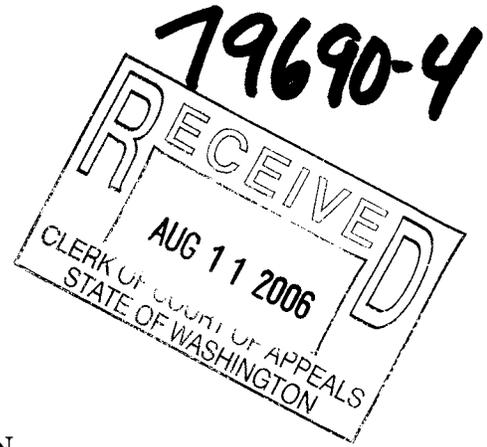


NO. 33846-7-II



IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

Respondent,

v.

MICHAEL DEREK SETTERSTROM,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THURSTON COUNTY

Before
The Honorable Richard D. Hicks, Judge, and the Honorable
William Thomas McPhee, Judge

REPLY BRIEF OF APPELLANT

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A. STATEMENT OF THE CASE

The facts of this case are fully set forth in the Appellant's opening brief.

B. STATEMENT OF THE FACTS

Appellant will rely upon the Statement of the Facts as presented in his opening brief.

C. ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING MR. SETTERSTROM'S MOTION TO SUPPRESS EVIDENCE BECAUSE LAW ENFORCEMENT OBTAINED THE EVIDENCE AS A RESULT OF AN UNLAWFUL DETENTION

The State argues that Michael Setterstrom was not restrained and the facts presented in the trial record would not have caused a reasonable person to conclude that he was not free to leave, and therefore Setterstrom was not seized. Brief of Respondent at 7-11.

Restraint amounting to seizure may arise from either the use of physical force or through a show of authority. *State v. Avila-Avana*, 99 Wn.App. 9, 14, 991 P.2d 720 (2000); *State v. Young*, 135 Wn.2d 498, 510, 957 P.2d 681 (1998). The relevant inquiry is whether, in view of all of the circumstances surrounding the incident, "a reasonable person would have felt free to leave or otherwise decline the officer's requests and terminate the

encounter. *State v. Thorn*, 129 Wn.2d 347, 352-53, 917 P.2d 108 (1996). Setterstrom, who was located in the lobby of DSHS offices at the time he was contacted, was detained in order for to identify him. Police were dispatched to the DSHS building pursuant to a report that these were two unwanted individuals. After being contacted, Setterstrom initially gave his name as Setterstrom, and then gave his name as Victor Garcia. The other man woke up and the officer asked him who the other man was. Setterstrom said the name “Victor.” RP at 11. The officer believed that Setterstrom was under the influence of drugs and patted down Setterstrom to determine if he had a weapon. RP at 12. During the pat down, Officer Stevens felt several hard objects in Setterstrom’s right front pants pocket, but could not determine what the objects were. He then reached into the pocket and removed all of the objects from the pocket one at a time. As he did so, a baggie of powder later identified as methamphetamine come out of along with the other objects.

In order to prevail on his appeal of the lower court’s CrR 3.6 ruling, Setterstrom must establish at what point a seizure of his person occurred, and must convince the court that the seizure was not supported by reasonable articulable suspicion based on objective facts. *State v. Stroud*, 30 Wn. App. 392, 394, 634 P.2d 316 (1981), *review denied*, 96 Wn. 1025 (1982); *Terry v.*

U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

In Washington, a police officer has not seized an individual merely by approaching him in a public place and asking him questions, if a reasonable person would have felt free to leave. *State v. Belanger*, 36 Wn. App. 818, 677 P.2d 781 (1984). A seizure occurs, however, if “in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.” *State v. Aranguren*, 42 Wn. App. 452, 455, 711 P.2d 1096 (1985) (citing *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S. Ct. 1870, 1877, 64 L. Ed. 2d 497 (1980)). A seizure is reasonable only if an officer has “a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.” *State v. Larson*, 93 Wn.2d 638, 644, 611 P.2d 771 (1980) (citing *Brown v. Texas*, 443 U.S. 47, 51, 99 S. Ct. 2637, 2641, 61 L. Ed. 2d 357 (1979)); *See also State v. Kennedy*, 107 Wn.2d 1, 5, 726 P.2d 445 (1986). A reasonable person should not have felt free to leave when confronted by two officers in uniform.

