fact, Number 6. He challenges Conclusions of Law 4, 5, 6, 7, and 8. State v. Handburgh, 61 Wn. App. 763, 766, 812 P.2d 131 (1991); These findings were unassailed by either party on appeal and, consequently, they are verities on appeal.

In State v. Johnson, 156 Wn.App. 82, 89-92, 231 P.3d 225 (2010)

the court addressed the standard of review of for a suppression hearing:

We review a trial court's denial of a CrR 3.6 suppression motion "to determine whether substantial evidence supports the trial court's challenged findings of fact and, if so, whether the findings support the trial court's conclusions of law." State v. Cole, 122 Wn.App. 319, 322-23, 93 P.3d 209 (2004). Unchallenged findings of fact are verities on appeal. State v. Balch, 114 Wn.App. 55, 60, 55 P.3d 1199 (2002). We review de novo conclusions of law, "including mischaracterized 'findings.'" Cole, 122 Wn.App. at 323, 93 P.3d 209. We defer to the fact finder on witness credibility issues. State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

This court need only look to the definition section of RCW 13.32A to determine that in this state that RCW 13.32A et seq. was established to allow the State to do exactly what it did in this instance, protect a minor-an infant. Appellant was fourteen at the time his mother reported him, twice in one day, as a runaway. This was the same day that he was detained by Officer Escamilla RP 5, 6, 12 The defining portion of this testimony is the section where the officer testifies that he personally spoke

to Appellant's mother who "reported" her son as a runaway and she asked that this juvenile, a non-emancipated person, be taken to a "secure facility for juveniles."

Q ...Let me back up before contact with him. You spoke to the respondent's mother at some point; is that correct?

A Correct. Earlier that day.

Q How did that -- how did that come about?

A That morning she -- I was dispatched to her residence. She requested to report her son Alexis as running away from her house.

Q Running away from her house. Did she say anything about what she wanted to happen with him?

A Yes.

....

A The mother, the reporting party, had advised that her son, who's about 14 years old, had ran away from home and she had contacted his probation officer first. Probation officer advised her to contact law enforcement and that she would be -- there would be a warrant issued for his arrest for -- violation of his condition, I guess. At that same time too she advised that if he were to be located -- as a runaway, once she completed and signed the report, she -- she requested him to be transported to CRC.

Q What -- what is CRC?

A It's a secure facility for juveniles.

Q What type of juveniles? Any juveniles? Or,--.

A I believe they have criteria that has to be met, but, yeah, runaways -- I've taken runaways -- juveniles that are found in circumstances that would be considered, say, dangerous circumstances. Yeah. Most of the time it's just runaways, though.

RP 5-6

A review of RCW 13.32A allows this section to be seen in the context of this stop and the following search. The initial section of the act explaining the act itself is crucial to the review of this case. RCW 13.32A.010 describes the intent and purpose of this section of the law. It

specifically addresses the problem that families face with a child who is a runaway. The act states in part;

The legislature intends to provide for the protection of children who, through their behavior, are endangering themselves. The legislature intends to provide appropriate residential services, including secure facilities, to protect, stabilize, and treat children with serious problems. The legislature further intends to empower parents by providing them with the assistance they require to raise their children.

In this instance Appellant's mother had reported him as a runaway earlier in the day and then again reported to/called the police when Appellant came home later in the day and again left home. RP 5-8 This "parent" RCW 13.32A.030 (14), who had been reported as a runaway her "child, "juvenile"... "minor" RCW 13.32A.030(4), who obviously has previous criminal convictions because she reported his absence to his probation officer, as having been gone long enough to be placed in a "CRC" RCW 13.32A.030, (RP passim.) "Crisis residential center" means a secure or semi-secure facility established pursuant to chapter 74.13 RCW." Without a doubt a fourteen year old who is already on probation and has been reported as a runaway meets both of the definitions under RCW 13.32A.010 for (3) "at-risk youth and (5) Child in need of services." Clearly the officer had no choice but to take the Appellant to the CRC. The CRC as seen from the record is a secure location that requires that any

youth brought to the center must be searched prior to entry. The policy that was established by the record is that the CRC requires;

Q And -- are you familiar with the policies of the CRC as far as -- as admitting kids and whether or not those -- those kids need to be searched?

A Yes.

Q I'm going to show you -- photograph that's attached to the back -- back page of my brief. Do you recognize that photograph?

