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Court of Appeals
Division III
State of Washington
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NO. 36703-7-III

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

STATE OF WASHINGTON,

Respondent,

v.

ANTONIO MITCHELL,

Appellant.

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

The Honorable John O. Cooney, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it refused to suppress unlawfully seized evidence.

2. The trial court erred when it found that officers had probable cause to arrest appellant at the time he was arrested and searched.¹

Issue Pertaining to Assignments of Error

A police officer had information that an arrest warrant had been issued for appellant. Before confirming the validity of that warrant, however, officers arrested appellant and searched him, finding drug evidence that ultimately resulted in his conviction. Where officers arrested and searched appellant without first confirming the existence of a valid warrant, did the trial court err when it found probable cause to arrest appellant and authority to search him incident to that arrest?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Spokane County Prosecutor's Office charged Antonio Mitchell with one count of possession of a controlled substance:

¹ The court's written findings and conclusions are attached to this brief as an appendix.

methamphetamine. CP 1. Mitchell moved to suppress evidence of the methamphetamine, arguing it was the product of an unlawful arrest. CP 4-13; 1RP² 3-14. The Honorable John O. Cooney denied the defense motion. CP 44, 78-80; 1RP 16-20.

Mitchell waived his right to trial by jury and agreed to a trial on stipulated facts before the Honorable Michael Price. 2RP 4-6; CP 46-47. Judge Price found Mitchell guilty and imposed a standard range sentence of 12 months and a day in prison. CP 66, 75-77. Mitchell timely filed his Notice of Appeal. CP 50-51.

2. Facts Surrounding Arrest and Search

There was no live witness testimony at the hearing on the CrR 3.6 motion to suppress. Rather, Judge Cooney was provided a video recording from the body camera of Spokane Police Officer Christopher Conrath and an audio recording of communications between a dispatch operator, Officer Conrath, and other officers at the scene. 1RP 3-4, 14-16; exhibits 101-102. Judge Cooney also reviewed transcripts of both recordings. 1RP 4; CP 31-43.

Judge Cooney's written findings and conclusions following the hearing accurately summarize the evidence. On December 5,

² This brief refers to the verbatim report of proceedings as follows: 1RP – February 28, 2019; 2RP – March 5 and March 20, 2019.

2018, Spokane Police Officers Conrath, Setzler, and Dunsmoor responded to a report of an unwanted person at an apartment. CP 78. Officer Conrath specifically chose to respond to the call because he had reason to believe the unwanted person might be Antonio Mitchell. The previous evening, he had looked for Mr. Mitchell based on information that there was a Department of Corrections warrant for his arrest. CP 79.

The officers entered the apartment and contacted a man on the couch. CP 79. After determining the man was in fact Mitchell, the officers handcuffed him and placed him under arrest. CP 79. Officer Conrath asked dispatch to confirm the DOC warrant, but prior to receiving any confirmation, officers searched Mitchell incident to arrest and discovered a small amount of methamphetamine in his pants pocket.³ CP 79. About 50 seconds after Officer Conrath had requested confirmation of the warrant, it was confirmed. It had not been confirmed prior to that time. CP 79.

³ On this point, the video evidence contradicted Officer Setzler's sworn affidavit filed in support of the criminal charge. In that affidavit, Officer Setzler indicated, "*Upon confirmation of the warrant*, [officers] placed the defendant in handcuffs and began a search incident to arrest of the defendant." CP 2 (emphasis added)

The defense argued that under article 1, § 7 of Washington's constitution, there was no authority of law (i.e., probable cause) to arrest Mitchell until the suspected warrant was confirmed. Therefore, the methamphetamine could not properly be characterized as the product of a search incident to valid arrest and had to be suppressed. 1RP 4-10, 13-14; CP 7-11.

Judge Cooney concluded that the search of Mitchell exceeded any permissible investigative frisk under Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). CP 79. He also recognized that the inevitable discovery doctrine and the good faith exception to the warrant requirement, applicable under the Fourth Amendment, do not apply under article 1, § 7. CP 79. Therefore, to justify the warrantless search under the Washington Constitution, there had to be probable cause to arrest Mitchell when the search was conducted. CP 80. On this point, Judge Cooney concluded:

Mr. Mitchell was identified by the officers and Officer Conrath knew of the arrest warrant from the previous night. The combination of the identification and unconfirmed warrant equaled probable cause to arrest Mr. Mitchell. The officers' arrest of Mr. Mitchell satisfies the custodial arrest requirement for a valid search incident to arrest. The search incident to arrest provides the authority of law as an exception to the warrant requirement. Consequently, the

discovery of the methamphetamine pursuant to that search was lawful and the motion to suppress is denied.

CP 80.

Mitchell now appeals to this Court.

C. ARGUMENT

THE COURT WAS REQUIRED TO SUPPRESS THE DRUG EVIDENCE, WHICH WAS BASED ON AN UNLAWFUL SEARCH.

