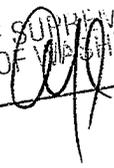


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CLERK OF SUPREME COURT
STATE OF WASHINGTON



SUPREME COURT NO. 81719-7
COURT OF APPEALS NO. 25497-6-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

DUSTIN WARREN HARRINGTON, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY
CAUSE NO. 06-1-00579-5

RESPONDENT'S REPLY TO APPELLANT'S PETITION FOR
REVIEW

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STATE OF WASHINGTON

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I. COURT OF APPEALS DECISION

On May 13, 2008, the Court of Appeals affirmed the petitioner's conviction, finding that the trial court properly denied the petitioner's motion to suppress and that no seizure took place.

II. STATEMENT OF THE CASE

On May 4, 2006, the petitioner was charged by Information with Possession of a Controlled Substance, Methamphetamine. (Clerk's Papers 062-063).¹ On August 24, 2006, the matter proceeded to a suppression hearing pursuant to CrR 3.6 before the Honorable Carrie L. Runge. (Report of Proceedings at 2).²

The first witness was Trooper William Bryan. (RP at 3). Trooper Bryan testified that on August 13, 2005, he was driving through the City of Richland when he observed a Richland Officer contacting an individual. (RP at 3-4). Trooper Bryan turned and parked his car near the area

¹ Hereinafter referenced as CP.

where the officer was contacting the individual because there was only one officer. (RP at 4). Trooper Bryan did not prepare a report, and testified from memory. (RP at 4-5). Trooper Bryan did not recall whether his lights were activated when he turned and parked. (RP at 6). Trooper Bryan believed his parked vehicle was 10 to 30 feet from the officer and individual, and that he initially stopped about 7 or 8 feet away from them. (RP at 5, 8). Trooper Bryan was there between two and four minutes before the petitioner began to run. (RP at 7). During this time, Trooper Bryan did not speak with either the officer or the petitioner. (RP at 8). Trooper Bryan indicated that he would not necessarily turn on his lights to make a U-turn as he did, but would normally turn on his lights when he parked in a lane, which he recalled that he was. (RP at 9).

² Hereinafter referenced as RP.

The second witness was Officer Scott Reiber. (RP at 10). On August 13, 2005, at approximately 11:00 PM, Officer Reiber was on patrol northbound in the 1600-1700 block of Jadwin. (RP at 10-11). He observed a male, later identified as the petitioner, who was walking southbound on Jadwin on the east side of the roadway. (RP at 11). Officer Reiber drove past the petitioner, executed a U-turn, and pulled into a driveway to contact him. (RP at 11). Officer Reiber did not activate his lights as he turned. (RP at 11). Officer Reiber then drove between 75 to 150 feet southbound of the petitioner and pulled between 20 to 30 feet into a driveway. (RP at 11-12).

Officer Reiber walked back to the petitioner, and asked if he could speak with him, to which the petitioner responded in the affirmative. (RP at 12-13). Officer Reiber asked where the petitioner was coming from, to which he answered his sister's house. (RP at 13). When

asked where his sister lived, he responded that he did not know. (RP at 13).

As Officer Reiber was speaking with the petitioner, he was standing to the east of the sidewalk, allowing the petitioner access to walk freely north or southbound. (RP at 13-14). Officer Reiber noticed several bulges in the petitioner's pants pockets, and that the petitioner appeared nervous. (RP at 14-15). The petitioner on several occasions put his hands in his pockets after being asked not to. (RP at 15).

Officer Reiber asked the petitioner if he could pat the petitioner down for weapons, to which the petitioner responded in the affirmative. (RP at 15). Officer Reiber felt a long hard object in the petitioner's right front pants pocket and asked what it was, to which the petitioner answered "my glass." (RP at 16). When asked what he meant, the petitioner stated, "my meth pipe." (RP at 16-17). Officer Reiber told the petitioner that he was under arrest, at which

point the petitioner turned and ran, and was taken into custody by both officers. (RP at 17). Officer Reiber indicated that he never activated his lights, and did not recall whether Trooper Bryan's lights were activated. (RP at 18).