A I do.

Q What is that?

A It's an advisement that all youth entering the CRC facility are to be searched by law enforcement.

Q Now, -- when you are searching a kid going into the CRC are you looking for weapons? More? Less? What's the purpose there?

A I'm searching for any objects, any items that -- youth may have either in his pockets, hidden, anything besides clothing. RP 9

The timing of the search is of no consequence. The facts are unrefuted; Appellant's Mother had reported him as a runaway twice on the day he was picked up by Officer Escamilla. Appellant's Mother spoke with Officer Escamilla and told him that she wanted her son taken to CRC. There is absolutely no dispute that Appellant was going to go to the crisis residential center which requires this officer to search the Appellant before he would be allowed to enter. There was absolutely no other location that is allowed by law that this officer could take Appellant. RP 8-9,

Q ...So when you made contact with the respondent, at what point did you -- did you determine that he was going to the CRC instead of to the detention hall for a warrant?

A Soon as dispatch advised that there was no warrant, but that he was still a missing runaway. RP 10-11

Officer Escamilla then conducted a complete search of the Appellant. The policy of the CRC that this search of the Appellant at its location is not controlling, what is, is did the officer have the legal ability to search Appellant.

Q And -- at that point did you search the respondent?

A I did.

Q The search that you performed on him, was it a pat-down for weapons or was it more than that?

A It was more than that.

Q Is it consistent with the type of search that you would do with anyone that you were transporting to the CRC?

A Yes.

Q Were there any -- any procedural steps that you needed to take after making contact with the respondent and before taking him to the CRC? Did you have to take him to the police station for any reason? Is it -- is it policy to take him back to talk to his mother first? Is there any other thing that you had to do between taking the respondent into custody and depositing him at the CRC?

A No.

RP 11

...

Q ... I'm showing you what's been marked as defense (inaudible)

A. Is that the picture of the sign at the CRC that the prosecutor showed you, and you testified about?

A Yes.

Q And you've seen that sign before at the CRC, correct?

A I have.

A Okay. It reads, "All youth entering the S -- SC must be thoroughly searched and pat down in front of the OHANA staff by law enforcement. Thank you. Amy, something."

RP 17

By analogy this court in State v. Chavez, 138 Wn.App. 29, 33156

P.3d 246 (Div. 3 2007) stated;

"All seizures of the person, even those involving only brief detentions, must be tested against the Fourth Amendment guaranty of freedom from unreasonable searches and seizures." State v. Thompson, 93 Wn.2d 838, 840, 613 P.2d 525 (1980) (citing United States v. Brignoni-Ponce, 422 U.S. 873, 878, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975); Terry v. Ohio, 392 U.S. 1, 17, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). To arrest a person, the officer must have probable cause to believe that an offense has been or is being committed. *Id.* A search incident to arrest can occur prior to the arrest, so long as a sufficient basis for the arrest existed before the search commenced. State v. Ward, 24 Wn.App. 761, 765, 603 P.2d 857 (1979) (citing State v. Smith, 88 Wn.2d 127, 559 P.2d 970 (1977); State v. Brooks, 57 Wn.2d 422, 357 P.2d 735 (1960)).

State v. Brooks, 57 Wn.2d 422, 425, 357 P.2d 735 (1960);

[I]f the officer is entitled to make an arrest on the basis of information available to him before he searches, and as an incident to that arrest is entitled to make a reasonable search of the person arrested ... there is nothing unreasonable in his conduct if he makes the search before instead of after the arrest." (quoting Simon, 290 P.2d at 533).

Society does in fact treat a "child, juvenile, minor" as if that person was suffering a disability, that disability is age. If a person is a minor and they wish to cure this disability they must go to court and file for emancipation. They must prove certain things and seek the authorization of a court to be freed of this legal disability. RCW 13.64.020 Petition for emancipation — Filing fees.

(1) A petition for emancipation shall be signed and verified by the petitioner, and shall include the following information: (a) The full name of the petitioner, the

petitioner's birthdate, and the state and county of birth; (b) a certified copy of the petitioner's birth certificate; (c) the name and last known address of the petitioner's parent or parents, guardian, or custodian; (d) the petitioner's present address, and length of residence at that address; (e) a declaration by the petitioner indicating that he or she has the ability to manage his or her financial affairs, including any supporting information; and (f) a declaration by the petitioner indicating that he or she has the ability to manage his or her personal, social, educational, and nonfinancial affairs, including any supporting information. (Emphasis mine.)

