



79690-4

NO. 33846-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

Setterstrom
MICHAEL DEREK ~~STEERSTROM~~,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
CAUSE NO. 05-1-00518-5

HONORABLE WM. THOMAS MCPHEE, Judge

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF THE ISSUES	1
STATEMENT OF THE CASE	1
ARGUMENT	7
1. <u>During the initial encounter between Lieutenant Stevens and the defendant, the freedom of action of the defendant was not restrained, nor were there circumstances that would have caused a reasonable person to conclude he was not free to leave, and so there was no seizure at that point.</u>	7
2. <u>The circumstances of Lieutenant Stevens' investigation of the defendant created in Stevens' mind a well-founded suspicion that, at that moment, the defendant was a safety risk, and therefore a pat-down search of the defendant was justified, and the scope of that search was limited to actions necessary to address that safety concern.</u>	11
CONCLUSION	16

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>State v. Armenta</u> , 134 Wn.2d 1, 948 P.2d 1280 (1997)	9,10
<u>State v. Collins</u> , 121 Wn.2d 168, 847 P.2d 919 (1993)	16
<u>State v. Contreras</u> , 92 Wn. App. 307, 966 P.2d 915 (1998)	8
<u>State v. Cormier</u> , 100 Wn. App. 457, 997 P.2d 950 (2000)	12
<u>State v. Fowler</u> , 76 Wn. App. 168, 883 P.2d 338 (1994)	15
<u>State v. Horrace</u> , 144 Wn.2d 386, 28 P.3d 753 (2001)	12
<u>State v. Hudson</u> , 124 Wn.2d 107, 874 P.2d 160 (1994)	13
<u>State v. Macon</u> , 128 Wn.2d 784, 911 P.2d 1004 (1996)	13
<u>State v. Mierz</u> , 127 Wn.2d 460, 901 P.2d 286 (1995)	8
<u>State v. Olsson</u> , 78 Wn. App. 202, 895 P.3d 867 (1995)	15,16
<u>State v. Young</u> , 135 Wn.2d 498, 957 P.2d 681 (1998)	9
<u>Terry v. Ohio</u> , 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)	12

<u>CONSTITUTIONAL</u>	<u>PAGE</u>
Fourth Amendment, U.S. Constitution	8,11
Art. I, s. 7, Washington Const.	8,12

A. STATEMENT OF THE ISSUES

1. Whether an unlawful seizure occurred during the initial encounter between Lieutenant Stevens and the defendant.

2. Whether Lieutenant Stevens' pat-down search of the defendant was supported by a well-founded suspicion that the defendant was, at that moment, a safety risk, and whether the scope of the resulting search was limited to actions necessary to address that safety concern.

B. STATEMENT OF THE CASE

On February 28, 2005, at about 8 a.m., Tumwater Police Lieutenant Don Stevens and Tumwater Police Officer Glen Staley were dispatched to a building which housed offices of the Washington Department of Social and Health Services (DSHS). Police were being asked to deal with two unwanted individuals in the lobby of the building, one who was sleeping and the other who appeared to be on drugs. 8-22-05 Hearing RP 9, 26.

Stevens and Staley arrived at the building at about the same time. They observed two individuals on a bench in the front lobby. One was sleeping, consistent with the report

requesting assistance. The other, defendant Michael Setterstrom, was filling out a form, possibly for DSHS support. 8-22-05 Hearing RP 10.

When the two individuals were first contacted, Stevens noted that the defendant was exhibiting fidgety, uncontrollable behavior, and was having difficulty focusing as Stevens attempted to speak with him. 8-22-05 Hearing RP 10. When Stevens asked for the defendant's name, the defendant first said his name was Setterstrom, but then claimed his name was Victor Garcia, and that he was filling out the form for a friend. 8-22-05 Hearing RP 10.

At about this time, the other individual with the defendant began to wake up. Given the defendant's inconsistent responses, Stevens asked the other individual who the defendant was. The defendant then intervened, blurting out the name "Victor", and encouraging the other person to remain silent. 8-22-05 Hearing RP 11.

