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Court of Appeals
Division III
State of Washington
10/10/2019 4:32 PM

No. 36542-5

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON
Chelan County Superior Court
Cause No. 17-1-00690-5

State of Washington, Respondent

v.

Kenneth Stephens, Appellant

BRIEF OF RESPONDENT

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I. STATEMENT OF THE ISSUES

1. Was there reasonable suspicion to temporarily detain Stephens after the officer received information from a citizen informant that Stephens had recently committed a theft at a nearby store?
2. Were Stephens' statements to officer(s) freely and voluntarily made when (1) Stephens was advised of (and understood) his constitutional rights and (2) agreed to speak with Officer Gonzalez about the incident?
3. Did the trial court abuse its discretion in denying Stephens' motion to dismiss for prosecutorial misconduct when it found that the State had not committed misconduct nor had Stephens been prejudiced?
4. Was there sufficient evidence for the crime of unlawful possession of a controlled substance where Stephens was found with methamphetamine in his person?
5. Did the trial court properly exercise its discretion when it (1) considered and subsequently denied Stephens' request for a residential DOSA sentence, (2) ultimately sentenced Stephens within the standard range, and (3) only gave Stephens credit for the time he served on the crime he was sentenced for?

II. STATEMENT OF THE CASE

A. Statement of Facts

On April 10, 2017, Officer Albert Gonzalez responded to a reported theft at a local retail store. RP 353-54; CP 99. An employee of the store had called 911 after seeing a man in the store who they identified had stolen video equipment earlier in the week. RP 346, 349; CP 99. The employee described the man as white and in his mid-thirties, wearing a black baseball cap and a black and gray jacket, riding a bicycle. CP 99-100; RP 355. The employee stated the man had not stolen anything that day, but had stolen items on previous days which were captured on security footage. CP 99-100. The employee further advised 911 that the suspect was riding Southbound on Mission Street.

Officer Gonzalez responded to this location and found Stephens, who (except for the described age) matched the location, direction of travel, clothing description, race, sex, and mode of transportation that was described by the employee. RP 356-57; CP 85. At this point, Officer Gonzalez detained Stephens, told Stephens he was investigating a theft, and advised him of his constitutional rights. RP 51, 357-58. Defendant stated he understood his rights, was willing to speak to Officer Gonzalez, and proceeded to admit that he had stolen the video cameras and sold them. RP 359. At this point, Officer Gonzalez advised Stephens he was under arrest,

arrested him, and searched him incident to the arrest. RP 359-60. On Stephens' person, Officer Gonzalez found two plastic baggies and a meth pipe that was later found to contain methamphetamine. RP 360-61.

B. Procedural History

Stephens was originally charged by the City of Wenatchee for third degree theft. Around six months later, the city prosecutor emailed a deputy prosecuting attorney for the State requesting that it file felony charges on Stephens. CP 59. On November 29, 2017, the State charged Stephens with two felonies: first degree trafficking in stolen property and unlawful possession of a controlled substance (meth). CP 1.

Stephens filed a motion to suppress the evidence based on an unlawful detention and filed a motion to dismiss for prosecutorial misconduct, CP 14-31; in addition to hearing these motions, the court also conducted a CrR 3.5 hearing to determine the admissibility of Stephens' statements to Officer Gonzalez.

As to the motion to dismiss, Stephens alleged that (1) evidence had been lost (a 911 tape as well as possibly a dashcam video) and (2) the State delayed filing the case. CP 20-31. Regarding the tapes, although a 911 call was initially recorded, it was automatically deleted (per the agency's retention policy) around July of 2017. CP 91, 174. It was unclear if Officer

Gonzalez's contact and arrest of Stephens was recorded, but in any event no recording was preserved. RP 76, RP 368-69.

The court denied all of Stephens' motions and found that Stephens' statements to Officer Gonzalez were freely and voluntarily made and therefore admissible. CP 172-75. The court also entered agreed written findings and conclusions for all of these motions as well as the CrR 3.5 hearing. 1/14/19 RP 4-6; CP 172-75. As to the CrR 3.6 motion to suppress, the court held that Officer Gonzalez had a reasonable suspicion to stop Stephens based on information from a store employee that Stephens had recently committed theft from the store. CP 172-73. In denying Stephens' motion to dismiss, the court ruled that Stephens had failed to establish any misconduct by the State or establish that he was prejudiced. CP 175.

