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No. 35560-8-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Otoniel Carriero,

Appellant.

Yakima County Superior Court Cause No. 15-1-01114-1

The Honorable Judge Michael G. McCarthy

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. The trial court erred by denying Mr. Carriero's suppression motion.
2. The police violated Mr. Carriero's Fourth and Fourteenth Amendment right to be free from unreasonable seizures by seizing him in the absence of a reasonable suspicion.
3. The officer invaded Mr. Carriero's right to privacy under Wash. Const. art. I, § 7 by seizing him in the absence of a reasonable suspicion.
4. The trial court erred by entering Finding of Fact No. 3. CP 37.
5. The trial court erred by entering Conclusion of Law No. 2. CP 40.
6. The trial court erred by entering Conclusion of Law No. 4. CP 40.
7. The trial court erred by entering Conclusion of Law No.5. CP 40.
8. The trial court erred by entering Conclusion of Law No. 6. CP 41.
9. The trial court erred by entering Conclusion of Law No. 7. CP 41.
10. The trial court erred by entering Conclusion of Law No. 9. CP 41.

ISSUE 1: An investigatory stop is unlawful unless supported by specific, articulable facts giving rise to a reasonable belief that the person seized is engaged in criminal activity. Did police improperly seize Mr. Carriero in violation of his rights under the Fourth Amendment and Wash. Const. art. I, § 7?

ISSUE 2: A driver is unlawfully seized when police request identification in the absence of reasonable suspicion. Was Mr. Carriero unlawfully seized when police blocked his car from leaving and asked him to identify himself?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Otoniel Carriero and Amber Rodriguez were sitting in his car at night. CP 38-39. They were parked in an alleyway in Yakima. CP 38-39. They were talking, and the car's lights were off. RP 15; CP 37-38.

Someone in the neighborhood called police saying they did not recognize the car.[1] RP 15; CP 37. Two officers went and parked around the car. They parked so that the car could not drive off. RP 17; CP 37, 38. While the car did not have front or rear plates, it did have the appropriate temporary tag mounted in the window. RP 20. Neither officer noted anything unlawful about the manner in which the car was parked. RP 9-45. Neither officer noted any suspicious behavior from either occupant of the car. RP 41; CP 38.

Both officers approached the car; one going to each side. They asked what the occupants were doing and for identification. CP 38-39.

Officer Gronewald spoke to Mr. Carriero, the driver. RP 32. Mr. Carriero told him that they wanted to be alone and were getting ready to leave. CP 38-39. Gronewald asked Mr. Carriero for identification and held it as he checked for warrants. RP 34, 35; CP 39.

[1] The trial court found that the reporting party had stated that he was "very concerned that criminal activity or violence would be committed." CP 37. No factual basis for this conclusion, either that it was in fact said or that there was any basis for such concern, appears in the record. RP 3-64.

Officer Walk talked to the passenger, Amber Rodriguez. He asked her for identification. CP 39. She gave it, and he waited for the driver's information to be run, and then asked dispatch to run her name. RP 18-19; CP 39-40. The officer held her identification as he did this. RP 18-19; CP 39.

The female passenger had a warrant, and she was taken out of the car and arrested. RP 20.

During this time, Officer Gronewald was standing on the driver's side of the car, shining his flashlight into the car. RP 20, 36. He saw a gun in the pouch behind the driver's seat. RP 20-21, 36-37; CP 39. He called Officer Walk over, showed him, and they got Mr. Carriero out of the car. RP 21, 37. Mr. Carriero has a felony conviction, so the officers arrested him. RP 21-22, 34.

The police had the car impounded, obtained a warrant, and seized the gun. CP 40. The State charged Mr. Carriero with Unlawful Possession of a Firearm in the first degree. CP 1.

Mr. Carriero moved to suppress all the evidence based on an unlawful seizure. CP 2-11.

At the hearing, both officers testified that the area was a "high crime" area. RP 12-13, 26, 33; CP 37.

The court found that the police actions were based on an articulable suspicion of criminal activity and upheld the seizure and search. RP 62-64; CP 37-41.

The case went to trial. Mr. Carriero presented the testimony of Omar Garcia. RP 343-369. Garcia told the jury that the gun was his, and Mr. Carriero had no way of knowing it had been put into his car. RP 343-369. He said that he had gotten a ride from Mr. Carriero that day, and he put the gun in the pouch because he knew he would get in trouble with his cousin if he had the gun where they were staying. RP 346-349. Garcia said that he was drunk and high at the time and never told Mr. Carriero about the gun. He said that when he heard Mr. Carriero was charged with possession of the gun, he came forward out of guilt. RP 343-351.

Even after hearing this testimony, the jury convicted Mr. Carriero as charged. CP 103. He was sentenced and timely appealed. CP 104, 108-115.

ARGUMENT

THE COURT ERRED BY ADMITTING EVIDENCE SEIZED IN VIOLATION OF MR. CARRIERO'S RIGHTS UNDER THE FOURTH AND FOURTEENTH AMENDMENTS AND WASH. CONST. ART. I, § 7.

