FILED

SEP 16, 2013

Court of Appeals
Division III
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 31608-4-III

STATE OF WASHINGTON, Respondent,

v.

JOHN WILLIAM WALLACE, JR., Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION

Police officers responded to a call requesting a welfare check in response to information that Wallace was overdosing on drugs. Although the concerns about Wallace's safety were quickly dispelled and he refused further medical treatment, the police continued to detain him to investigate suspected criminal activity. Ultimately, the police arrested Wallace for malicious mischief in the third degree, even though the facts and circumstances available did not permit an inference that Wallace had probably committed the crime. The trial court denied Wallace's motion to suppress evidence that methamphetamine was located on his person when he was searched incident to his arrest. After a trial in which Wallace was acquitted of the malicious mischief charge and convicted of possessing methamphetamine, the trial court sentenced Wallace to twelve months plus one day based upon an offender score of 5, even though the State presented no evidence of prior criminal history beyond bare assertion. Wallace argues that his conviction and sentence should be reversed.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1: The trial court erred in concluding that there was probable cause to arrest Wallace for malicious mischief in the third degree. (Conclusion 1.)

ASSIGNMENT OF ERROR 2: The trial court erred in concluding that the search of Wallace's person was a lawful search incident to arrest. (Conclusion 2.)

ASSIGNMENT OF ERROR 3: The trial court erred in concluding that evidence obtained from the search of Wallace incident to his arrest for malicious mischief in the third degree was admissible at trial. (Conclusion 3.)

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE 1: When the police lacked sufficient evidence to determine who probably owned the trailer, did probable cause exist to arrest Wallace for malicious mischief in the third degree? NO.

ISSUE 2: When the police lacked sufficient evidence that Wallace knowingly and maliciously broke the trailer window, did probable cause exist to arrest Wallace for malicious mischief in the third degree? NO.

ISSUE 3: Do the trial court's factual findings support its conclusion that probable cause existed to arrest Wallace for malicious mischief in the third degree? NO.

ISSUE 4: Did the arresting officer unlawfully detain Wallace by exceeding the scope of the community caretaking function? YES.

IV. STATEMENT OF THE CASE

John Wallace, Jr. was charged with malicious mischief in the third degree and with possessing methamphetamine that was discovered on his person at the time. CP 1-2. Pretrial, Wallace moved to suppress the methamphetamine as the fruit of an unlawful seizure. CP 15.

The arresting officer reported that he received information from Wallace's mother that Wallace was overdosing based on information she received from a third-party. She told the officer that the property was condemned and nobody was supposed to be there. The officer went to the property to perform a welfare check and made contact with Wallace at a travel trailer. Wallace appeared to be under the influence of some kind of stimulant and had blood on his hands. While waiting for medics to arrive, the officer saw that a window in the trailer was broken and asked Wallace how it happened. Wallace told the officer that he had woken up with a sharp pain in his stomach and leapt out of bed, striking the window. When the medics arrived, Wallace declined further medical assistance. He denied attempting to harm himself. CP 24.

The officer then contacted Wallace's mother again to question her further. She told the officer that the property had been condemned and she had trespassed Wallace from being there. She stated that the trailer door

had been bolted closed. Upon re-contact, Wallace stated that the trailer belonged to him and his brother and the door was open when he arrived that morning. His mother denied that the trailer belonged to him and stated again that she had trespassed him from the property, although she had obtained no order to that effect. She advised the officer that Wallace had a drug problem and she wanted him to get help, and further indicated that she wanted to press charges for malicious mischief. CP 24.

Without further investigation into the ownership of the trailer or Wallace's right to be present, the officer placed Wallace under arrest and searched him. The search produced a baggie of a substance identified to be methamphetamine. CP 24.

The trial court ruled that probable cause supported Wallace's arrest and permitted the evidence to be introduced. Appendix.[1] At trial, the jury convicted Wallace of possessing methamphetamine but acquitted him on the malicious mischief charge. CP 55-56. At sentencing, the State alleged Wallace had an offender score of five but did not present any evidence beyond allegation of his prior convictions, nor did Wallace affirmatively

[1] After the record on appeal was designated, the trial court entered its written findings of fact and conclusions of law, which are attached to the Appendix hereto. Appellant has filed a supplemental designation of clerk's papers to make the findings and conclusions part of the appellate record but they have not been filed as of the time of this filing.

acknowledge any prior convictions. CP 59. Based on the score of five, the trial court sentenced Wallace to a term of twelve months and one day in custody. CP 62.

Wallace now appeals. CP 68.

