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Court of Appeals
Division III
State of Washington
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NO. 36561-1-III

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

STATE OF WASHINGTON,

Respondent,

v.

RICO DAVIS,

Appellant.

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

The Honorable John O. Cooney, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE SEIZURE WAS UNLAWFUL BECAUSE, AT THE TIME OF INITIAL DETENTION, THE OFFICER NO LONGER SUSPECTED A BURGLARY OR TRESPASS.

The State claims Officer Zimmerman had reasonable suspicion that justified detaining Davis to investigate a potential burglary or trespass. Brief of Respondent at 9. This assertion is belied by Zimmerman's own testimony. All burglary and trespass offenses involve knowingly and unlawfully entering or remaining in a building or dwelling. RCW 9A.52.020; RCW 9A.52.025; RCW 9A.52.030; RCW 9A.52.070. Officer Zimmerman knew Davis had not unlawfully entered because he knew "the female let him in." IRP 14. He knew Davis was not unlawfully remaining because Davis was offering to leave. Ex. 1. Instead of acknowledging that any reasonable suspicion had dissipated, Zimmerman insisted on identifying Davis in an unlawful seizure.

The State also claims Davis' detention was justified because he gave police a false name. Brief of Respondent at 9-10. This argument must be rejected because the facts warranting an investigative detention must exist at the initiation of the detention. Terry v. Ohio, 392 U.S. 1, 19-20, 88 S. Ct. 1868, 1879, 20 L. Ed. 2d 889 (1968). When Zimmerman initially detained Davis, he had not yet provided a false name. Ex. 1. The State agrees Davis was seized when he offered to leave and Zimmerman instead asked him to

identify himself. Brief of Respondent at 2, 8. His initial detention cannot be justified on the grounds that, while already unlawfully detained, Davis gave a false name. That fact can have no bearing on this Court's analysis as to whether the detention was justified at the outset, as required under Terry.

2. THE RECORD IS SUFFICIENT TO REVIEW THE UNLAWFUL SEARCH OF DAVIS' PERSON, WHICH WAS NOT A SEARCH INCIDENT TO ARREST.

This Court should find the unlawful Terry search is an issue that can be raised for the first time on appeal because it is manifest in the record, which is sufficient to permit review. The State implicitly agrees the necessary evidence is in the record. The State explains that "The motion to suppress based on an unlawful search would have been based on identical evidence as the motion to suppress based on an unlawful detention." Brief of Respondent at 21. Because the motion, if it had been made, would have presented "identical evidence," with the motion that was, in fact made, then the record is sufficient to review both issues.

In the opening brief, Davis argued the wallet was obviously not a weapon and, therefore, continuing to pry into its contents exceeded the scope of a valid frisk or pat-down for dangerous weapons under Terry. In response, the State argues in part that the search was permissible under the exception to the warrant requirement for searches conducted incident to a lawful arrest.

Brief of Respondent at 18-19. The flaw in this argument is that, at the time of the search, Davis was not under arrest.

Nothing in the record indicates that Davis was under arrest at the time of the search. Zimmerman had decided to detain Davis. Ex. 1 at time stamp 22:18; CP 18. But not every seizure is an arrest. See Terry, 392 U.S. at 16.

An arrest occurs when the officer manifests the intent to take the person into custody. State v. Patton, 167 Wn.2d 379, 387, 219 P.3d 651 (2009). This is an objective test based on all the surrounding circumstances, including whether the officer informed the person he or she was under arrest. Id. Even when police tell a person he is under arrest, the encounter may amount to a mere investigative detention. See State v. Lyons, 85 Wn. App. 267, 270, 932 P.2d 188 (1997). For example, in Lyons, the officer suspected Lyons of driving with a suspended license. Id. at 269. He chased Lyons, caught up with him, grabbed him, and told him he was under arrest for driving while suspended. Id. On appeal, Lyons argued this was an unlawful arrest without probable cause. Id. at 270. This Court concluded it was a mere investigative detention, designed to confirm or dispel the suspicion of driving with a suspended license. Id. at 271.