The case proceeded to trial and Stephens was convicted of one count of unlawful possession of a controlled substance. Before the sentencing hearing, the trial court acknowledged it could either sentence Stephens within the standard range or impose a DOSA sentence. 12/19/18 RP 17. It ultimately sentenced Stephens within the standard range (14-month sentence within the standard range of 12+ to 24 months). RP 510-11. It also denied Stephens' request for a DOSA, reasoning that the DOSA may not work because Stephens had another pending case that would likely interfere with his ability to complete the DOSA. RP 510-11.

III. ARGUMENT

Unchallenged findings of fact are verities on appeal, challenged findings of fact are reviewed for substantial evidence, and a trial court's legal conclusions are reviewed de novo. *State v. Cherry*, 191 Wn. App. 456, 464, 362 P.3d 313 (2015); *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994) (“Defendant’s failure to assign error to the facts entered by the trial court precludes our review of these facts and renders these facts binding on appeal”).

In the present case, the trial court entered agreed written findings of fact for the CrR 3.5 hearing, the CrR 3.6 hearing, and the motion to dismiss. 1/14/19 RP 4-6; CP 172-75.

A. Officer Gonzalez had a reasonable suspicion to stop Stephens.

A defendant may be detained for investigative purposes when an officer has a reasonable suspicion based on articulable facts that criminal activity has occurred. *State v. Armenta*, 134 Wn.2d 1, 20, 948 P.2d 1280 (1997). When an officer is provided information from an informant, courts consider the following factors when determining whether that information carries sufficient indicia of reliability (to justify an investigative stop): (1) whether the informant is reliable, (2) whether the information was obtained in a reliable fashion, and (3) whether the officers can corroborate any details

of the informant's tip. *State v. Kennedy*, 107 Wn.2d 1, 7, 726 P.2d 445 (1986); *State v. Lee*, 147 Wn. App. 912, 199 P.3d 445 (2008).

Citizen informants are presumptively reliable. *State v. Gaddy*, 152 Wn.2d 64, 73, 93 P.3d 872 (2004). However, some showing of credibility is nevertheless necessary. *State v. Jones*, 85 Wn. App. 797, 800, 934 P.2d 1224 (1997). When assessing this, Washington cases focus heavily on the individual circumstances of each case. *See State v. Conner*, 58 Wn. App. 90, 96, 791 P.2d 261 (1990). In *Conner*, the court held that an employee who had called to report a crime from a specific location was reliable. *Id.*

The present case is analogous to *Conner*, and the trial court ruled that Officer Gonzalez had a reasonable suspicion based on articulable facts to justify temporarily detaining Stephens to conduct an investigation into the reported criminal activity. This conclusion is supported by the court's findings of fact: (1) Devin Lau, a store employee called 911 and advised dispatch that a person who had previously stolen video cameras from the store within the last week was in the store; (2) the employee relayed that this person had left the store, was in his mid-thirties, was wearing a black baseball cap and gray jacket, was riding a bike, and was southbound on Mission St.; (3) Officer Gonzalez responded to this location and observed Stephens who matched the exact description, mode of transportation, and direction of travel as the suspect. These findings are unchallenged verities

that support the court's conclusion. Because Officer Gonzalez had a reasonable suspicion to temporarily detain Stephens to investigate the reported theft, the court properly denied his motion to suppress.

B. Stephens' statements to Officer Gonzalez were freely and voluntarily made.

When a suspect is in custody, a court must determine the voluntariness of any statements he/she makes before admitting those statements at trial. CrR 3.5; *State v. Negrete*, 72 Wn. App. 62, 70, 863 P.2d 137 (1993). In determining whether a statement was voluntarily made, a court will consider such factors as whether the person was in custody, whether he was advised of his Fifth Amendment rights, threats or promises by the interrogator, length and location of the interrogation, etc. *State v. Curtiss*, 161 Wn. App. 673, 690, 250 P.3d 496 (2011).

