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NO. 36450-0-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

SHILOH KELLEY,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SPOKANE COUNTY

The Honorable Harold D. Clarke, III, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied Mr. Kelley's motion to suppress and dismiss because Mr. Kelley was unlawfully seized when Officer Rankin initially contacted him, and all evidence collected after that point is fruit of the poisonous tree.
2. Mr. Kelley assigns error to the trial court's Conclusions of Law 1-5.

Issue Presented on Appeal

1. Did the trial court err when it denied Mr. Kelley's motion to suppress and dismiss when Mr. Kelley was unlawfully seized, and all the state's evidence was collected during the subsequent unlawful *Terry*¹ investigation?

B. STATEMENT OF THE CASE

Procedural Facts

The state charged Mr. Kelley with one count of Unlawful Possession of a Controlled Substance (UPCS) and one count of Making a False or Misleading Statement to a Public Servant. CP

¹ *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

77. Mr. Kelley was convicted as charged by a jury. RP 48, 311-12. The trial court sentenced Mr. Kelley to a 24-month residential Drug Offender Sentencing Alternative (DOSA) sentence. CP 162. Mr. Kelley filed a timely noticed of appeal. CP 171-72.

Substantive Facts

On June 26, 2018, Shiloh Kelley was sitting in the backseat of Antoinette Beeman's Saab sedan in the parking lot of a Maverik gas station in Spokane, Washington. RP 76, 152-53. Ms. Beeman was smoking a cigarette near the front of her car when Officer Brandon Rankin of the Spokane Police Department entered the parking lot. RP 152. When she noticed him approaching, she put her cigarette out and entered the gas station. RP 152. Officer Rankin approached her vehicle and looked inside. RP 154.

He observed Mr. Kelley sitting in the backseat holding a cell phone and noticed in the panel of the front passenger's door, a plastic bottle that had been fashioned into what he believed to be a water pipe. RP 155. Officer Rankin also observed on the floorboard of the front passenger's seat, two pieces of a crystalline substance he believed to resemble methamphetamine. RP 155.

When Ms. Beeman emerged from the store, she spoke to

Officer Rankin. RP 155-56. She denied any knowledge of the drugs inside her car. CP 114. When Officer Rankin informed Ms. Beeman he was going to seek a search warrant for the car, another officer arrived on the scene. RP 76. Mr. Kelley then told the officers he wanted to get out of the car. RP 156. Officer Rankin instructed him to step out of the car and submit to a search for weapons. RP 156-57. Officer Rankin did not find any contraband during the frisk, but told Mr. Kelley that he was part of an ongoing criminal investigation and therefore needed to be identified pending the results of the search warrant. RP 158-59. Mr. Kelley could not produce identification but told Officer Rankin that he was "Ryan D. Ogden." RP 160. After being questioned for several minutes, Mr. Kelley told the officers his true name. RP 172.

Officer Rankin ran a records search using the information Mr. Kelley provided and it returned a photo of Ryan Ogden, who does not resemble Mr. Kelley. RP 164. Officer Rankin returned and arrested Mr. Kelley for Obstructing a Law Enforcement Officer. RP 165. During the search incident to arrest, Officer Rankin discovered in Mr. Kelley's front left pocket: \$50 in cash and a clear plastic bag. RP 167. As Officer Rankin was removing the plastic bag, Mr. Kelley

said “it’s just an empty bag.” RP 169-70.

[PROSECUTOR]: Now, when you removed the baggie from his left pocket, did the defendant say anything to you at that point?

[RANKIN]: He said that it’s just an empty bag.

[PROSECUTOR]: Can you please describe how did that happen, the timing, things like that?

[RANKIN]: So, I was searching his left front pocket, so I’m standing on Mr. Kelley’s left side, slightly behind him; and as I’m emptying the pocket, I removed the plastic bag and the cash almost at the same time. As I pulled it completely from the pocket, Mr. Kelley made the statement “it’s just an empty bag.” I hadn’t had a chance to even look at the bag or examine what was inside of it or even finish searching the pocket completely at that point.

RP 169-170. Upon further inspection of the bag, Office Rankin noticed a small piece of an unidentified brown substance. RP 168.