Article 1, § 7 provides, “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Washington courts have long recognized that article 1, § 7 provides greater protection of individual privacy rights than its counterpart – the Fourth Amendment. See State v. Mayfield, 192 Wn.2d 871, 874, 434 P.3d 58 (2019) (“our state exclusionary rule is considerably broader than the federal exclusionary rule”); State v. White, 135 Wn.2d 761, 768 n.4, 958 P.2d 982 (1998) (noting cases in which Washington has diverged from federal precedent).

Where the State seeks to present evidence seized during a search incident to arrest, “a valid custodial arrest is a condition precedent” to any such search. State v. O’Neill, 148 Wn.2d 564, 587, 62 P.3d 489 (2003); State v. Parker, 139 Wn.2d 486, 496, 987 P.2d 73 (1999). Indeed, it is the fact of lawful arrest itself that

provides the “authority of law” that article 1, § 7 demands. Parker, 139 Wn.2d at 496-97. The State bears the burden to prove a lawful search incident to arrest. State v. Afana, 169 Wn.2d 169, 177, 233 P.3d 879 (2010).

Probable cause to arrest “exists when the arresting officer is aware of facts and circumstances, based on reasonably trustworthy information, sufficient to cause a reasonable officer to believe that a suspect has committed or is committing a crime.” Afana, 169 Wn.2d at 182 (citing State v. Potter, 156 Wn.2d 835, 840, 132 P.3d 1089 (2006)). Whether the facts satisfy the probable cause requirement is a question of law this Court reviews de novo. State v. Fuentes, 183 Wn.2d 149, 155-156, 352 P.3d 152 (2015); State v. Armenta, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997).

“The ‘authority of law’ requirement of article 1, section 7 is [also] satisfied by a valid warrant[.]” Afana, 169 Wn.2d at 177. But “the validity of an arrest depends on the objective reasonableness of the arresting officer’s belief that probable cause exists,” a determination made at the time of the arrest. Id. at 183. An arrest warrant must necessarily be valid at that time. State v. Flores, 186 Wn.2d 506, 520-521, 379 P.3d 104 (2016) (citing State v. Manning, 57 Wn.2d 327, 329, 356 P.2d 721 (1960)). A previously issued but

now invalid warrant does not provide probable cause to arrest. State v. Nall, 117 Wn. App. 647, 651, 72 P.3d 200 (2003). Officers also must have a reasonable belief that the defendant is the person named in the warrant. State v. Smith, 102 Wn.2d 449, 453, 688 P.2d 146 (1984).

In the present case, the State offered little evidence concerning what Officer Conrath knew, and the source of his information, regarding a warrant for Mitchell's arrest prior to the post-arrest confirmation. Officer Conrath's body camera recorded him indicating to other officers that "Antonio has a felony DOC warrant," CP 33, and "he had a DOC last night." CP 34. Later, he again mentions a warrant "last night" and can be heard asking dispatch if Mitchell "still has a DOC." CP 37. He does not receive confirmation, however.

After making contact with Mitchell inside the apartment and confirming his identity, but still without confirmation of the warrant, Officer Conrath says to Mitchell, "You got a warrant. You knew that, right?" CP 38. Mitchell does not give any indication he knew anything about a warrant, but Conrath tells the other officers, "yeah, we are good." CP 38. Officer Dunsmoor has Mitchell stand and asks Officer Conrath if dispatch was confirming the warrant. CP

38. Conrath responds, “it was last night, and he’s still got it so we can go through it again.” CP 38. Officer Conrath then asks dispatch once again to confirm the warrant. CP 38. But by the time dispatch provides that confirmation, Mitchell has already been searched incident to arrest and the methamphetamine in his pocket discovered and removed. CP 38-39.

The record is silent concerning the source of Officer Conrath’s knowledge of the DOC warrant from the night before. It is not clear if, for example, he actually looked at a law enforcement database and saw the warrant listed or, perhaps, someone merely told him that DOC had issued a warrant.⁴ Although it was the State’s burden to prove a valid search incident to arrest, Afana, 169 Wn.2d at 176-177, there was no showing below that the source of Conrath’s initial information was reasonably trustworthy or based on updated information. Indeed, Officer Conrath’s multiple requests the following day that dispatch confirm the warrant reveals that he himself wondered about its current status. Yet, he did not

⁴ In his oral ruling, Judge Cooney assumed Officer Conrath had actually confirmed the warrant the evening before Mitchell’s arrest. See RP 20 (“the time between confirming the warrant the night prior and then contacting Mr. Mitchell was minimal.”). There is no evidence to support this assumption, and no similar finding was included in Judge Cooney’s written findings and conclusions. Compare CP 78-80. Even if true, however, as counsel pointed out below, the warrant may have subsequently been quashed. See 1RP 13.

wait the very short time necessary for verification (less than one minute) before having Mitchell arrested and searched.

In State v. Bailey, 154 Wn. App. 295, 298, 224 P.3d 852, review denied, 169 Wn.2d 1004, 236 P.3d 205 (2010), the defendant, without prompting from an investigating police officer, indicated he “likely had an outstanding warrant” when asked for identification. The warrant was verified and the defendant arrested. Id. In a search incident to arrest, the officer discovered methamphetamine. Id. This Court found that the defendant’s assertion that he likely had a warrant provided reasonable suspicion for an investigative detention to verify the warrant. Bailey, 154 Wn. App. at 301.