In the present case, the trial court ruled that Stephens' statements to Officer Gonzalez were "freely and voluntarily made." CP 173. In support of this conclusion, the court found that Stephens had been advised of his Fifth Amendment rights, understood those rights, and was willing to speak to Officer Gonzalez. CP 173. Although it did not specifically rule on whether Stephens was in custody at the time he made these statements, the court did find that Stephens was detained at the time but not yet under arrest.

CP 173. These findings are unchallenged verities and support the court's conclusion that the statements were voluntarily made.

C. There was probable cause to arrest Stephens.

Officer Gonzalez had probable cause to arrest Stephens for theft. Stephens was identified by store employees as having stolen items from the store earlier in the week and he confessed to stealing these items. It was only subsequent to this confession that Officer Gonzalez arrested Stephens (and the search that found the meth was incident to this arrest). RP 359-61.

Stephens' contention that Officer Gonzalez arrested him prior to him making any statements contradicts the trial court's conclusion and conflates the terms "custody," "arrest," and "investigatory stop." Although an officer must have probable cause to make an arrest, a person may be in custody prior to arrest, and whether a person is in custody or not is determined based on a number of factors. *Berkemer v. McCarty*, 468 U.S. 420, 104 S. Ct. 3138, 82 L. Ed.2d 317 (1984); *State v. Harris*, 106 Wn.2d 784, 789-90, 725 P.2d 975 (1986). Whether someone is in "custody" is relevant to the voluntariness of his/her statements to law enforcement. Whether there is probable cause to effect an arrest may be relevant to any evidence obtained as a result of the arrest.

In the present case, the trial court found that Stephens was not arrested until after confessing to the theft. CP 173. Up until this point, the

court found that Stephens was merely detained (based on a reasonable suspicion) by Officer Gonzalez while he investigated the theft. CP 173.

Stephens' argument that he was arrested without probable cause at the time he was Mirandized is not only incorrect but also makes a meaningless distinction. First it is incorrect: the trial court ruled that at the time of questioning, Stephens was merely detained, and this is a verity on appeal (as well as supported by substantial evidence). Second, assuming *arguendo*, that he was arrested when he was Mirandized and there was not probable cause at this point, this would not have affected Officer Gonzalez's ability to question Stephens *post-Miranda*: Stephens' statements were voluntarily made to an officer who had reasonable suspicion to detain and question him. Nor would it have affected Officer Gonzalez's *post-confession* search incident to arrest. At the time of the search incident to the arrest, Officer Gonzalez had probable cause to arrest Stephens (information from employees that Stephens had recently stolen items coupled with Stephens' confession).

D. The trial court did not abuse its discretion in denying Stephens' motion to dismiss.

A defendant may move to dismiss a criminal prosecution due to governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. CrR

8.3(b). A trial court's decision to grant or deny a defendant's CrR 8.3(b) motion to dismiss is reviewed for abuse of discretion. *State v. Koerber*, 85 Wn. App. 1, 4, 931 P.2d 904 (1996); *State v. Coleman*, 54 Wn. App. 742, 748, 775 P.2d 986 (1989).

In the present case, the court did not abuse its discretion because Stephens failed to not only show any governmental misconduct, but furthermore failed to show any prejudice to his right to a fair trial. While the court recognized that potential evidence may have been lost or destroyed, it was unable to conclude this was a result of any misconduct by the State. As such, the court did not abuse its discretion in denying Stephens' CrR 8.3 motion.

E. There was sufficient evidence for the crime of unlawful possession of a controlled substance, methamphetamine.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilty beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220, 616 P.2d 628 (1980)). When sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *Salinas* at 201. A claim of insufficiency admits the

truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *Id.*

For there to be sufficient evidence of the crime of unlawful possession of a controlled substance, there must be evidence that Stephens possessed a controlled substance, specifically methamphetamine. RCW 69.50.4013(1). Neither knowledge nor intent is an element of the crime. *State v. Schmeling*, 191 Wn. App. 795, 802, 365 P.3d 202 (2015).

In the present case, there was sufficient evidence to convict Stephens of the crime of unlawful possession of a controlled substance—methamphetamine. Officer Gonzalez testified he located baggies and a meth pipe on Stephens; the pipe contained methamphetamine. RP 359-60, 411.