Stevens had extensive knowledge regarding illegal controlled substances, from his training

as a DARE officer and from his three years as a detective with the county's Narcotics Task Force. 8-22-05 Hearing RP 8. Based on the defendant's physical behavior and apparent mental condition, as well as his possible deception regarding his true identity, Stevens' experience and training caused him to become convinced the defendant was under the influence of illegal drugs, most likely methamphetamine. 8-22-05 Hearing RP 11. Therefore, he had Officer Staley escort the other individual outside so that he could continue his investigation with the defendant. 8-22-05 Hearing RP 11.

At that point, the defendant's agitated behavior began to escalate. Given Stevens' belief that the defendant was high on methamphetamine, and that the defendant's increasing agitation could cause a violent response toward the officer, Stevens chose to pat down the defendant to make sure he did not have a weapon on him. 8-22-05 Hearing RP 12. During the pat down, Stevens felt several hard objects in the defendant's right

front pants pocket. He could not tell what the objects were. Therefore, he reached into the pocket and removed all of the objects at one time.

8-22-05 Hearing RP 12.

When Stevens did so, a Ziploc baggie of powder came out of the defendant's pocket along with the other items. Stevens recognized what he believed to be methamphetamine in the baggie, and focused in on that baggie to the exclusion of the other objects. He also focused on the defendant to watch for his reaction to the discovery of the baggie. 8-22-05 Hearing RP 12-13.

Stevens placed the baggie on the nearby bench, and ordered the defendant to place his hands behind his back, so that Stevens could make a probable cause arrest of the defendant for unlawful possession of a controlled substance. However, while Stevens was attempting to place handcuffs on the defendant, Setterstrom dropped down to his knees and sucked the baggie into his mouth. Stevens was unable to recover the baggie from the defendant. 8-22-05 Hearing RP 13-14.

While Staley was outside with the other individual, named Rice, he looked through a window into the building and observed Stevens with the defendant down on the bench. Staley then went inside to assist Stevens. At that point, the search had already occurred. 8-22-05 Hearing RP 28.

On March 28, 2005, an Information was filed in Thurston County Superior Court charging the defendant with one count of unlawful possession of a controlled substance, to wit: methamphetamine. CP 4. On August 22, 2005, a CrR 3.6 hearing was held before the Honorable Judge Wm. Thomas McPhee. At the beginning of the hearing, defense counsel specifically agreed that Lieutenant Stevens had acted properly up to the point of the pat down search, but that the search thereafter was unlawful.

. . . In this case, according to the police report, Your Honor, the officer did a pat-down search and allegedly felt something hard that he believed to be a weapon, and therefore, for officer's safety, continued to do a further search.

THE COURT: Stop there now. To

understand your theory, are we okay up to that point?

MS. MURPHY: Up to that point. We're not complaining.

THE COURT: Okay.

8-22-05 Hearing RP 6. Defense counsel repeated this position at the end of the hearing in presenting closing argument to the court.

Officer Stevens did everything correctly. There was not a flaw in his investigative search prior to the pat-down.

8-22-05 Hearing RP 35. Since the defense did not contest the legality of the officer's contact and questioning of the defendant prior to the pat-down, the court made no conclusions of law with regard to that portion of the incident. However, the court did conclude that the pat-down search, including the subsequent removal of the items from the defendant's pocket, was justified for reasons of officer safety, based on the information available to Lieutenant Stevens at the time. 8-22-05 Hearing RP 39-44. Written Findings of Fact and Conclusions of Law were entered by the trial court on October 4, 2005. CP 85-86.

The case proceeded to a jury trial on August 29-30, 2005. The defendant was convicted of one count of unlawful possession of a controlled substance. A Judgment and Sentence was imposed on August 30th, in which the defendant was given a standard range sentence of 6 months in custody and 12 months of community custody. CP 66-73.

C. ARGUMENT

1. During the initial encounter between Lieutenant Stevens and the defendant, the freedom of action of the defendant was not restrained, nor were there circumstances that would have caused a reasonable person to conclude he was not free to leave, and so there was no seizure at that point.

