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No. 63067-9-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY HERBERT,

Appellant.

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2009 JUL 10 PM 4:34

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

The Honorable Ellen J. Fair

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court erred following the CrR 3.6 hearing in admitting methamphetamine evidence that was seized as the product of an illegal police detention of the defendant, Mr. Herbert.

2. The trial court erred in concluding that Mr. Herbert was seized only at such point as when Deputy Dill obtained the defendant's identification card from him, rather than earlier, when the Deputy shined his patrol car's spotlight on Mr. Herbert and commenced questioning him about his conduct in the parking lot late at night.

3. Deputy Dill was not in possession of articulable suspicion of criminal activity at the time that Mr. Herbert was seized, when the Deputy shined his patrol car's spotlight on Mr. Herbert and commenced questioning him about his conduct.

4. The trial court erred in entering finding of fact 4, which states that "the vehicle had been impounded as evidence in a criminal case within the past 30 days."

5. The trial court erred in entering conclusion of law 1, in which the court finds that the car "was associated with recent

criminal activity.”¹

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether under the Fourth Amendment and under Article 1, § 7 of the State Constitution, Mr. Herbert was “seized” when Deputy Dill shined his patrol car’s spotlight on him and commenced questioning him about his conduct, where a reasonable person would not feel free to leave under such circumstances.

2. 1. Whether under the Fourth Amendment and under Article 1, § 7 of the State Constitution, Deputy Dill’s seizure of Mr. Herbert was supported by reasonable articulable suspicion as required by Terry v. Ohio² and State v. Stroud.³

C. STATEMENT OF THE CASE

(1). **Procedural history.** Anthony Herbert was found guilty of possession of methamphetamine in a stipulated facts trial following the trial court’s denial of his CrR 3.6 motion to suppress.

¹Findings of fact erroneously labeled conclusions of law are treated as findings of fact, and error must be assigned thereto where they are not supported by substantial evidence. State v. Wood, 57 Wn. App. 792, 799 n. 4, 790 P.2d 220 (1990).

²Terry v. Ohio, 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

³State v. Stroud, 30 Wn. App. 392, 394, 634 P.2d 316 (1981), review denied, 96 Wn.2d 1025 (1982).

CP 21 (bench trial stipulation), 23 (police reports), 24 (jury waiver), 30 (judgment). He was sentenced to a standard range term of confinement. CP 32-34 (judgment and sentence).

Mr. Herbert timely filed a notice of appeal. CP 32.

(2). Findings of Fact and Conclusions of Law. The trial court, in its written CrR 3.6 Certificate, found and held as follows in numbered findings of fact and conclusions of law:

I. FINDINGS OF FACT.

1. On December 12, 2008, Snohomish County Sheriff's Deputy Marcus Dill was on patrol near the Lake Hill Motel, located in the 14800 block of Highway 99 in Snohomish County.

2. The Lake Hill Motel is known to Deputy Dill as a high crime area, having responded to numerous previous calls to that location including drug crimes and prostitution.

3. After midnight on 12/12/08 Deputy Dill observed a Chevy Suburban pull into the parking lot of the Lake Hill Motel.

4. As a routine practice Deputy Dill ran the license plate number of the Suburban, and found out that the vehicle had been impounded as evidence in a criminal case within the past 30 days.

5. He observed the front seat passenger, later identified as

the Defendant, exit the Suburban.

6. Deputy Dill observed the Defendant looking into a work van that was also parked in the parking lot. [The Deputy] shined his spotlight on the Defendant and asked if the van belonged to the Defendant. The Defendant said, "No."

7. Deputy Dill called the Defendant over to his location, about 20 feet from the work van. He asked him what he was doing and the Defendant said that he and his friend were hoping to get a hotel room for the night.

8. There was a large, red, illuminated "NO VACANCY" sign clearly visible to both Deputy Dill and the Defendant. When asked if he understood what the "NO VACANCY" sign meant, the Defendant responded "Oh, that's what that means."

9. Some facts were disputed, such as whether there was a work van in the parking lot at all, and the manner in which Deputy Dill obtained the Defendant's ID. The Defendant testified that he had been on a two day methamphetamine binge at the . time of the incident, whereas Deputy Dill testified that he was 100% certain that there was a work van. The Court finds that Deputy Dill's testimony is more credible than the Defendant's testimony.

10. Deputy Dill obtained the Defendant's ID, and whether it was obtained by request. or by removing it from the Defendant's wallet is not relevant. The Defendant was not free to leave when the ID was obtained.

11. Deputy Dill used his handheld radio to run the Defendant's name for warrants while remaining in the presence of the Defendant. At some point prior to dispatch responding, the Defendant informed Deputy Dill that he may have a warrant for his arrest.

12. Dispatch confirmed that the Defendant had a warrant for his arrest. The Defendant was arrested, properly Mirandized,⁴ and searched incident to arrest.