Officer Rankin booked Mr. Kelley into the Spokane County jail and logged into evidence the bag found during the search incident to arrest. RP 173. The black substance inside the bag tested positive for heroin. RP 250; Ex. 3.

Motion To Suppress/Dismiss

Mr. Kelley moved to suppress the state’s evidence on the basis that it was the product of an unlawful seizure and asked the trial court to dismiss both charges during the pretrial stage. CP 11.

The trial court held a suppression hearing and denied Mr. Kelley's motion to suppress and dismiss. RP 41-46. The trial court entered Findings of Fact and Conclusions of Law following the suppression hearing. CP 112-18. The trial court concluded that:

1. The Defendant was not seized . . . when Officer Rankin, and other officers, approached the vehicle, engaged the Defendant in conversation, and shined their flashlights into the vehicle;
2. Officer Rankin had a reasonable, articulable suspicion of the crime of Possession of a Controlled Substance based on his observations of the device used to smoke methamphetamine and the white crystalline substance he recognized as methamphetamine inside the vehicle, combined with the fact that the Defendant was the only occupant of the vehicle and the driver's statements that she does not know the Defendant and insistence that she does not know of any drugs or paraphernalia in her vehicle and if there were to be any they were not hers;
3. Officer Rankin was therefore permitted to request the Defendant to identify himself pursuant to a *Terry* stop/investigation;
4. Officer Rankin had probable cause to arrest the Defendant for Obstructing a Law Enforcement Officer when the Defendant provided a name and date of birth of a person who did not match the appearance of the Defendant; and
5. Officer Rankin discovered the brown tar-like substance in the plastic bag in the Defendant's pants pocket during a valid search incident to arrest.

CP 115-18.

The state sought to admit Mr. Kelley's statements to Officer Rankin regarding his name and date of birth. CP 58. The trial court held a hearing pursuant to CrR 3.5 and determined that the statements were admissible at trial because they were not made in response to custodial interrogation. RP 90-92.

C. ARGUMENT

1. THE TRIAL COURT ERRED WHEN IT DENIED MR. KELLEY'S MOTION TO SUPPRESS AND DISMISS BECAUSE THE STATE'S EVIDENCE IS THE PRODUCT OF AN UNLAWFUL SEIZURE

- a. Mr. Kelley was unlawfully seized when Officer Rankin contacted him inside the car and the subsequent search incident to arrest was illegal

Both the Fourth Amendment to the United States Constitution and art. I, § 7 of the Washington State Constitution protect Washington citizens from unreasonable searches and seizures. U.S. Const. Amend. IV; Wash. Const. art. I, § 7. Art I, § 7 provides defendants with even greater protections than the Fourth Amendment. *State v. Reeder*, 184 Wn.2d 805, 813-14, 365 P.3d 1243 (2015).

Under art. I, § 7, a person is seized "when, by means of

physical force or a show of authority” his or her freedom of movement is restrained and a reasonable person would not have believed he or she is (1) free to leave, given all the circumstances, or (2) free to otherwise decline an officer's request and terminate the encounter. *State v. O'Neill*, 148 Wn.2d 564, 574, 62 P.3d 489 (2003) (internal quotations and citations omitted).

Courts employ an objective standard when evaluating whether a defendant was unlawfully seized. *O'Neill*, 148 Wn.2d at 574 (citing *State v. Young*, 135 Wn.2d 498, 501, 957 P.2d 681 (1998)). The officer's subjective intent is irrelevant to a seizure analysis; courts must examine the officer's actions and whether a reasonable person would believe they were free to terminate the contact as a result of those actions. *O'Neill*, 148 Wn.2d at 575 (citing *State v. Knox*, 86 Wn. App. 831, 838, 939 P.2d 710 (1997)). Circumstances that indicate a seizure include the presence of multiple officers, the physical touching of the citizen, and the use of language that suggests compliance with the officer's order could be compelled. *State v. Cerrillo*, 122 Wn. App. 341, 350, 93 P.3d 960 (2004) (citing *Young*, 135 Wn.2d at 512).

