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No. 63738-0-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

ROY PORTER,

Appellant.

2009 OCT 20 PM 4:10

FILED  
COURT OF APPEALS DIVISION ONE  
STATE OF WASHINGTON

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

The Honorable Chris Washington

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BRIEF OF APPELLANT

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**A. SUMMARY OF ARGUMENT**

Officer J.M. Diamond arrested Roy Porter based on Officer James Lee's order to arrest a black man wearing a white t-shirt and jeans in the center of a park where Officer Lee was conducting surveillance. This description was not sufficiently specific to limit the pool of potential suspects in the park, which was populated with 40-60 people, most of whom were African-American. Because Officer Diamond lacked individualized probable cause to arrest Mr. Porter, this Court should reverse Mr. Porter's conviction for possession of cocaine.

Further, the trial court erred when it denied Mr. Porter's request for a sentence below the standard range due to the extraordinarily small amount of cocaine found in his possession (estimated to be between .001 to .01 grams).

**B. ASSIGNMENTS OF ERROR**

1. The trial court erred by concluding that the officers had probable cause to arrest Mr. Porter.

2. The trial court erred when it denied Mr. Porter's request for a sentence below the standard range due to the extraordinarily small amount of cocaine found in his possession.

3. Due to an absence of substantial evidence in the record, appellant challenges Finding of Fact 1(a).

4. Due to an absence of substantial evidence in the record, appellant challenges Finding of Fact 1(b).

5. Due to an absence of substantial evidence in the record, appellant challenges Finding of Fact 1(c).

6. Due to an absence of substantial evidence in the record, appellant challenges Finding of Fact 1(d).

7. Due to an absence of substantial evidence in the record, appellant challenges Finding of Fact 1(e).

8. Due to an absence of substantial evidence in the record, appellant challenges Finding of Fact 1(f).

9. Due to an absence of substantial evidence in the record, appellant challenges Finding of Fact 1(g).

10. Due to an absence of substantial evidence in the record, appellant challenges Finding of Fact 1(h).

11. Due to an absence of substantial evidence in the record, appellant challenges Finding of Fact 1(i).

12. Due to an absence of substantial evidence in the record, appellant challenges Finding of Fact 1(j).

13. Due to an absence of substantial evidence in the record, appellant challenges Finding of Fact 1(l).

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A custodial arrest must be based on a warrant or probable cause that the arrestee has been committing or has committed a crime. An officer has probable cause to arrest a suspect based on information from a fellow officer only if the fellow officer's physical description of the suspect is specific enough to sufficiently limit the pool of possible suspects. Officer Lee described the suspect as a black male wearing a white t-shirt and jeans standing near the center of Occidental Park. Within 30 seconds of receiving the description, Officer Diamond drove into the park and arrested the first black male in a white t-shirt that he saw. While he arrested Mr. Porter, Officer Diamond did not pay attention to the other 40-60 people in the area scattering in different directions. Did the trial court err when it found that Officer Diamond had probable cause to arrest Mr. Porter? (Assignments of Error 1, 3-13)

2. Where a defendant has requested an exceptional sentence below the standard range, review of a sentence within the standard range is warranted where the court has refused to

exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range. Mr. Porter requested a sentence below the standard range due to the extraordinarily small amount of cocaine found in his possession. Where the trial court denied this request on the impermissible basis that the court assumed Mr. Porter had a larger amount before the police arrested him, is review of Mr. Porter's sentence warranted? (Assignment of Error 2)

3. An "extraordinarily small amount" of a controlled substance is a substantial and compelling reason for downward departure from the standard sentencing range. Where Mr. Porter was found in possession of an amount of cocaine that was too small to measure and was estimated to weigh between .001 and .01 grams, did the trial court err when it denied Mr. Porter's request for a sentence below the standard range? (Assignment of Error 2)

#### D. STATEMENT OF THE CASE

1. The Arrest. On the night of October 5, 2008, Roy Porter went out with his two brothers to visit bars in the Pioneer Square neighborhood. RP 300. They met each other at Occidental Park, greeted each other, and talked for a few minutes before heading out to the bars. RP 304-06. The park was crowded with about 40

to 50 people, approximately 80% of whom were African-American. RP 23, 307.