13. The Defendant waived his Miranda rights and informed the Deputy that he would find a methamphetamine pipe in a search of his person. Deputy Dill did find a pipe with suspected methamphetamine residue in the Defendant's clothing.

14. Incident to a second search at the jail, Deputy Dill found a baggie of suspected methamphetamine in the Defendant's "coin pocket" in his pants. The Defendant admitted that the substance

⁴Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

was methamphetamine.

II. CONCLUSIONS OF LAW

1. The totality of the circumstances presented to Deputy Dill were that he was patrolling a high crime area, he observed a car that was associated with recent criminal activity, he observed the Defendant exit that car and begin looking into a work van that did not belong to him, and the Defendant then explained that he was looking for a hotel room despite the NO VACANCY sign that was clearly visible. Based on the totality of the circumstances, the Court finds that Deputy Dill had a reasonable, articulable suspicion that the Defendant was engaged or about to engage in criminal activity. The level of intrusion was relatively low and brief. The detention was reasonable and lawful under the circumstances. CP 43-46.

D. ARGUMENT

1. **MR. HERBERT WAS SEIZED WITHOUT REASONABLE SUSPICION WHEN DEPUTY DILL SHINED HIS SPOTLIGHT ON THE DEFENDANT AND COMMENCED QUESTIONING HIM ABOUT HIS CONDUCT IN THE PARKING LOT LATE AT NIGHT.**

a. **Mr. Herbert was seized at that juncture.** The methamphetamine located by the Sheriff'S Deputy in this case was the fruit of an unreasonable seizure prohibited by the Fourth Amendment and Article 1, § 7 of the Washington Constitution.

In order to prevail on his appeal of the lower court's CrR 3.6 ruling, Mr. Herbert must establish at what point a seizure of his person occurred, and must convince this 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.2d 1025 (1982); Terry v. Ohio, 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).⁵

⁵The question whether a seizure has occurred during a citizen-police encounter is a mixed question of law and fact. State v. Rankin, 108 Wn. App. 948, 954, 33 P.3d 1090 (2001). On review of a suppression motion, the appellate court defers to the trial court's factual findings as to what happened in the encounter, but whether those facts constitute a seizure of the defendant by the police is a question of law that is examined de novo. State v. Thorn, 129 Wn.2d 347, 351, 917 P.2d 108 (1996). Similarly, the second question of the

Deputy Dill, in his patrol vehicle, had followed the car containing the defendant into the parking lot. RP 22. In the chronology of this police encounter, settled law indicates that Mr. Herbert was “seized” in the constitutional sense at that point in time when Deputy Dill got out of his patrol car and shined his spotlight directly on Mr. Herbert, bathing him in light in the dark night, and asked him if the van was his. RP 9.⁶ Consider the following mixed statement of law and fact:

“When the Sheriff’s Deputy got out of his patrol car, and shined his spotlight on the defendant, and asked the defendant whether the vehicle that he was peering into was his, a reasonable person in the defendant’s shoes would have felt perfectly free to simply ignore the Deputy, walk away into the night, and leave the area.”

This proposition is plainly untenable – but the Respondent State of Washington must convince this Court of just that.

The case law does not help the State. A seizure occurs if “in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to

constitutional reasonableness of the seizure is also a legal determination that is analyzed de novo by the reviewing court, based on the trial court’s supported factual findings. State v. Hoffman, 116 Wn.2d 51, 98, 804 P.2d 577 (1991).

⁶The verbatim report of proceedings of the CrR 3.6 hearing, held January 30, 2009, is cited as “RP” followed by the appropriate page reference.

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)). Here, the Deputy's conduct of shining the spotlight on the defendant and commencing questioning about his conduct constituted a seizure. In an oft-cited decision involving facts similar to the present case, the Court of Appeals has held that there is a "seizure" of a person when police officers pull up behind a parked vehicle and activate their emergency lights and high beam headlights. State v. Stroud, 30 Wn. App. at 392-94. The facts of Stroud as described by the Court were as follows:

Aberdeen police officers observed a parked car occupied by two men. Although the car was legally parked and the officers were unable to observe any illegal activity within, they pulled up behind and turned on both their flashing light and high beam headlights. Officer Ryan walked to the driver's side of the vehicle as Officer Loyer approached the passenger side. Upon noticing Officer Loyer standing alongside the car, Stroud made a quick motion of his hand down between his legs. Officer Loyer, not knowing whether defendant had "a weapon or what," opened the car door and asked him to step from the vehicle. When defendant complied, Officer Loyer observed a marijuana cigarette on the seat.

Stroud, 30 Wn. App. at 393-94 (the Court found the seizure of

Stroud to be unlawful).