This comparison to a person with a mental health problem is appropriate. The goal of the juvenile justice system is primarily rehabilitation not punishment. The various statutes cited above unilaterally discuss helping the family unit and protecting the minor from harm from themselves and others. The parties cited to and the Court adopted the reasoning set forth in State v. Dempsey, 88 Wn.App. 918, 924, 947 P.2d 265 (Wn.App. Div. 3 1997):

A Civil Commitment Search is Not Limited to a Weapons Pat Down. A search incident to a civil detention is not limited by *Terry* considerations. Lowrimore, 67 Wn.App. at 956-57, 841 P.2d 779. In a *Terry* stop, the only purpose for the search is to protect the officer from immediate harm while he completes his investigation. Terry v. Ohio, 392 U.S. 1, 22, 88 S.Ct. 1868, 1881, 20 L.Ed.2d 889 (1968). A civil custody search, on the other hand, has the primary purpose of protecting, not the officer, but the affected individual and others who may come into contact with him while rendering aid. Lowrimore, 67 Wn.App. at 956-57, 841 P.2d 779. The search here falls into the "emergency situation" exception to the warrant

requirement. *Id.* at 957, 841 P.2d 779. This exception permits a warrantless search to whatever extent is objectively reasonable to carry out the police caretaking function, given the circumstances reasonably perceived by the officer at the scene at the time. State v. Lynd, 54 Wn.App. 18, 21-22, 771 P.2d 770 (1989). During an intervention, the officer may search for any dangerous instrumentality. Lowrimore, 67 Wn.App. at 956-57, 841 P.2d 779. There need only be "some reasonable basis to associate the emergency with the place searched." Lynd, 54 Wn.App. at 21, 771 P.2d 770. (Footnote omitted.)

The State would also argue that this is an instance where the analysis set forth in State v. Kinzy, 141 Wn.2d 373, 5 P.3d 668 (Wash. 2000) regarding the use and application of the "community care taking" function of police work is applicable. Once again this appellant was a fourteen year old with prior criminal convictions who was reported earlier in the day as a runaway and later his mother called the police to inform them that Appellant had been home and left yet again. Officer Escamilla was performing the very definition of community caretaking. The court in Kinzy weighed all of the factors presented to the officers the night that Kinzy was detained and searched and found the seizure and search unreasonable. The facts here support the actions of the officers. They had been given specific orders by the Appellant's Mother, his guardian, and that was to stop, detain and transport him to a secure facility that required that he be search before entry. As the court in Kinzy states:

When a person has been seized, balancing the interests does not necessarily favor an encounter by police. "A person is 'seized' within the meaning of the Fourth Amendment of the United States Constitution only when restrained by means of physical force or a show of authority." The relevant inquiry is whether totality of the circumstances indicate "a reasonable person would have felt free to leave or otherwise decline the officer's requests and terminate the encounter." Consistent with this inquiry, a citizen's interest in being free from police intrusion is no longer minimal once there is a seizure. When weighing the public's interest, this Court must cautiously apply the community caretaking function exception because of "a real risk of abuse in allowing even well-intentioned stops to assist." Once the exception does apply, police officers may conduct a noncriminal investigation so long as it is necessary and strictly relevant to performance of the community caretaking function. The noncriminal investigation must end when reasons for initiating an encounter are fully dispelled.

IV. CONCLUSION

The appellant has failed meet his burden. The trial court was fully apprised of all of the facts. That court made a discretionary decision which was supported by findings of fact and conclusions of law. The facts which were presented to the court and adopted by the court were fully supported by the record and support the ruling of the court. The actions of the trial court should be upheld.

This appeal should be dismissed.

Dated this 9th day of June 2014,

s/ David B. Trefry

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DECLARATION OF SERVICE

I, David B. Trefry, state that on June 9, 2014 by agreement of the parties, I emailed a copy of the State's Motion on the Merits to: Jan Gemberling and Jill Reuter at admin@gemberlay.com and to Alexis Arvayo C/O Janet Gemberling, PS, PO Box 9166, Spokane, WA 99209

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 9th day of June, 2014 at Spokane, Washington.

s/ David B. Trefry
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