Meanwhile, Seattle Police Officer James Lee and another officer were conducting surveillance of the park from a stairwell in a building on the northwest corner of the park. RP 14, 17, 24. The officers were part of an anti-crime team, and they were looking for hand-to-hand sales of crack cocaine in the park. RP 16. Officer Lee was positioned 150 feet from the people he was observing in the park, and testified that his binoculars made it seem like he was 15 feet away. RP 18, 145-46. It was dark that night, and Officer Lee admitted that a large tree partially blocked his view of the park. RP 24. The officers began the surveillance at 8:25 p.m. that night, and the arrest took place at 8:37 p.m. RP 146-47.

Officer Lee observed a man in the park being approached by a group of people. RP 18. Three people approached the man one by one; the man handed them something Officer Lee could not identify; and the people handed the man what appeared to Officer Lee to be money. RP 18-19. Officer Lee told the other officers over the radio to arrest the man for drug traffic loitering. RP 19.

Seattle Police Officer J.M. Diamond and three other officers were in a car positioned away from the park, waiting for the call to

move in and arrest suspects. RP 43. Officer Diamond heard over the radio that one of the suspects was a black male wearing a white t-shirt and jeans, and was located near the totem poles at the center of the park. RP 37. The arrest team drove in to the center of the park, and the people in the park scattered in different directions. RP 39, 169. Officer Diamond immediately approached the first black male wearing a white t-shirt that he saw. RP 39.

Officer Diamond testified that it was 30 seconds from the moment the officers received the call to the moment he arrested Mr. Porter. RP 39. He testified that he did not pay attention to the other people in the park because he was focusing on Mr. Porter. RP 230.

Officer Diamond testified that as he approached Mr. Porter, Mr. Porter walked northbound from the center of the park to the bocce ball courts on the north end of the park, where he stood behind two people. RP 41. Officer Diamond approached Mr. Porter, arrested him, handcuffed him, and began searching him. RP 42. Officer Diamond then left Mr. Porter with another officer while Officer Diamond went to help the other officers arrest another suspect. RP 42.

Officer Lee, on the other hand, testified that the man he was observing was located by the benches on the east side of the park, and that when the officers entered the park, the man walked 20 feet in a southbound direction. RP 26-27. Officer Lee testified that the man did not hide behind anyone, and was stopped near the totem poles at the center of the park. RP 27-28. Officer Lee testified that when the officers arrested Mr. Porter, Officer Lee notified the officers that they had arrested the correct suspect. RP 21.

2. The Search. The arresting officers did not find any drugs when they searched Mr. Porter at the park. RP 52. They found \$104 in cash. RP 22. They transported Mr. Porter to the police precinct, where Officer Lee searched the inside of Mr. Porter's pockets, and other officers conducted a strip search. RP 21, 310. Officer Lee turned Mr. Porter's pockets inside out, removed lint and particles, and packaged the particles in an evidence bag. RP 21.

Eric Finney of the Washington State Patrol Crime Lab testified that the particles contained cocaine, but that the amount was too small to weigh, estimating it to weigh between .001 to .01 grams. RP 252, 255.

3. Charge, Motion to Suppress, and Trial Outcome. The State charged Mr. Porter with Violation of the Controlled Substances Act: Possession of Cocaine. CP 15 (Amended Information).

At the CrR 3.6 hearing, the defense moved to suppress the cocaine, arguing that the officers lacked probable cause to arrest Mr. Porter. CP 8-14. The trial court denied the motion. SupCP 56A; RP 66.

After trial, the jury found Mr. Porter guilty as charged. CP 27.

4. Sentencing. At sentencing, Mr. Porter requested an exceptionally low sentence due to the extraordinarily small amount of cocaine found in his possession. RP 378-79. The trial court denied the request, reasoning,

Well, my sense is from the trial that the amount of cocaine really isn't of much significance. You had some. [. . .] my sense is from the testimony, that even though it's not what you're charged with, at one time in the evening you may have had more in your pants than when the police got you.

RP 381. The trial court sentenced Mr. Porter to 6 months. RP 381; CP 55-62.

Mr. Porter appeals. CP 63-71.

E. ARGUMENT

1. OFFICER DIAMOND LACKED PROBABLE  
CAUSE TO ARREST MR. PORTER

A lawful custodial arrest must be based on either an arrest warrant or upon probable cause. U.S. Const. amends. IV, XIV; Wash. Const. art. 1, § 7.

Probable cause exists when the officers have knowledge or reasonably trustworthy information of facts and circumstances that are sufficient in themselves to warrant a person of reasonable caution in the belief that (1) an offense has been or is being committed (2) by the person being arrested.