Notably, the facts of State v. Stroud do not indicate that the suspect car in that case was parked in such a way that the positioning of the police vehicle behind the suspect car prevented its departure. In Stroud, the suspect car was parked on the street, on the 100 block of State Street in Aberdeen. Stroud, 30 Wn. App. at 393-94. The facts clearly indicate that the car was parallel parked on the side of the street -- the police indicated they purposefully patrolled by driving in the opposite direction that the car was pointed, and then swung around and parked behind the suspect car. Stroud, 30 Wn. App. at 394, 396. The Court correctly believed that the suspect car was not blocked from leaving, as indicated by the Court's statement that if Stroud had driven off after the police pulled up, he could have been charged with a misdemeanor under RCW 46.61. Stroud, 30 Wn. App. at 394, 396. Nonetheless, despite the fact the police vehicle did not block the suspect's departure, the Stroud Court held that the officers' act of activating their patrol vehicle's lights constituted a seizure, because in these circumstances any reasonable person would feel that his or her departure from the scene was not a realistic alternative.

Stroud, 30 Wn. App. at 396 (citing United States v. Palmer, 603 F.2d 1286, 1289 (8th Cir. 1979)) (also stating that “[t]he fact that the officers alighted from their own vehicle and approached the vehicle within which defendant was seated could only have reinforced that impression”).

Ultimately, “[w]hether a person has been restrained by a police officer must be determined based upon the interaction between the person and the officer.” State v. O’Neill, 148 Wn.2d 564, 571, 62 P.3d 489 (2003) (citing State v. Knox, 86 Wn. App. 831, 839, 939 P.2d 710 (1997)). An important circumstance strongly indicating a seizure is the use by the officer of language or tone of voice indicating that some type of compliance is compelled. United States v. Mendenhall, *supra*, at 554.

No reasonable person would feel free to leave the scene in the circumstances in which Mr. Herbert found himself. State v. Aranguren, 42 Wn. App. at 455; United States v. Mendenhall, 446 U.S. at 554. Mr. Herbert was “seized” under Article 1 § 7 and the Fourth Amendment at this juncture.

b. There was no reasonable suspicion. At the time of the stop, the only proffered factors in support of reasonable suspicion

was the suspect's presence in a "high crime" area (albeit in the parking lot of an open business where other cars were also parked), and the defendant's act of peering into a vehicle. Settled law, by the holding of many cases, indicates the presence of Mr. Herbert in a high crime area was inadequate for reasonable suspicion. State v. Stroud, 30 Wn. App. at 399 (stop of an automobile because it was parked in an industrial area some distance from a retail business which had its own parking lot, at 1:41 a.m. in the morning was unreasonable, because the officers were unable to articulate specific, objective facts upon which to base a reasonable suspicion that the person in the car was engaged in criminal activity); State v. Ellwood, 52 Wn. App. 70, 74, 757 P.2d 547 (1988); State v. Larson, 93 Wn.2d 638, 645, 611 P.2d 771 (1980).

The fact that Mr. Herbert had been riding in a car that had been impounded in November adds nothing to reasonable suspicion. First, the actual facts were that the vehicle "had the evidence impound hit," which meant that the police had "arrested somebody out of the vehicle or it had been seized as evidence regarding some sort of investigation." RP 6. This had occurred

sometime in November, although the Deputy was not sure. RP 7. These facts are a “wash,” in that they do not have any weight whatsoever in terms of indicating that the defendant, a passenger in the car, might be involved in criminal activity. See, e.g., State v. Richardson, 64 Wn. App. 693, 825 P.2d 754 (1992) (a citizen's presence in a high crime area in the company of a person suspected of drug dealing does not give rise to articulable suspicion that the citizen is involved in criminal activity).

The fact that the defendant was peering into a vehicle also adds nothing to reasonable suspicion. Although the area was described as “high crime,” the offenses in the area were drug crimes and prostitution, not vehicle prowling or car theft. The courts have long held that a police officer's observations of mere “furtive” movements alone establish nothing.” United States v. Humphrey, 409 F.2d 1055, 1059 (10th Cir. 1969).

2. SUPPRESSION IS REQUIRED

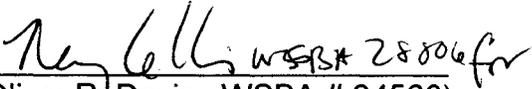
Evidence which is the product of an unlawful search or seizure is not admissible. Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). Evidence will be “excluded as 'fruit' [of the illegal seizure] unless the illegality is [not] the 'but for' cause

of the discovery of the evidence” and suppression is required where “ ‘the challenged evidence is in. some sense the product of illegal governmental activity.’ ” Segura v. United States, 468 U.S. 796, 104 S.Ct. 3380, 82 L.Ed.2d 599, 615 (1984) (quoting United States v. Crews, 445 U.S. 463, 471, 100 S.Ct. 1244, 1249, 63 L.Ed.2d 537 (1980)). Here, the methamphetamine would not have been discovered but for the illegal stop. It must be suppressed.

E. CONCLUSION

Based on the foregoing, Mr. Herbert asks that this Court reverse the trial court’s CrR 3.6 hearing and reverse his conviction.

Respectfully submitted this 10th day of July, 2009.


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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 63067-9-I
)	
ANTHONY HERBERT,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 10TH DAY OF JULY, 2009, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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