As in Bailey, Officer Conrath arguably had reasonable suspicion to detain Mitchell for a reasonable period to verify or dispel the existence of a warrant. But neither Bailey, nor any other Washington case, holds that an officer’s information that an individual previously had a warrant (here, source unknown) provides probable cause to arrest without first verifying the existence of that warrant.

Reasonable suspicion allows “police to make an intermediate response to a situation [between release and arrest] for which there is no probable cause to arrest but which calls for further investigation.” State v. Kennedy, 107 Wn.2d 1, 17, 726 P.2d 445 (1986). It is not a substitute for probable cause. Even if Officer Conrath had reasonable suspicion to hold Mitchell for a warrant check, the unconfirmed warrant was insufficient to provide “authority of law” for Mitchell’s arrest and subsequent search.

Article 1, § 7 requires exclusion of illegally obtained evidence to deter unlawful police activity and to vindicate the privacy rights of Washington citizens. State v. White, 97 Wn.2d 92, 109-10, 640 P.2d 1061 (1982). Indeed, “Washington’s exclusionary rule is ‘nearly categorical.’” Afana, 169 Wn.2d at 180 (quoting State v. Winterstein, 167 Wn.2d 620, 636, 220 P.3d 1226 (2009)). The methamphetamine evidence discovered in Mitchell’s pocket should have been excluded. Without that evidence, his conviction cannot stand.

D. CONCLUSION

This Court should reverse Mitchell's conviction.

DATED this 30th day of August, 2019.

Respectfully submitted,

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APPENDIX

CN: 1810533832

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PC: 3

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APR 10 2019

Timothy W. Fitzgerald
SPOKANE COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON,

Plaintiff,

vs.

ANTONIO MARCELL MITCHELL,
(DOB: 04/11/1978)

Defendant.

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No. 18-1-05338-32

Rpt: 2018-20240295

FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON CrR 3.6
MOTION

I. BASIS

This matter came before the Court for hearing on a CrR 3.6 Motion to Suppress Evidence. Mr. Mitchell was present with and represented by counsel, Nathan Poston. The State was represented by Mary Ann Brady. The Court reviewed the briefs, body camera video, dispatch recording, as well as a transcript for both of those recordings. The Court heard argument from the parties and denied the motion to suppress.

II. FINDINGS

- 1) On December 5, 2018, Officers Setzler, Conrath, and Dunsmoor from the City of Spokane Police Department responded to a call for service relating to an unwanted person at an apartment.

- 2) Officer Conrath specifically responded to the call because he believed that subject might be Antonio Mitchell. The previous evening Officer Conrath had looked for Mr. Mitchell because Mr. Mitchell had a warrant for his arrest from the Department of Corrections.
- 3) The officers entered the apartment building and contacted a subject on the couch inside of the complainant's apartment.
- 4) The Officers engaged in a brief conversation with subject and tried to determine his identity.
- 5) The Officers determined that the subject was Mr. Mitchell and placed him under arrest. The officers handcuffed Mr. Mitchell and awaited confirmation from Officer Conrath on the arrest warrant. Officer Conrath called into dispatch for confirmation of the warrant.
- 6) Prior to receiving confirmation of the warrant, the officers searched Mr. Mitchell turning his pants pocket out. A small amount of methamphetamine was discovered pursuant to this search. About 50 seconds after Officer Conrath called into dispatch, the warrant was confirmed. It had not been confirmed prior to that time.

III. CONCLUSIONS OF LAW

- 1) The search performed by the Officers exceeded the scope of a frisk pursuant to *Terry* frisk. However, the search would fit within the scope of a search incident to arrest.
- 2) The Fourth Amendment of the United States recognizes inevitable discovery and good faith as exceptions to the warrant requirement. In this case, this precludes a finding that the search was "unreasonable" pursuant to the Fourth Amendment.
- 3) Article I, section 7 of the Washington State constitution does not recognize inevitable discovery or good faith. Only "authority of law" can justify a warrantless search or seizure under article I, section 7. An arrest must be supported by probable cause. Here,

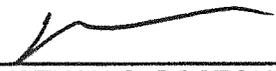
there needed to be probable cause that there was a valid existing warrant and that Mr. Mitchell was the subject of that warrant. Mr. Mitchell was identified by the officers and Officer Conrath knew of the arrest warrant from the previous night. The combination of the identification and unconfirmed warrant equaled probable cause to arrest Mr. Mitchell. The officers' arrest of Mr. Mitchell satisfies the custodial arrest requirement for a valid search incident to arrest. The search incident to arrest provides the authority of law as an exception to the warrant requirement. Consequently, the discovery of the methamphetamine pursuant to that search was lawful and the motion to suppress is denied.

DATE: April 10, 2019



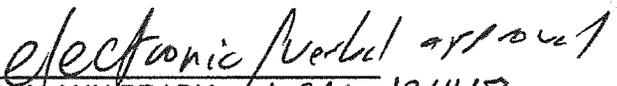
JUDGE JOHN O. COONEY

Presented by:



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Approved as to Form:

electronic/verbal approval


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