The defendant contends on appeal that Stevens' initial contact with the defendant upon arrival at the DSHS building constituted a seizure of the defendant, and that this investigative seizure was unlawful because it was not based on any articulable suspicion of wrongdoing. Thus, in characterizing the actions of Lieutenant Stevens in that initial encounter, the defense has gone from saying at the trial court level that he "did everything correctly" to claiming at the appellate level that he acted illegally. 8-22-05 Hearing RP

35.

Normally, the failure of trial counsel to allege such error as a basis to suppress the evidence would waive the ability to make that claim thereafter. State v. Mierz, 127 Wn.2d 460, 468, 901 P.2d 286 (1995). However, since the appellate court will review a manifest constitutional error raised for the first time on appeal, the court may choose to consider this claim based on the record developed during the CrR 3.6 hearing in this case. In that instance, the defendant must establish that the record shows actual prejudice to this defendant, such that the trial court would likely have granted a motion to suppress on the basis of this claim had it been raised below. State v. Contreras, 92 Wn. App. 307, 311-312, 966 P.2d 915 (1998).

In the present case, the record does not show that the defendant was seized by Lieutenant Stevens in their initial encounter. Under the Fourth Amendment to the United States Constitution and under Article I, section 7 of the Washington

State Constitution, a person has been seized when, by means of physical force or a show of authority, his freedom of action has been restrained. There is a seizure when, in view of all the circumstances involving the incident, a reasonable person would have believed that he was not free to leave. State v. Young, 135 Wn.2d 498, 509-510, 957 P.2d 681 (1998); State v. Armenta, 134 Wn.2d 1, 10-11, 948 P.2d 1280 (1997). Such a seizure is only constitutionally permissible if the officer has a reasonable suspicion that the individual is associated with a criminal act that has occurred, is occurring, or is about to occur. Armenta, 134 Wn.2d at 10. The defendant has the burden of showing that a contact between a police officer and a citizen amounted to a seizure. Young, 135 Wn.2d at 510.

Not every encounter between a police officer and a citizen constitutes a seizure. An officer may engage a person in conversation in a public place and ask for identification without that contact becoming a seizure, and so may do so

without any articulable suspicion of wrongdoing. Young, 135 Wn.2d at 511; Armenta, 134 Wn.2d at 11.

In the present case, Stevens merely walked up to the defendant and began speaking with him in a public place due to the report of unwanted persons being in the building. The officer asked the defendant what his name was. He then asked the other individual, Rice, what the defendant's name was. There was no attempt to restrain the defendant at that point or to display any other show of authority. This initial contact was not a seizure.

Prior to this contact, the officer had been informed that one of the individuals was sleeping and the other appeared to be on drugs. In contacting the defendant, Stevens observed behavior that, based on Stevens's experience, indicated that the defendant was under the influence of methamphetamine, and also observed that the defendant was evasive about his identity. These observations raised a reasonable suspicion

in his mind that the defendant was involved in illegal drug activity. 8-22-05 Hearing RP 10-11.

Stevens then had Officer Staley escort Rice outside so that he could continue his investigation of the defendant. The State agrees that this show of authority was sufficient to now indicate to the defendant that he was not free to leave, and therefore had been seized. However, at this point the officer had a reasonable suspicion of criminal activity, and so an investigative detention was lawful.

The remaining question is whether the additional intrusion of a pat down and removal of objects from the defendant's pocket was legally justified.

2. The circumstances of Lieutenant Stevens' investigation of the defendant created in his mind a well-founded suspicion that, at that moment, the defendant was a safety risk, and therefore justified a pat-down search of the defendant, and the scope of that search was limited to actions necessary to address those safety concerns.