United States v. Fisher, 702 F.2d 372, 375 (2d Cir. 1983); State v. Gluck, 83 Wn.2d 424, 426-27, 518 P.2d 703 (1974). Under the Fourth Amendment and Article I, section 7, probable cause must be individualized to the specific person being arrested. Ybarra v. Illinois, 444 U.S. 85, 91, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979); State v. Grande, 164 Wn.2d 135, 142-43, 187 P.3d 248 (2008) (citing State v. Parker, 139 Wn.2d 486, 498, 987 P.2d 73 (1999)). Probable cause is determined by the facts and circumstances “within the officer’s knowledge *at the time of the arrest.*” State v. Mance, 82 Wn. App. 539, 542-43, 918 P.2d 527 (1996) (emphasis in original) (quoting State v. Fricks, 91 Wn.2d 391, 398, 588 P.2d 1328 (1979)).

An officer may arrest a person based on information gathered by a fellow officer where the fellow officer and arresting officer are working as a unit, even when the facts supporting probable cause are unknown to the arresting officer at the time of the arrest. State v. Maesse, 29 Wn. App. 642, 647, 629 P.3d 1349, rev. denied, 96 Wn.2d 1009 (1981). However, an officer making an arrest based on a description of a suspect lacks probable cause where “the information possessed by [the arresting officer] could have applied to any number of persons and did not reasonably single out from that group the person arrested.” Fisher, 702 F.2d at 375 (citing Wong Sun v. United States, 371 U.S. 484, 479, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)).

To support probable cause to arrest, the physical description of the suspect must yield a limited pool of suspects. United States v. Goodrich, 450 F.3d 552, 561 (3d Cir. 2006) (citing Wayne R. LaFare, Search and Seizure, A Treatise on the Fourth Amendment, § 9.5 (g) (4<sup>th</sup> ed.2004)) (“the description must permit the police to be reasonably selective in determining who to stop for investigation, and [ . . . ] will depend upon how many persons are in the universe of potential suspects”); Massillon v. Conway, 574 F.Supp.2d 381, 397-98 (S.D.N.Y. 2008) (suspect description did not support probable

cause where arrest team acted on description of a man in a green jacket and jeans); United States v. Rosario, 543 F.2d 6, 8 (2d Cir. 1976) (physical description of suspect as unknown “m/w/28 yrs., 5’8” tall, 155 lbs, light complexion, wearing blue trousers, multi[-]colored shirt and sneakers” was not specific enough to support arrest because the description would fit “a very large group of ordinary young men”); Cf. United States v. Valez, 796 F.2d 24, 27 (2d Cir. 1986) (description of suspect sufficiently detailed to provide probable cause where defendant matched every detail of undercover officer's description of a “Hispanic male in his twenties, wearing a black leather jacket, grey pants with a comb in the back pocket, and a white or off-white V-neck shirt with dark trim on the collar”).

The trial court’s assessment of probable cause is an issue of law reviewed *de novo*. State v. Neth, 165 Wn.2d 177, 182, 196 P.3d 658 (2008).

a. The physical description of the suspect was not specific enough to create individualized probable cause to arrest Mr. Porter. In this case, the arresting officer lacked probable cause to arrest Mr. Porter because Officer Lee’s physical description of the suspect as a black male wearing a white t-shirt and jeans did

not sufficiently limit the pool of possible suspects. There were approximately 40-60 people in the small park that night, and the majority of them were African-American. RP 23, 307. Many of the African American males in the park could have been wearing the common combination of a white t-shirt and jeans.

Officer Diamond's claim – for the first time on cross-examination – that Mr. Porter was the only black male wearing a white t-shirt is highly dubious because Officer Diamond did not have an opportunity to observe all of the other people in the park. RP 39, 43, 49; CP 3-4 (Certification for Determination of Probable Cause). Before Officer Diamond and the other officers drove into the park, he was not in a position to observe the people there. RP 43. When Officer Diamond walked into the park, within less than 30 seconds, he arrested the first black male wearing a white t-shirt that he saw. RP 39. He testified that he was not paying attention to the other people at the park because he was focusing on arresting Mr. Porter. RP 230. Therefore, several people matching the suspect description could have gone unnoticed as Officer Diamond pursued and arrested Mr. Porter. Indeed the trial court did not make a finding that Mr. Porter was the only black male in the park wearing a white t-shirt. SupCP 56A.