Here, Zimmerman did not say he was arresting Davis for giving a false name; he “detained” him “due to not being able to properly identify

him.” CP 18. This language is far more akin to an investigative detention, designed to confirm or dispel a concern that Davis might have given a false name, than an arrest based on probable cause.

A lawful arrest is a necessary prerequisite to a search incident to arrest. State v. Grande, 164 Wn.2d 135, 139-40, 187 P.3d 248 (2008). Because Davis was not yet under arrest, the warrantless search of his person was not a search incident to arrest.

3. THE STRIP SEARCH WAS UNLAWFUL AND UNCONSTITUTIONAL REGARDLESS OF DAVIS’ STATUS AS A PERSON SUBJECT TO COMMUNITY CUSTODY.

The State claims Davis could be strip searched without a warrant and in public because of his status as a person on community custody. Brief of Respondent at 28. This argument should be rejected because pertinent aspects of the statute and the protections of the Washington Constitution protect even probationers from unreasonable public strip searches.

The State argues RCW 10.79.130 does not protect Davis because he was serving a term of community custody. Brief of Respondent at 28. But the State also claims that his warrant for violating the terms of his community custody means that he “has been arrested for . . . an offense involving possession of a drug” and therefore reasonable suspicion is automatically deemed to exist under RCW 10.79.130(2)(c). Brief of

Respondent at 28-29. Notably, the State fails to present any reasoned analysis of the statute or other authority for its claim that RCW 10.79.130(2) allows a strip search when a person has been arrested on a Department of Corrections warrant for violating conditions of community custody, rather than when the person has actually been arrested for a drug offense. Brief of Respondent at 28-29.

The State further claims there was reasonable suspicion to strip search Davis based on his history of drug offenses and RCW 10.79.140. Brief of Respondent at 29. What the State fails to recognize is that a strip search based on reasonable suspicion under RCW 10.79.140 requires “the specific prior written approval of the jail unit supervisor on duty.” RCW 10.79.140(2). There is no indication that Keller sought or obtained anyone’s written approval before searching Davis. CP 100-01. RCW 10.79.140 does not authorize the strip search in this case.

Regardless of community custody status, the standards requiring privacy for a strip search still apply. RCW 10.79.100; RCW 10.79.120. Non private searches are permitted only under two specifically delineated circumstances: “if there arises a specific threat to institutional security that reasonably requires such a search or if all persons in the facility are being searched for the discovery of weapons or contraband.” RCW 13.34.100(7) (emphasis added). Neither of those conditions pertained in Davis’ case. It

was not permissible, under the statute, to strip search him in an area within view of a hallway where any officer could walk by. RCW 10.79.100.

The legislative intent to restrict strip searches to situations where such searches are necessary is also not limited to pre-trial arrestees. RCW 10.79.060. This statement of intent is not among the provisions exempted from application in RCW 10.79.120.

The diminished privacy rights of those serving a term of community custody do not go so far as to make them subject to random suspicionless searches. Warrantless searches of persons on probation may occur “only where there is a nexus between the property searched and the alleged probation violation. State v. Cornwell, 190 Wn.2d 296, 306, 412 P.3d 1265 (2018). The court explained in Cornwell that “the individual’s privacy interest is diminished only to the extent necessary for the State to monitor compliance with the particular probation condition that gave rise to the search.” Id. at 304. The court continued, “The individual’s other property, which has no nexus to the suspected violation, remains free from search.” Id. A suspected violation of community custody conditions does not entitle the State to a search that amounts to a fishing expedition. Id. Even if chapter 10.79 RCW does not prohibit the suspicionless strip search in this case, article I, section 7 of the Washington Constitution does. Cornwell, 190 Wn.2d at 306.

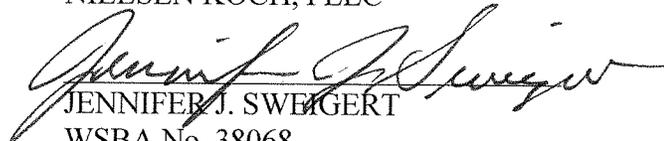
B. CONCLUSION

For the foregoing reasons, and for the reasons stated in the opening Brief of Appellant, Davis asks this Court to reverse his conviction.

DATED this 9th day of January, 2020.

Respectfully submitted,

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