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FILED

NOV 02 2007

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 254976

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

DUSTIN WARREN HARRINGTON, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 06-1-00579-5

BRIEF OF RESPONDENT

ANDY MILLER
Prosecuting Attorney
for Benton County

ALEX C. EKSTROM, Deputy
Prosecuting Attorney
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STATEMENT OF THE CASE

On May 4, 2006, the appellant, Dustin Warren Harrington, 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 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

¹ Hereinafter referenced as CP.

² Hereinafter referenced as RP.

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 2 and 4 minutes before the defendant began to run. (RP at 7). During this time, Trooper Bryan did not speak with either the officer or the appellant. (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).

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 appellant, who was walking southbound on Jadwin on the east side of the roadway. (RP at 11).

Officer Reiber drove past the defendant, 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 defendant and pulled between 20 to 30 feet into a driveway. (RP at 11-12).

Officer Reiber walked back to the defendant, and asked if he could speak with him, to which the defendant responded in the affirmative. (RP at 12-13). Officer Reiber asked where the defendant 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 defendant, he was standing to the east of the sidewalk, allowing the defendant access to walk freely north or southbound. (RP at 13-14). Officer Reiber noticed several bulges in the defendant's pants pockets, and that the defendant

appeared nervous. (RP at 14-15). The defendant on several occasions put his hands in his pockets after being asked not to. (RP at 15).

Officer Reiber asked the defendant if he could pat the defendant down for weapons, to which the defendant responded in the affirmative. (RP at 15). Officer Reiber felt a long hard object in the defendant's right front pants pocket and asked what it was, so which the defendant answered "my glass." (RP at 16). When asked what he meant, the defendant stated "my meth pipe." (RP at 16-17). Officer Reiber told the defendant that he was under arrest, at which point the defendant 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 appellant was found guilty on stipulated facts and was sentenced on August 31, 2006. (CP 23-25, CP 6-14). Appellant's timely appeal followed. (CP 3-4).

ARGUMENT

Appellant's counsel argues that trial court erred in denying the motion to suppress. The state contends that the initial contact was a valid social contact and that the weapons frisk was warranted by the defendant's behavior. The trial court acted within its discretion in denying the motion.

A. STANDARD OF REVIEW

A trial court's findings of fact are reviewed for substantial evidence, defined as "a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding." State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994) (citing State v. Halstien, 122 Wn.2d 109 (1993)). A trial court's conclusions of law are subject to de novo review.

State v. Armenta, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997).

B. 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 (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 defendant 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 defendant cites to Markgraf in support of the contention that the activation of the hazard lights, to the rear, constitutes a seizure of the defendant. 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 an officer 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 defendant in conversation in a public and asking for identification does not, alone, raise the encounter to an investigative detention").

Defendant cites to, 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 defendant had cocaine and whether the officer could search the defendant, without any basis, constituted a seizure. State v. Soto-Garcia, 68 Wn. App. 20, 25, 841 P.2d 1271 (1992). Here, as indicated below, 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.

C. THE FRISK FOR WEAPONS WAS REASONABLE

To conduct a protective frisk for weapons, an officer "need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent [person] in the circumstances would be warranted in the belief that his [or her] safety or that of others was in danger." State v. Collins, 121 Wn.2d 168, 174, 847 P.2d 910 (1993) (citing Terry v. Ohio, 392 U.S. 1, 27, 20 L.Ed. 2d 889, 88 S.Ct. 1868 (1968)). As the court in Collins indicated:

court are reluctant to substitute their judgment for that of police officers in the field. 'A founded suspicion is all that is necessary, some basis from which the court can determine that the [frisk] was not arbitrary or harassing.' Collins, 121 Wn.2d at 174 (citing State v. Belieu, 112 Wn.2d 587, 601-602, 773 P.2d 46 (1989) (further citation omitted).

In this case, Officer Reiber was with the defendant during a social contact after dark. State v. Sweet, 44 Wn.App. 226, 235, 721 P.2d 560

(1986) (late-night stop one factor justifying a weapons frisk). The defendant had previously been behaving in an agitated manner. State v. Walker, 66 Wn. App. 622, 630-31, 834 P.2d 41 (1992) (Factors that support protective frisk include whether clothing could conceal weapons, and gestures or movements in response to officer's presence). Officer Reiber was concerned about what the defendant might do. As the defendant gave bizarre answers to questions, the officer could see that there were several bulges in the defendant's pants pockets. The defendant refused to keep his hands out of his pockets. The combination of the time and place of the contact, the bulges that could be a weapon and the behavior of the defendant would cause a reasonable officer to believe that their safety might be at risk. See State v. Laskowski, 88 Wn. App. 858, 950 P.2d 950 (1997), review denied, 135 Wn.2d 1002 (1998) (Officer investigating vehicle prowl justified in frisking suspect who appeared

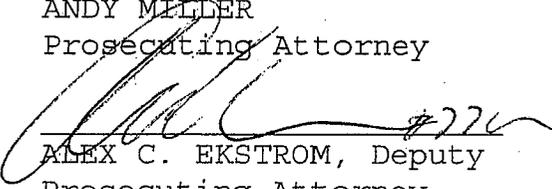
nervous, wore a backpack capable of concealing a weapon, and was with a companion who had a shotgun shell).

CONCLUSION

The trial court acted within its discretion, based on the facts presented at the CrR 3.6 hearing, in denying the motion. Therefore, the Respondent argues and submits that the Appellant's conviction should be affirmed.

Respectfully submitted this 1st day of November, 2007.

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Ofc. Id. 91004