The officers lacked reasonable suspicion when they blocked Mr. Carriero's car in the alley and asked for identification. The trial court should have suppressed his statements and all evidence seized.

A. This court should review the warrantless seizure *de novo.*

Appellate courts review *de novo* the constitutionality of a warrantless seizure. *State v. Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008).

B. The officers unlawfully seized Mr. Carriero by blocking in his car and requesting identification.

The federal and state constitutions both protect against unlawful seizure of persons. U.S. Const. Amends. IV, XIV; Wash. Const. art. I, § 7; *State v. Diluzio*, 162 Wn. App. 585, 590, 254 P.3d 218 (2011). Unlike the Fourth Amendment, the analysis under art. I, § 7 "focuses on the rights of the individual rather than on the reasonableness of the government action." *State v. Eisfeldt*, 163 Wn.2d 628, 639, 185 P.3d 580 (2008).

Warrantless seizures are *per se* unreasonable. *State v. Doughty*, 170 Wn.2d 57, 61-62, 239 P.3d 573 (2010). The State bears the burden of proving that a warrantless seizure falls into one of the "jealously and carefully drawn" exceptions to the warrant requirement. *Id.* The exclusionary rule requires suppression of all evidence obtained pursuant to a person's unlawful seizure. *State v. Harrington*, 167 Wn.2d 656, 664, 222 P.3d 92 (2009).[2]

[2] Certain exceptions recognized under the federal constitution do not apply under art. I, § 7. *See. e.g. State v. Winterstein*, 167 Wn.2d 620, 636, 220 P.3d 1226 (2009) (inevitable

(Continued)

An investigatory stop must be justified by suspicion of criminal activity that is well-founded, reasonable, and based on specific and articulable facts. *Doughty*, 170 Wn.2d at 62. A person's presence "in a high crime area at night is not enough." *State v. Martinez*, 135 Wn. App. 174, 180, 143 P.3d 855 (2006). Instead, "[t]he circumstances must suggest a substantial possibility that the particular person has committed a specific crime or is about to do so." *Id.*

A seizure occurs whenever an officer's use of force or display of authority restrains a person "to such an extent that a reasonable person would not feel free to leave or to decline the officer's request and terminate the encounter." *State v. Fuentes*, 183 Wn.2d 149, 158 n. 7, 352 P.3d 152 (2015).

A request that a driver or passenger identify himself or herself amounts to a seizure.[3] *State v. Penfield*, 106 Wn. App. 157, 163, 22 P.3d 293 (2001); *see also State v. Brown*, 154 Wn.2d 787, 797, 117 P.3d 336 (2005). In *Penfield*, an officer asked for identification from the male driver of a car stopped because it was registered to a woman with a suspended license. The Court of Appeals found that the request for identification

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discovery exception); *State v. Afana*, 169 Wn.2d 169, 181, 233 P.3d 879 (2010) (good faith exception).

[3] Police also seize a person by physically blocking departure. *See, e.g., State v. Beito*, 147 Wn. App. 504, 510, 195 P.3d 1023 (2008); *State v. Moreno*, 173 Wn. App. 479, 491, 294 P.3d 812 (2013).

amounted to a seizure and reversed. *Penfield*, 106 Wn. App. at 162. Similarly, in *Brown*, the Supreme Court suppressed evidence seized after an officer improperly asked a car's passenger for his name. *Brown*, 154 Wn.2d at 797.

Here, the officers seized Mr. Carriero when they blocked his car in and asked for identification. CP 37-38; RP 38-39. Under the circumstances, a reasonable person would not have felt free to leave. *Fuentes*, 183 Wn.2d at 158 n. 7; *Penfield*, 106 Wn. App. at 161-163.

The officers did not have a well-founded and reasonable suspicion that Mr. Carriero was engaged in criminal activity. *Doughty*, 170 Wn.2d at 62. The only information they had was that Mr. Carriero was present "in a high crime area at night." *See Martinez*, 135 Wn. App. at 180. Nothing suggested a "substantial possibility" that he had committed a specific crime or [was] about to do so." *Id.*

The seizure was unlawful. The officers lacked reasonable suspicion and had no basis to ask for identification from Mr. Carriero or from his passenger. *Penfield*, 106 Wn. App. at 161-163; *Brown*, 154 Wn.2d at 797.

This unconstitutional seizure tainted all that followed under the "fruit of the poisonous tree" doctrine. *See State v. VanNess*, 186 Wn. App. 148, 154, 344 P.3d 713 (2015). Accordingly, Mr. Carriero's conviction

must be reversed. *Penfield*, 106 Wn. App. at 163. The evidence must be suppressed and the charge dismissed with prejudice. *Id.*

CONCLUSION

For the foregoing reasons, Mr. Carriero's conviction must be reversed and the case remanded for dismissal with prejudice.

Respectfully submitted on March 22, 2018,

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Yakima County Prosecuting Attorney
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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division III, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on March 22, 2018.

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