Under *Terry*, a search is permissible when a police officer

has a reasonable suspicion of criminal activity based on articulable facts known to them at the inception of the stop. *State v. Fuentes*, 183 Wn.2d 149, 158, 352 P.3d 152 (2015) (citing *State v. Gatewood*, 163 Wn.2d 534, 539-40, 182 P.3d 426 (2008)). In evaluating whether an officer had a reasonable suspicion, courts look to the totality of the circumstances known to the officer. *Fuentes*, 183 Wn.2d at 158 (citing *State v. Glover*, 116 Wn.2d 509, 513-14, 352 P.2d 152 (1991)).

The circumstances of a stop include the officer's training and experience, the location of the stop, the conduct of the person detained, the purpose of the stop, and the amount of physical intrusion on the suspect's liberty. *Fuentes*, 183 Wn.2d at 158 (citing *State v. Acrey*, 148 Wn.2d 738, 746-47, 64 P.3d 594 (2003)).

Here, there were no facts to support a reasonable suspicion that Mr. Kelley was involved in criminal activity at the inception of his contact with Officer Rankin. The record shows that Officer Rankin decided to investigate the vehicle based on facts that do not suggest any criminal activity:

[PROSECUTOR]: And did you at any point exit – get out of your patrol vehicle and approach the Saab car?

[RANKIN]: I did.

[PROSECUTOR]: For what purpose?

[RANKIN]: I observed an adult female standing near the hood of the vehicle. When she saw me, she appeared to end smoking her cigarette and go into the store. So I just approached the vehicle to see what was going on in or around the car.

RP 152. The facts that drew Officer Rankin's attention to the car where Mr. Kelley was sitting were that there was a then-unidentified woman smoking a cigarette outside the car, and that she put her cigarette out and entered the store once she saw a patrol car enter the parking lot.

Nothing about what Officer Rankin initially observed justifies a *Terry* detention of Mr. Kelley. At the inception of the investigation, Mr. Kelley was sitting in a car that was legally parked in a public parking lot. Officer Rankin's admitted reason for investigating the car is that he saw Ms. Beeman walk into the store as he entered the parking lot.

The record does not indicate that Officer Rankin was even aware of Mr. Kelley's presence until he had already approached the car with his flashlight and started to investigate. When Officer Rankin looked inside the car, he noticed Mr. Kelley sitting in the backseat holding a cell phone. RP 153. The police only discovered

the suspected methamphetamine and water pipe after Mr. Kelley had been illegally seized inside the car. RP 153-54.

The trial court erred by concluding that Mr. Kelley was not seized until he exited the car even though the police began questioning Mr. Kelley during their investigation of a paraphernalia possession crime while he was seated in the back of the car. RP 44.

Without reasonable suspicion of criminal activity, Officer Rankin shined his flashlight into the car to illuminate drug paraphernalia and began questioning Mr. Kelley, who was the sole occupant of the car. RP 113, 152, 156. Mr. Kelley was not engaged in suspicious activity. Rather, he was sitting in the backseat holding a cell phone. RP 153. The presence of a potential water pipe in the front panel the front passenger's door did not establish a reasonable suspicion that Mr. Kelley was involved in criminal activity; the search was a fishing expedition based on no more than a hunch. RP 155.

Furthermore, as soon as Ms. Beeman emerged from the gas station, Officer Rankin began to question her about the car and its contents. RP 155-56. Mr. Kelley was able to observe this

interaction from inside the car and asked to get out once a further search warrant was discussed. RP 156. When Mr. Kelley exited the car, he was physically detained and searched in the presence of multiple officers. RP 155.

When Mr. Kelley exited the car, Officer Rankin searched him for weapons and demanded identification before he could leave. RP 156-58. Under an objective standard, no reasonable person would believe they were free to leave a car while an officer was investigating a crime involving the presence of contraband inside the car.