V. ARGUMENT

Wallace contends that the trial court erred in concluding that evidence obtained from a search incident to his arrest was admissible, and that the sentence imposed was based upon an offender score that is not supported by substantial evidence in the record.

The court of appeals reviews a trial court's conclusions of law pertaining to suppression of evidence *de novo*. *State v. Acrey*, 148 Wn.2d 738, 745, 64 P.3d 594 (2003). Likewise, the trial court's calculation of an offender score is reviewed *de novo*. *State v. Larkins*, 147 Wn. App. 858, 862, 199 P.3d 441 (2008). Because a trial court acts without statutory authority when it imposes sentence based on an erroneous offender score, the calculation of the score may be raised for the first time on appeal. *State v. Rowland*, 97 Wn. App. 301, 304, 983 P.2d 696 (1999).

A. Probable cause did not exist to arrest Wallace for malicious mischief in the second degree when there was conflicting evidence of ownership of the trailer and there was insufficient evidence of knowing and malicious damage to property.

As a result of the decision to arrest Wallace for malicious mischief, police searched Wallace and located a substance that was found to contain methamphetamine. But for the search, no admissible evidence existed to charge Wallace with the felony crime of possessing methamphetamine. Wallace contends that because probable cause did not exist to support his arrest for malicious mischief in the third degree under the facts and circumstances presented, his arrest was unlawful and, accordingly, the search of his person incident to his arrest was likewise unlawful.

Warrantless searches are unreasonable per se under article 1, section 7 of the Washington Constitution and the Fourth Amendment to the U.S. Constitution. *State v. White*, 135 Wn.2d 761, 769, 958 P.2d 982 (1998) (citing *State v. Hendrickson*, 129 Wn.2d 61, 70, 917 P.2d 563 (1996)); *State v. Johnson*, 128 Wn.2d 431, 446-47, 909 P.2d 293 (1996). This is a strict rule, and exceptions to the warrant requirement are limited and narrowly drawn. *White*, 135 Wn.2d at 769; *Hendrickson*, 129 Wn.2d at 70–71. Accordingly, the State bears a heavy burden to prove the

warrantless searches at issue fall within the exception it argues for. *State v. Parker*, 139 Wn.2d 486, 496, 987 P.2d 73 (1999) (*citing Johnson*, 128 Wn.2d at 447).

"Under article I, section 7, a lawful custodial arrest is a constitutionally required prerequisite to any search incident to arrest." *Parker*, 139 Wn.2d at 496 (*citing State v. Cyr*, 40 Wn.2d 840, 843, 246 P.2d 480 (1952), *overruled on other grounds by State v. Ringer*, 100 Wn.2d 686, 674 P.2d 1240 (1983)). The arrest provides the "authority of law" to search consistent with the protections of article I, section 7. *Parker*, 139 Wn.2d at 496-97 (*citing Cyr*, 40 Wn.2d at 843; *State v. Michaels*, 60 Wn.2d 638, 643, 374 P.2d 989 (1962)).

"Thus, while the search incident to arrest exception functions to secure officer safety and preserve evidence of the crime for which the suspect is arrested, in the absence of a lawful custodial arrest a full blown search, regardless of the exigencies, may not validly be made." *Parker*, 139 Wn.2d at 497 (*citing State v. Johnson*, 71 Wn.2d 239, 242, 427 P.2d 705 (1967) (lawful arrest is a prerequisite to a lawful search); *State v. Miles*, 29 Wn.2d 921, 933, 190 P.2d 740 (1948) (if arrest is unlawful, search is unlawful); *State v. Gibbons*, 118 Wash. 171, 183, 203 P. 390

(1922) (search following unlawful arrest has "no lawful support as incident thereto")).

Probable cause exists "where the facts and circumstances within the arresting officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in a belief that an offense has been . . . committed." *State v. Gluck*, 83 Wn.2d 424, 426-27, 518 P.2d 703 (1974). In determining whether probable cause exists, the court considers the totality of facts and circumstances within the officer's knowledge at the time of the arrest. *State v. Cottrell*, 86 Wn.2d 130, 542 P.2d 771 (1975). While evidence that establishes guilt beyond a reasonable doubt is not required, the probable cause determination considers "probabilities arising from the fats and considerations of everyday life on which prudent men, not legal technicians, act." *Cottrell*, 86 Wn.2d at 132 (*quoting State v. Parker*, 79 Wn.2d 326, 328-29, 485 P.2d 60 (1971)). Thus, the rule can be described as follows: "Probable cause 'boils down, in criminal situations, to a simple determination of whether the relevant official, police or judicial, could reasonably believe that the person to be arrested has committed the crime.'" *State v. Chesley*, 158 Wn. App. 36, 41, 239 P.3d 1160 (2012) (*quoting State v. Fisher*, 145 Wn.2d 209, 220 n. 47, 35 P.3d 366 (2001)).