After the hearing, the Court denied the motion to suppress. (RP at 35). Finding of Fact and Conclusions of Law were entered on August 31, 2006. (CP 15-20). The petitioner was found guilty on stipulated facts, and was sentenced on August 31, 2006. (CP 23-25, CP 6-14). Petitioner's timely appeal followed. (CP 3-4).

III. ARGUMENT FOR REVIEW

Petitioner argues that the Court of Appeals erred in affirming his conviction. The State contends that the decision of the Court of Appeals is not in conflict with other decisions of this court, the U.S. Supreme Court, or the Court of Appeals, and asks this court to deny the Petition for Review.

A. THE INITIAL CONTACT WAS A VALID SOCIAL CONTACT.

Not all contacts between an individual and an officer constitute "an official intrusion requiring objective justification." State v. Mote, 129 Wn. App. 276, 282, 120 P.3d 596 (2005) (citing United States v. Mendenhall, 446 U.S. 544, 551-55, 100 S.Ct 1870, 64 L.Ed. 2d 497 (1980)). The officer's act of contacting an individual in a public place and requesting identifying information is not a seizure, nor is it an investigatory detention. Mote, 129 Wn. App. at 282 (citations omitted). The court has indicated that this remains true even if the officer "subjectively suspects the possibility of criminal activity but does not have suspicion justifying a Terry stop." Id. (citation omitted, italics in original). The court has indicated that:

[p]olice officers must be able to approach citizens and permissively inquire into whether they will answer questions as part of their "community caretaking" function.

Id. (citing State v. Nettles, 70 Wn. App. 706, 712, 855 P.2d 699 (1993)).

In the absence of a show of authority, such inoffensive contact by officers, in full uniform, and armed, "cannot, as a matter of law, amount to a seizure of the person." Id. at 283 (citations omitted). In Mote, the petitioner testified that he did not feel free to leave, but the court found that subjective response not objectively reasonable. Id. at 291-292.

The action alleged by the defense as a show of authority is the activation of the lights by Trooper Bryan. The petitioner cites to Markgraf in support of the contention that the activation of the hazard lights, to the rear, constitutes a seizure of the petitioner. However, the record at hearing reveals that Trooper Bryan had no recollection as to whether his lights were activated or not on the date of the contact.

Assuming for the purpose of argument that the lights were activated, Markgraf is distinguishable, in that it involved an officer in a patrol vehicle pulling up to a parked vehicle and activating emergency lights. State v. Markgraf, 59 Wn. App. 509, 511, 798 P.2d 1180 (1990). An individual who is confronted by an officer who initially activates his or her emergency lights is in a different position from an individual who is several minutes into a social contact when another officer arrives, parks some distance away, and activates their hazard lights. Mote, 129 Wn. App. at 292 (discussing the significance of second officer arriving later on in contact). Trooper Bryan's usual procedure of activating his hazard lights due to his partially blocking a roadway cannot be deemed a seizure, or all individuals, in vehicles or on foot, who are nearby would be deemed collectively seized. Markgraf also needs to be read in context, as it preceded the expansive

language by the Washington State Supreme Court in State v. Young, 135 Wn.2d 498, 511, 957 P.2d 681 (1998). ("[A] police officer's conduct in engaging a petitioner in conversation in a public and asking for identification does not, alone, raise the encounter to an investigative detention").

Petitioner cites too, among other cases, State v. Soto-Garcia, which is distinguishable from the fact pattern in this case. In Soto-Garcia, the question by the officer whether a petitioner had cocaine and whether the officer could search the petitioner, without any basis, constituted a seizure. State v. Soto-Garcia, 68 Wn. App. 20, 25, 841 P.2d 1271 (1992). Here, there was a basis for the frisk and follow-up question. The court makes clear that it is not the subjective perception of the individual that controls, but rather whether a reasonable person

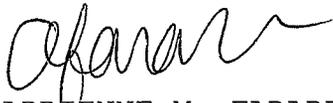
would feel free to go. Soto-Garcia, 68 Wn. App.
at 25.

IV. CONCLUSION

The Court of Appeals properly affirmed the conviction based upon the facts. The Respondent submits that the Petition for Review be denied.

Respectfully submitted this 11 day of
July, 2008.

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Ofc. Id. 91004