- b. Mr. Kelley's statements regarding his identity were improperly obtained because they came during questioning that followed an illegal seizure

"[W]hen an individual has been unlawfully seized, no subsequent events or circumstances can retroactively justify [the] stop." *State v. Butler*, 2 Wn. App. 2d 549, 563, 411 P.3d 393 (2018) (citing *State v. Z.U.E.*, 178 Wn. App. 769, 780, 315 P.3d 1158 (2014)). Under *Butler*, if a police officer illegally seizes an individual, they cannot later remedy this unlawful seizure by claiming that the seizure produced evidence of a crime. Any evidence of this type

would be fruit of the poisonous tree and an inadmissible product of the initial unlawful seizure. *Butler*, 2 Wn. App. 2d at 565.

In this case, Mr. Kelley was unlawfully seized inside the car when contacted by Officer Rankin because there was no reason to detain Mr. Kelley who had not given the police cause to believe he might have been involved in criminal activity. The drug evidence uncovered after that point is the product of an unlawful seizure and cannot justify further detention of Mr. Kelley. The record establishes that Mr. Kelley did not provide the false name or date of birth to Officer Rankin until after Officer Rankin searched for weapons and demanded Mr. Kelley's identification. RP 160. This demand occurred after the initial unlawful seizure.

The trial court erred when it concluded that Officer Rankin was "permitted to request the defendant to identify himself pursuant to a *Terry* stop/investigation." CP 117 (Conclusion of Law 3). The justification for requesting Mr. Kelley's identification was a *Terry* stop that originated from an unlawful seizure. The circumstances leading up to the alleged *Terry* stop render it unlawful, meaning that any evidence derived from the stop should not have been admitted and the trial court erred when it denied Mr. Kelley's motion to

suppress his statements.

c. Remedy

Evidence seized illegally must be suppressed under the exclusionary rule. *State v. Gaines*, 154 Wn.2d 711, 716-17, 116 P.3d 993 (2005) (citing *State v. Ladson*, 138 Wn.2d 343, 359, 979 P.2d 833 (1999)). Furthermore, other evidence derived from the illegal search or seizure is subject to suppression under the “fruit of the poisonous tree” doctrine. *Gaines*, 154 Wn.2d at 716-17. “Under article 1, section 7, a lawful custodial arrest is a constitutionally required prerequisite to any search incident to arrest.” *O’Neill*, 148 Wn.2d at 585. The arrest provides the “authority of law” required to search or seize under art. I, § 7. *O’Neill*, 148 Wn.2d at 585.

Mr. Kelley was unlawfully seized while inside Ms. Beeman’s car. Thus, and any evidence collected after that point is fruit of the poisonous tree and should have been suppressed at trial. *Gaines*, 154 Wn.2d at 716-17. Because Mr. Kelley’s subsequent arrest was unlawful, the products of the search incident to his arrest, including the baggie containing heroin, are not admissible. Similarly, Mr. Kelley’s statements about his identity were not made until after the unlawful seizure. RP 160. Thus, these statements are also fruit of

the poisonous tree and should be suppressed.

This Court should reverse the conviction and remand for suppression of the evidence - without which the state cannot pursue charges against Mr. Kelley.

D. CONCLUSION

The state's evidence in this case is the product of an illegal seizure that violated the Fourth Amendment and art. I, § 7 of the Washington State Constitution. Following that seizure, the police subjected Mr. Kelley to an unlawful *Terry* detention where he offered a false name and they discovered a bag of heroin on his person. Mr. Kelley sought to suppress his statements to Officer Rankin and the heroin, but the trial court erroneously denied his motion to suppress.

DATED this 30th day of May 2019.

Respectfully submitted,

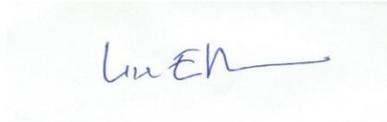


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I, Lise Ellner, a person over the age of 18 years of age, served the Spokane County Prosecutor's Office SCPAAppeals@spokanecounty.org and Shiloh Kelley/DOC#783822, Washington Corrections Center, PO Box 900, Shelton, WA 98594 a true copy of the document to which this certificate is affixed on May 29, 2019. Service was made by electronically to the prosecutor and Shiloh Kelley by depositing in the mails of the United States of America, properly stamped and addressed.

A handwritten signature in blue ink that reads "Lise Ellner" followed by a horizontal line.

Signature

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