A person is not seized when a police officer simply engages a person in conversation in a public place. *Florida v. Bostick*, 501 U.S. 429, 434, 111 S. Ct. 2381, 115 L. Ed. 2d 389 (1990); *State v. Richardson*, 64 Wn. App. 693, 696, 825 P.2d 754 (1992). The inquiry is whether, in view of all of the

circumstances, a reasonable person would have believed he was not free to leave. *State v. Young*, 135 Wn.2d 498, 509-10, 957 P.2d 681 (1998) (recognizing Washington State Constitution provides greater privacy protections than federal constitutional provisions).

Even if an initial contact is permissible, the conduct of the officer may transform the contact into a seizure. *Richardson*, 64 Wn. App. at 695-96. The *Richardson* Court found that an officer's request that pedestrians empty their pockets and place their hand on a patrol car during questioning in an area of "high drug activity" was a "show of authority" which transformed the initially consensual police encounter into an unlawful seizure. 64 Wn. App. at 695-97.

On the other hand, while the *Young* Court recognized Washington Constitution article I, § 7 provides greater privacy protections than the Fourth Amendment to the federal constitution, it rejected *Young's* claims that the police use a spotlight constituted a "show of authority" that would lead a reasonable person to believe she was not free to leave, and was therefore a seizure. 135 Wn.2d at 509-12. The Court enumerated examples of a "show of authority" by police which could signify a seizure:

the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of

the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.

...

135 Wn.2d at 512 (*quoting United States v. Mendenhall*, 446 U.S. 544, 554, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980)).

Contrary to the court's finding, it is evident Setterson's seizure took place when he was initially contacted. An officer engaging a citizen in conversation is not a seizure. *State v. Thorn*, 129 Wn.2d 347, 351, 917 P.2d 108 (1996), *overruled on other grounds*, *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). A police spotlight on a person is not a sufficient "show of authority" to constitute a seizure. *Young*, 135 Wn.2d at 512-13. A police request to remove one's hands from one's pockets may not rise to the level of a seizure. *State v. Nettles*, 70 Wn. App. 706, 712, 855 P.2d 699 (1993), *rev. denied*, 123 Wn.2d 1010 (1994). Standing alone, an officer's request for identification does not transform an encounter into a seizure. *State v. Armenta*, 134 Wn.2d 1, 11, 948 P.2d 1280 (1997). However, no reasonable person under such circumstances in total would feel free to terminate such an encounter and leave.

Under the totality of the circumstances present here, it is apparent Setterstrom was seized by the time the officers asked him his name.

Setterstrom was in the lobby of a state office open to the public. The State concedes in its brief that Setterstrom “was filling out a form, possibly for DSHS support.” Brief of Respondent at 2. Setterstrom—although his presence may have been objectionable to the person making the initial complaint— had a legitimate right to be in the building; he was not disruptive and may have been involved in applying for benefits. In such circumstances, Setterstrom had a legitimate reason to be there; no reasonable person would have felt free to leave by the time the officer demanded his identification.

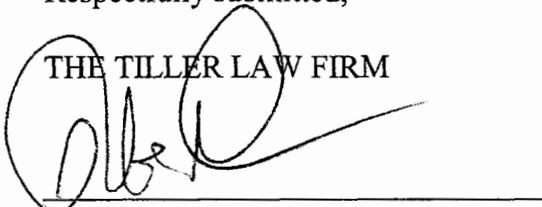
C. CONCLUSION

For the above-stated reasons, and those set forth in Setterstrom’s Opening Brief, this Court should grant the relief requested in the opening brief.

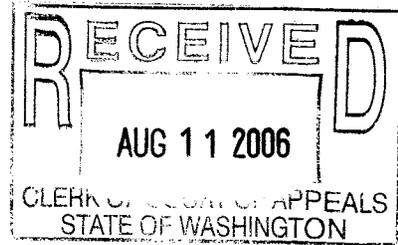
DATED: August 10, 2006.

Respectfully submitted,

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CERTIFICATE

I certify that I mailed a copy of the foregoing Reply Brief of Appellant, postage pre-paid on August 10, 2006, at the Centralia, Washington post office addressed as follows:

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A handwritten signature in black ink, appearing to read "Peter B. Tiller". The signature is written in a cursive style with a long horizontal flourish extending to the right.

PETER B. TILLER, WSBA NO. 20835