F. The trial court properly exercised its discretion when it sentenced Stephens within the standard range, considered and denied his request for a DOSA, and only authorized credit for the time he'd served on the crime he was being sentenced on.

While no defendant is entitled to challenge a sentence within the standard range, a defendant may still challenge the underlying legal determination by which the sentencing court reaches its decision. *State v. McFarland*, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017). A sentence within

the standard range is reviewable when the sentencing court refused to exercise discretion at all or relied on an impermissible basis in doing so. *Id.*

In the present case, the court sentenced Stephens within the standard range while acknowledging it had the discretion to sentence him to a DOSA. RP 510-512. Going further, the court reasoned that a DOSA may not work well because Stephens had another pending case “that is going to interfere with [Stephens] ability to participate in a residential DOSA sentence and so [the court] is not going to give that to [Stephens].” RP 511. The court properly exercised its discretion in denying Stephens’ request for a DOSA and imposing a standard range sentence.

Additionally, the resolution of Stephens’ other pending case post-sentencing does not justify revisiting the court’s decision to impose a standard range sentence. *See State v. Shove*, 113 Wn.2d 83, 86, 776 P.2d 132 (1989) (Washington sentencing laws are structured as a system of determinate sentences that are ascertained at the time of sentencing and generally not subject to later change). Because the court properly exercised its discretion at the time of sentencing, it is not reviewable.

The court also properly denied Stephens request for credit for time that he had served on a crime he was never convicted of (theft). In general, a sentencing court shall give an offender credit for all confinement time served before the sentencing if that confinement was solely in regard to the

offense for which the offender is being sentenced. RCW 9.94A.505(6). An offender “should be given credit **only** for presentence time he has actually served on a charged offense.” *State v. Stewart*, 136 Wn. App. 162, 165, 149 P.3d 391 (2006) (emphasis added). Although Stephens did serve some time on an uncharged theft offense (previously charged in a different jurisdiction), he was not charged with this offense in the present case nor convicted of it.

Stephens’ argument that RCW 9.94A.505(6) does not preclude a sentencing court from giving credit for time served on a separate uncharged offense assumes courts have plenary sentencing authority. This is not so: “The legislature has plenary authority over sentencing.” *State v. Jones*, 182 Wn.2d 1, 6, 338 P.3d 278 (2014). Without specific authority to give credit for time served on an uncharged offense (theft), the sentencing court has no discretion to do so.

G. The State concedes that interest should not have been ordered on nonrestitution legal financial obligations.

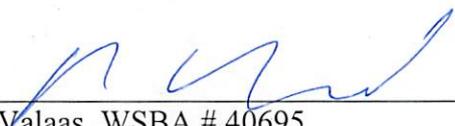
As of June 7, 2018, no interest shall accrue on nonrestitution legal financial obligations. RCW 10.82.090(1). The State concedes that it was error for the court to impose interest in the present case and agrees with Stephens that the appropriate remedy is a remand for the limited purpose of striking this language from the judgment and sentence.

IV. CONCLUSION

Based on the foregoing reasons, the court should affirm Stephens' conviction and only remand for the limited purpose of striking the interest from the legal financial obligations.

DATED this 10 day of October, 2019

Respectfully submitted:



Ryan Valaas, WSBA # 40695
Deputy Prosecuting Attorney

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

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

KENNETH STEPHENS,

Defendant/Appellant.

No. 36542-5-III
Chelan Co. Superior Court No. 17-1-00690-5

DECLARATION OF SERVICE

I, Cindy Dietz, under penalty of perjury under the laws of the State of Washington, declare that on the 10th day of October, 2019, I caused the original BRIEF OF RESPONDENT to be filed via electronic transmission with the Court of Appeals, Division III, and a true and correct copy of the same to be served on the following in the manner indicated below:

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Signed at Wenatchee, Washington, this 10th day of October, 2019.



Cindy Dietz
Legal Administrative Supervisor
Chelan County Prosecuting Attorney's Office

CHELAN COUNTY PROSECUTING ATTORNEY

October 10, 2019 - 4:32 PM

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