Malicious mischief in the third degree requires proof that the defendant knowingly and maliciously causes physical damage to the property of another. RCW 9A.48.090. Thus, to determine whether probable cause existed in the present case to authorize the warrantless arrest and search of Wallace, the court must evaluate the information available to the arresting officer at the time and consider, under "everyday life" standards, whether the belief that the defendant has probably committed the crime is reasonable.

In situations where probable cause rests upon information provided by a citizen informant, there must be objective facts from which a neutral observer could conclude that the information and the source are reliable. *State v. Northness*, 20 Wn. App. 551, 554, 582 P.2d 546 (1978). When a non-anonymous citizen provides information to the police, the ordinary requirement that the police show evidence of the informant's past reliability is relaxed because the citizen has had no prior opportunity to establish a previous record of reliability. *Northness*, 20 Wn. App. at 556 (*citing U.S. v. Harris,* 403 U.S. 573, 91 S. Ct. 2075, 29 L. Ed. 2d 723 (1971)). The information provided by the citizen may itself establish the citizen's reliability, if the information itself is sufficiently detailed and satisfies the requirement that belief in the reliability of the information is justified. *Northness*, 20 Wn. App. at 556-57.

Accordingly, while a citizen informant need not establish a history of veracity, facts must still be demonstrated that show how the informant came by his or her information and a basis for the citizen's personal knowledge must be established. *See State v. Jackson*, 102 Wn.2d 432, 437-38, 688 P.2d 136 (1984). A deficiency in the informant's information may be overcome by independent police work that provides "probative indications of criminal activity along the lines suggested by the informant." *Jackson*, 102 Wn.2d at 738 (*quoting U.S. v. Canieso*, 470 F.2d 1224, 1231 (2d Cir. 1972)). Corroboration of public or innocuous facts is insufficient; instead, corroboration that is sufficient to confirm the informant's information must tend "to give substance and verity to the report that the suspect is engaged in criminal activity." *Jackson*, 102 Wn.2d at 438.

In the present case, the information provided by Wallace's mother failed to show a basis for her claim that she owned the trailer and Wallace had no right to be present there. Wallace disputed the ownership of the trailer. To support a reasonable inference that Wallace committed the crime of malicious mischief in the third degree, an "everyday life" analysis of the facts must show a probability that the trailer belonged to somebody other than Wallace. The evidence available to the arresting officer fails to support this inference because in the absence of some kind

of confirmation, there was no basis for believing that one person's claim was more true than the other's. And the officer took no steps to attempt to corroborate the information received from Wallace's mother, either by searching the vehicle registration records for the travel trailer or by verifying whether, as she claimed, the trailer door had been screwed closed. Without a basis for concluding that the trailer was more probably not Wallace's property, the arrest for malicious mischief cannot be sustained.

Moreover, the evidence available to the arresting officer further failed to give rise to a reasonable inference that Wallace struck and damaged the trailer window knowingly and maliciously, as required to commit the crime of malicious mischief in the third degree. Wallace advised the officer that he had struck the window after being woken up from a sharp stomach pain. On this information, grounds did not exist for concluding on a more probable than not basis that Wallace acted knowingly and maliciously in breaking the window; to the contrary, the information indicated that the action was inadvertent and potentially involuntary.

Under the totality of the circumstances, considering the information available to the arresting officer at the time of the arrest, there

were insufficient facts to justify an inference that Wallace probably acted knowingly and maliciously to damage property belonging to another. Accordingly, there were insufficient grounds for Wallace's arrest and subsequent search, and the trial court's ruling permitting introduction of the fruits of the search was erroneous.

B. The arresting officer illegally detained Wallace when he exceeded the scope of a lawful community caretaking investigation.

According to the arresting officer's report, he was dispatched to the property in reference to information that Wallace was overdosing. After he arrived and contacted Wallace, Wallace denied requiring any medical assistance and later refused treatment from a medic. CP 24. Once it was established that Wallace did not require further assistance, the arresting officer turned his attention from Wallace's welfare to investigating whether Wallace committed a crime by contacting Wallace's mother for additional information, questioning Wallace, and investigating the condition of the travel trailer. Once the officer's concerns about Wallace's safety were alleviated, the basis for the detention ended and the officer was required to terminate the contact and allow Wallace to leave. Because the officer extended the detention beyond its lawful scope, the

later-obtained evidence was the fruit of an unlawful detention and should have been excluded at trial.

