

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 34511-4-III

STATE OF WASHINGTON, Respondent,

v.

SEAN MICHAEL HEALY, Appellant.

APPELLANT'S REPLY BRIEF

Andrea Burkhart, WSBA #38519
Two Arrows. PLLC
PO Box 1241
Walla Walla, WA 99362
Tel: (509) 876-2106
andrea@2arrows.net
Attorney for Appellant

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I. ARGUMENT

Rehashing its argument made below, the State argues that because the City of Pullman elevates the infraction of urinating in public to a misdemeanor if the individual has a prior citation, Officer Gordon was justified in detaining Healy to investigate whether he had committed the misdemeanor offense. *Respondent's Brief*, pp. 7-8, 11-13. But the State points to no facts available to the officer that would have rationally led to an individualized suspicion that the misdemeanor, rather than the infraction, was being committed. This is inconsistent with the requirement that police articulate specific facts that relate to a particular crime, rather than a generalized suspicion that the person is up to no good. *State v. Z.U.E.*, 178 Wn. App. 769, 779, 315 P.3d 1158 (2014), *affirmed*, 183 Wn.2d 610 (2015); *State v. Day*, 161 Wn.2d 889, 895, 168 P.3d 1265 (2007).

Moreover, under the State's argument, municipalities would have the power to diminish citizens' constitutional privacy interests by simply providing circumstances in which its infractions could be elevated to misdemeanors. Then, if no additional information is needed to establish a suspicion that the misdemeanor, rather than the infraction is occurring, police would be able to avoid constitutional limitations on investigative detentions for civil infractions by pointing to the hypothetical possibility

that the misdemeanor could be occurring. This renders the restriction against investigative detentions for civil infractions recognized in *State v. Duncan*, 146 Wn.2d 166, 43 P.3d 513 (2002) and *Day*, 161 Wn.2d 889, a nullity, because police could then investigate every civil infraction as though it were a misdemeanor despite the absence of any particular suspicion of the misdemeanor. Healy respectfully submits that constitutionally protected interests are not this flexible.

Finally, the State argues that because RCW 7.80.050(3) allows a notice of infraction to be issued on reasonable cause to believe the infraction was committed, Officer Gordon was authorized under RCW 7.80.060 to detain Healy in order to identify and cite him. *Respondent's Brief*, p. 14. But this argument overlooks the critical fact that Officer Gordon did not see the infraction committed in his presence. RP 24, 38-39, 44, 54, 63-64; RCW 7.80.050(2). As such, the State's argument amounts to an effort to evade the inevitable consequences of *Duncan* by characterizing the detention as initiated for the purpose of citation, rather than for investigation. *Respondent's Brief*, p. 15. The problem with the State's argument is that Gordon admitted that was not what he was doing.

Moreover, the State's argument fails to recognize that exactly as in *Duncan*, Officer Gordon here could not confirm that the infraction had

occurred without investigating critical facts that he did not witness. In *Duncan*, police observed men in a bus stop in close proximity to a bottle in a paper bag that the officers believed, based on experience, was alcohol. 146 Wn.2d at 169. In that case, because proximity to the beer bottle was insufficient as a matter of law to prove that anybody possessed it, reasonable cause did not exist to cite anybody for possession. *Id.* at 179. The *Duncan* Court expressly rejected the argument that the State seeks to make here, that “reasonable cause” to believe an infraction occurred is something less than a straightforward assessment of whether the infraction occurred in the officer’s presence. *Id.*

Here, it was undisputed that no infraction has occurred unless Healy actually urinated in public. Gordon admitted that he did not see Healy actually urinating. Under the *Duncan* standard, the violation did not occur in his presence. Consequently, Gordon lacked authority to detain Healy to cite him under RCW 7.80.050(2).

II. CONCLUSION

For the foregoing reasons, and in addition to the reasons set forth in his Appellant's Brief, Healy respectfully requests that the court REVERSE the order denying his motion to suppress and DISMISS the conviction.

RESPECTFULLY SUBMITTED this 16 day of October, 2017.



ANDREA BURKHART, WSBA #38519
Attorney for Appellant

CERTIFICATE OF SERVICE

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

Sean Healy
5820 11th Street SW
Mukilteo, WA 98275

Denis Paul Tracy
Whitman Co Prosecutor
PO Box 30
Colfax, WA 99111

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 10 day of October, 2017 in Walla Walla,
Washington.



Andrea Burkhart

BURKHART & BURKHART, PLLC

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Address:
PO BOX 1241
WALLA WALLA, WA, 99362-0023
Phone: 509-876-2106

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