It is inconsequential that both officers testified that Officer Lee confirmed that Officer Diamond arrested the correct suspect. RP 21, 54. First, the validity of this alleged confirmation is questionable. The contradictions between Officer Lee's testimony – that the suspect walked southbound and did not hide, versus Officer Diamond's testimony – that Mr. Porter walked southbound and hid behind two people – indicate that the officers were observing two different people. Thus, it is highly likely that when the 40-60 people in the park scattered as the arrest team moved in, Officer Lee lost track of the suspect, and confirmed the arrest of Mr. Porter simply because he was a black male wearing a white t-shirt and jeans. Because Officer Lee was positioned so far away from the suspect, it was dark out, and his attention was focused on the suspect's hands, Officer Lee's identification of Mr. Porter was based on the suspect's clothing rather than facial features.

Second, Officer Lee's "confirmation" did not give Officer Diamond individualized probable cause that Mr. Porter had engaged in criminal activity because this information was provided to Officer Diamond after he arrested Mr. Porter. RP 21.

b. The fellow officer rule does not allow officers to guess and check their way to a proper arrest. The fellow officer rule provides that

an arresting officer who does not personally possess sufficient information to constitute probable cause may still make a warrantless arrest if (1) he acts upon the direction or as a result of a communication from a fellow officer, and (2) the police, as a whole, possess sufficient information to constitute probable cause.

Maesse, 29 Wn. App. at 646-47 (citing United States v. Bernard, F.2d 551 (9th Cir. 1979)). This rule is based on the assumption that “The officers involved were working in close concert with each other and the knowledge of one of them was the knowledge of all.” Bernard, 623 F.2d at 561 (quoting Stassi v. United States, 410 F.2d 946 (5th Cir. 1969)).

Thus, in evaluating probable cause, courts may look to the collective knowledge of the team of officers, and probable cause can exist even if the arresting officer does not know the substance of the information obtained by other officers. Maesse, 29 Wn. App. at 646-47. However, the arresting officer must still have sufficient information regarding the identity of the suspect to establish individualized probable cause to arrest the particular suspect. See, e.g., Maesse, 29 Wn. App. at 643-44 (arresting officer made arrest

based on suspect description of “white male fifteen to sixteen years old wearing an orange jacket and a yellow baseball cap,” and defendant was the only person matching that description); Torrey v. City of Tukwila, 76 Wn. App. 32, 35, 39, 882 P.2d 799 (1994) (in evaluating probable cause to arrest, court considered undercover officers’ observations of dancers violating standards of conduct ordinance where undercover officers specifically identified defendants during raid by arresting officers).

In evaluating probable cause in this case, this Court may consider Officer Lee’s observations of the suspect’s behaviors prior to the order to arrest the suspect, even though Officer Diamond was not aware of this information at the time of arrest. However, the fellow officer rule does not allow this Court to consider Officer Lee’s alleged knowledge that Officer Diamond was arresting the correct person, of which Officer Diamond was unaware at the time of arrest.

A holding to the contrary would allow an arresting officer to guess and check his way to a proper arrest by arresting every person matching a fellow officer’s vague suspect description and then confirming whether he arrested the correct person. It also would create an end-run around the requirement that probable

cause must be individualized to the specific person arrested, and would eviscerate citizens' rights under the Fourth Amendment and Article I, section 7.

Therefore, this Court must not consider Officer Lee's alleged confirmation of the arrest in its evaluation of probable cause.

c. The evidence obtained as a result of the illegal arrest must be suppressed. Where there has been a violation of Article I, section 7 or the Fourth Amendment, courts must suppress evidence obtained as a result of the illegal search or seizure as fruit of the poisonous tree. State v. Day, 161 Wn.2d 889, 895, 168 P.3d 1265 (2007); State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999); Wong Sun, 371 U.S. at 484.

Because Officer Diamond did not have probable cause that Mr. Porter had been committing or had committed a crime, the arrest violated Mr. Porter's rights under the Fourth Amendment and Article I, section 7. Therefore, the cocaine obtained as a result of the arrest must be suppressed, and Mr. Porter's conviction for possession of cocaine must be reversed.

2. THE TRIAL COURT ERRED WHEN IT DENIED MR. PORTER A SENTENCE BELOW THE STANDARD RANGE DUE TO THE EXTRAORDINARILY SMALL AMOUNT OF COCAINE FOUND IN HIS POSSESSION

Generally, RCW 9.94A.585(1) precludes an appeal of a sentence within the standard range. State v. Herzog, 112 Wn.2d 419, 423, 771 P.2d 739 (1989) (citing former RCW 9.94A.210(1)). However, where a defendant has requested an exceptional sentence below the standard range, review is warranted “where the court has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range.” State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997).