Courts have recognized an exception to the Fourth Amendment and article 1, section 7 prohibitions against unreasonable searches and seizures for emergency aid and routine checks on health and safety. *Acrey*, 148 Wn.2d at 749. However, the exception is limited because of the risk of abuse. Accordingly, "[t]he noncriminal investigation must end when reasons for initiating an encounter are fully dispelled." *Acrey*, 148 Wn.2d at 750 (*quoting State v. Kinzy*, 141 Wn.2d 373, 388, 5 P.3d 668 (2003). Moreover, the community caretaking function cannot be exercised as a pretext to search for evidence of criminal activity. *State v. Schlieker*, 115 W. App. 264, 270, 62 P.3d 520 (2003).

In the present case, the community caretaking function ended when the medics advised the arresting officer that nothing further could be done for Wallace unless he voluntarily sought to be admitted for medical treatment, and Wallace refused the treatment. But instead of terminating the contact and ending Wallace's detention, the officer continued to detain Wallace while investigating him for potential criminal activity. Only after the extended detention did the officer obtain information used to arrest and search Wallace. Under *Acrey* and *Kinzy*, the detention should have ended

immediately when the concern that Wallace required medical treatment for an overdose was dispelled.

Because the community caretaking exception does not apply to detentions to investigate criminal activity, it was contrary to the Fourth Amendment and article 1, section 7 of the Washington Constitution for the arresting officer to continue the detention while he investigated criminal activity. Accordingly, the fruits of the unlawful detention should have been suppressed and the trial court erred in permitting them to be introduced at trial.

C. Insufficient evidence supports Wallace's offender score and sentence.

The State bears the burden to prove the existence of prior convictions by a preponderance of the evidence. *State v. Bergstrom*, 162 Wn.2d 87, 93, 169 P.3d 816 (2007). The trial court may rely on no more information than is admitted by the defendant, acknowledged, or proved at trial or at sentencing. RCW 9.94A.530(2). Although RCW 9.94A.530(2) states that a defendant acknowledges prior criminal history alleged by the State by failing to object at the time of sentencing, the Washington Supreme Court held in *State v. Hunley*, 175 Wn.2d 901, 287 P.3d 584 (2012) that the statute is unconstitutional on its face by depriving the State

of its burden to present some evidence of prior convictions. Consequently, a defendant's failure to object cannot constitute an acknowledgment in the absence of sufficient evidence presented by the State. *Id.* at 917.

In the present case, no evidence exists in the record establishing the existence of any prior convictions or any agreement or acquiescence by Wallace in the truth of the State's bare assertions. Accordingly, Wallace should have been sentenced based on an offender score of 0. With an offender score of 0, the standard range sentence is 0-6 months. RCW 9.94A.517, RCW 9.94A.518 (possess controlled substance is seriousness level I). The trial court's sentence of twelve months plus one day thus exceeds the trial court's authority under the Sentencing Reform Act in light of the lack of evidence produced by the State in support of its requested sentence.

VI. CONCLUSION

For the foregoing reasons, Wallace respectfully requests that the court reverse his conviction and sentence and remand the case to the trial court for further proceedings.

RESPECTFULLY SUBMITTED this 10th day of September, 2013.

ANDREA BURKHART, WSBA #38519
Attorney for Appellant

DECLARATION OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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John William Wallace, Jr., DOC #846911
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PO Box 769
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 16th day of September 2013 in Walla Walla, Washington.

Andrea Burkhart

APPENDIX

ORIGINAL

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF BENTON

STATE OF WASHINGTON, Plaintiff, vs. **JOHN WILLIAM WALLACE, JR.,** Defendant.	**NO.** 12-1-01261-3 **FINDINGS OF FACT AND CONCLUSIONS OF LAW ON 3.6 HEARING**

A hearing was held March 6, 2013, before the Honorable Judge Cameron Mitchell. Based on the written briefs and argument by counsel, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. On October 19, 2012, at approximately 1617 hours, Benton County Sheriff Officer Benitez was dispatched to 216203 E. Perkins Rd. on a welfare check of a possibly suicidal subject;
2. Linda Wallace-Lincoln had reported she had third-party information that her son, John William Wallace, Jr., was possibly overdosing on drugs in a trailer in a back field of that property;