Under the Fourth Amendment to the United States Constitution, when a police officer is in contact with an individual for investigative

purposes, and observes unusual conduct which leads the officer to reasonably conclude, in the light of his experience, that the individual might at that time be a safety risk, the officer is permitted to conduct a limited search of the outer clothing of such person in an attempt to check for any weapon that might be used to assault him. Terry v. Ohio, 392 U.S. 1, 21-22, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); State v. Cormier, 100 Wn. App. 457, 461, 997 P.2d 950 (2000). These same principles apply under Article I, section 7, of the Washington State Constitution. State v. Horrace, 144 Wn.2d 386, 394, 28 P.3d 753 (2001). Thus, there must be a legitimate safety concern justifying a pat-down for weapons, and the scope of the search must be limited to what is necessary to address that safety concern. Cormier, 100 Wn. App. at 461.

In the present case, at the point Lieutenant Stevens detained the defendant for investigative purposes, Stevens observed that the defendant's agitation was escalating. 8-22-05 Hearing RP 12,

19. At the same time, the officer's training and experience had led him to conclude that the defendant was under the influence of methamphetamine. 8-22-05 Hearing RP 11. This combination caused Stevens to become concerned that the defendant was going to react violently toward him, and so he patted the defendant down for any weapons that could be used against him. As the trial court found, Stevens had a legitimate safety concern that justified the pat-down for weapons.

As noted above, the scope of the resulting search must also be justified. When an officer conducts a pat-down search and feels an item of questionable identity which could be a weapon, he may take such action as is necessary to examine the object and determine its identity. State v. Hudson, 124 Wn.2d 1-7, 112-113, 874 P.2d 160 (1994). In the present case, Stevens patted the right front pants pocket of the defendant and felt several hard objects. Stevens could not tell what they were. He removed all of the hard objects at

one time. When he did that, he observed the baggie of what appeared to be methamphetamine. 8-22-05 RP Hearing.

The defendant argues on appeal that, even if the officer had the right to remove the hard objects to determine their identity, he did not have the right to remove the baggie. However, this argument assumes he purposely removed that bag of powder, which is contrary to the facts as determined by the court. See Findings of Fact 6, 7, and 8 in CP 85-86. The court determined that the officer inadvertently removed the baggie while purposely removing the hard objects. Finding of Fact No. 8, CP 86; 8-22-05 Hearing RP 42.

On appeal, review of a trial court's factual finding is to determine whether it is supported by substantial evidence. State v. Macon, 128 Wn.2d 784, 799, 911 P.2d 1004 (1996). Here, the testimony of Lieutenant Stevens, which was determined to be credible by the trial court, provided the evidentiary basis for the court's finding. 8-22-05 Hearing RP 12, 41.

Thus, this case is distinguishable from State v. Fowler, 76 Wn. App. 168, 883 P.2d 338 (1994). In that case, the officer did a pat-down of a subject and felt one hard object and two soft objects in a single pocket. Rather than separate the items with his hand and remove only the hard object, the officer removed all three objects at once. This was deemed by the appellate court to have been an unreasonable search because the officer could tell that the two soft objects were not weapons, and could have separated the items and removed only the hard one. Fowler, 76 Wn. App. at 169, 173. Here, Stevens felt only the hard objects. The fact that the baggie came out with those objects was not anticipated by the officer.

The present case is similar to State v. Olsson, 78 Wn. App. 202, 895 P.2d 867 (1995). In that case, during a pat-down search, the officer felt a hard object in the suspect's pocket, which the suspect said was a knife. When the officer removed the knife, he inadvertently came across a

substance later identified as cocaine. The scope of the search was found to have been reasonably limited to the officer's safety concern. Olsson, 78 Wn. App. at 208.

Similarly, in State v. Collins, 121 Wn.2d 168, 847 P.2d 919 (1993), the officer conducted a pat-down search of Collins and discovered a hard object in his left rear pocket, but could not determine the nature of the object. As the officer pulled the hard object out of the pocket, a baggie containing a powder inadvertently fell out of the pocket. The powder was later determined to be methamphetamine. The legality of this search was upheld. Collins, 121 Wn.2d at 171-172, 177.

Thus, there was a basis for the search which occurred in this case, and the scope of the resulting search was reasonable under the circumstances.

D. CONCLUSION

Based on the above, the State respectfully requests that the defendant's conviction for

unlawful possession of a controlled substance be affirmed.

DATED this 10th day of July, 2006

Respectfully submitted,



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