Here, Mr. Porter requested a sentence below the standard range because the amount of cocaine found in his possession was so small that it could not be measured. RP 378-79. The trial court denied the request and sentenced Mr. Porter to 6 months incarceration. RP 381; CP 55-62. Although Mr. Porter’s sentence is within the standard range, review is appropriate because the trial court relied on an impermissible basis in denying his request for a sentence below the standard range. The trial court reasoned,

Well, my sense is from the trial that the amount of cocaine really isn't of much significance. You had some. [ . . . ] my sense is from the testimony, that even though it's not what you're charged with, at one time in the evening you may have had more in your pants than when the police got you.

RP 381. Thus, the trial court denied Mr. Porter's request based on acts for which Mr. Porter was neither charged nor convicted. RCW 9.94A.530(2) provides in relevant part,

In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing, or proven pursuant to RCW 9.94A.537.

Therefore, the trial court denied Mr. Porter's request for a sentence below the standard range on an impermissible basis, and this Court may review Mr. Porter's sentence.

A factor may support a sentence outside the standard range if the factor (1) was not considered by the Legislature in establishing the standard sentence range, and (2) is "sufficiently substantial and compelling to distinguish the crime in question from others in the same category." State v. Alexander, 125 Wn.2d 717, 725, 888 P.2d 1169 (1995) (citing State v. Smith, 123 Wn.2d 51, 57, 864 P.2d 1371 (1993) (quoting State v. Grewe, 117 Wn.2d 211, 215-16, 813 P.2d 1238 (1991))).

In Alexander, the Washington Supreme Court held that “a trial court may treat an ‘extraordinarily small amount’ of a controlled substance is a substantial and compelling reason for downward departure from the standard sentence range.” Alexander, 125 Wn.2d at 727. The Court reasoned that the Legislature did not contemplate the inclusion of extraordinarily small amounts when it established the standard sentencing range for delivery of a controlled substance, and “an extraordinarily small amount of controlled substance [. . .] distinguishes Alexander’s crime from others in the same category.” Id. at 726. The Court added, “By permitting judges to tailor the sentence in this manner, we also promote proportionality between the punishment and the seriousness of the offense.” Id. at 727-28.

The trial court in this case should have granted Mr. Porter’s request for a sentence below the standard range because he was convicted for possession of an extraordinarily small amount of cocaine – which was estimated to weigh between .001 and .01 grams. RP 252, 255. In the same way the Legislature did not contemplate an extraordinarily small amount of a controlled substance for inclusion in standard sentencing range for delivery of a controlled substance, it did not do so for possession of a

controlled substance. Id. at 726-27; RCW 69.50.4013. Further, the extraordinarily small amount of cocaine in this case distinguishes Mr. Porter's crime from others in the same category because this amount was so small that it was extremely difficult to notice, let alone use. RP 52.

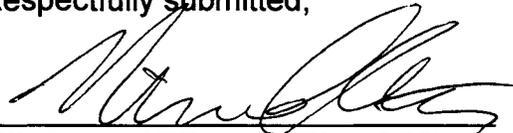
Therefore, the trial court should have granted Mr. Porter's request for a sentence below the standard range, and this Court should remand Mr. Porter's case for re-sentencing.

F. CONCLUSION

For the above reasons, Mr. Porter respectfully requests this Court reverse his conviction for possession of cocaine, or remand his case for re-sentencing.

DATED this 20th day of October 2009.

Respectfully submitted,



MINDY M. ATER (WSBA 40755)  
Washington Appellate Project (91052)  
Attorneys for Appellant

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

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STATE OF WASHINGTON	)	
Respondent	)	CoA No. 63738-0
	)	
v.	)	
	)	
	)	
ROY PORTER,	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, ANN JOYCE, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

1. THAT ON THE 20TH DAY OF OCTOBER, 2009, A COPY OF **APPELLANT'S OPENING BRIEF** WAS SERVED ON THE PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL ADDRESSED AS FOLLOWS:

[X] Prosecuting Atty King County  
King Co Pros/App Unit Supervisor  
W554 King County Courthouse  
516 Third Avenue  
Seattle WA 98104

[X] Roy Porter  
1529 18<sup>th</sup> Ave. S., Apt. B  
Seattle, WA 98144

**SIGNED** IN SEATTLE, WASHINGTON, THIS 20TH DAY OCTOBER, 2009

x *Ann Joyce*