3. Ms. Wallace-Lincoln indicated this information came from her other son's acquaintance, who was receiving text messages from the defendant saying he was overdosing;
4. Ms. Wallace-Lincoln reported that she owned the property at that address;
5. She also reported that the property had been condemned, was uninhabitable, and nobody was supposed to be staying in any building on the property;
6. When Officer Benitez arrived at the location, he made contact as the defendant stepped out of a travel trailer on the back of the property;
7. The defendant was extremely "high" and showed symptoms of being under the influence of an unknown stimulant;
8. The defendant was flailing his limbs and head in an uncontrollable fashion and had blood on his hands;
9. Officer Benitez asked the defendant to step out of the trailer and he eventually did so with great difficulty;
10. Officer Benitez detained the defendant for safety purposes and requested assistance from medical personnel;
11. When medics arrived, Officer Benitez noticed a window on the trailer was broken and asked the defendant what had happened;
12. The defendant stated he was asleep when an unknown side pain upset him, causing him to jump up and punch out the window;
13. Medics bandaged the cut on the defendant's hand and advised Officer Benitez the defendant was "tweaking out" and there was nothing else they could do for him unless he agreed to voluntarily be transported to the hospital;

14. The defendant said he was fine and refused to be transported to the hospital;
15. Officer Benitez then asked the defendant if he was trying to hurt himself and the defendant said no.
16. Officer Benitez inquired as to why he would be receiving a report that the defendant was trying to hurt himself and the defendant responded that all the allegations were false, he was not trying to hurt himself in any way, and he just wanted to go back to bed;
17. Officer Benitez then made contact with the reporting party, Ms. Wallace-Lincoln, who said she owned the property, had trespassed the defendant from the property, and the property was condemned under the Benton County Code;
18. She also indicated the defendant was homeless because she had kicked him out of her residence due to his narcotics problem and his inability to get his life together;
19. When asked if the defendant made any threats to harm himself, Ms. Wallace-Lincoln said no, but her information suggested something was not right and she thought he may be overdosing;
20. She stated she assumed he was on the property without permission because he frequently trespassed and hid out there, despite her screwing the doors to the trailer shut;
21. She then informed Officer Benitez she wanted to pursue malicious mischief charges against the defendant;
22. Officer Benitez informed the defendant that his mother said he wasn't supposed to be there and the defendant replied that the trailer itself actually belonged to him;
23. Ms. Wallace-Lincoln again informed Officer Benitez the trailer did not belong to

the defendant and he had no claim in the trailer or property;

24. Upon further investigation, Officer Benitez saw blood around the broken window and on the outside of the trailer door, indicating the defendant injured himself breaking in, not out;
25. Based on the damage to the trailer and the defendant admitting he had punched the window out, Officer Benitez placed the defendant under arrest for malicious mischief;
26. The search incident to the defendant's arrest produced a small baggie containing a white crystalline substance;
27. A field test was performed and the substance in the baggie field-tested positive for methamphetamine;
28. When Officer Benitez arrived on location, he had information there may be a possible suicide at the property, the property had been condemned, and that nobody was supposed to be on the property;
29. Further investigation prior to the arrest revealed that the purported landowner specifically stated the defendant was not supposed to be on the property;
30. Investigation prior to arrest also revealed the broken glass and blood on the defendant, indicating he had damaged the property and broken into the trailer;

CONCLUSIONS OF LAW

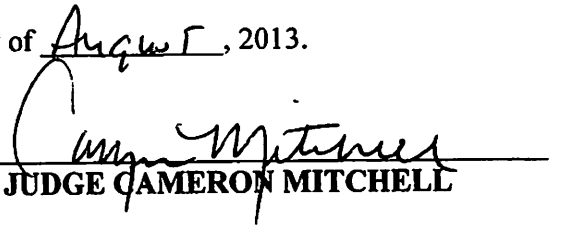
1. The information Officer Benitez had prior to arriving on scene, together with the information he uncovered in his investigation prior to the defendant's arrest, was sufficient to establish probable cause to arrest the defendant;
2. The search incident to the defendant's arrest was therefore lawful and proper;

3. Evidence of the methamphetamine seized in the search incident to the defendant's arrest should not be suppressed

ORDER

Based on the information, argument heard, and the case record to date, the Court finds that the defendant's Motion to Suppress is hereby denied.

SIGNED this 8th day of August, 2013.



JUDGE CAMERON MITCHELL

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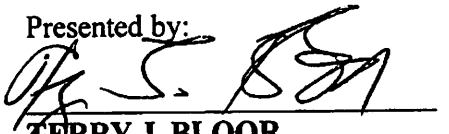

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