

63934-0

63934-0

NO. 63934-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MARTIN HARRIS,

Appellant.

2010 FEB 23 PM 2:12

COURT OF APPEALS
FILED

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LEROY MCCULLOUGH

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. <u>ISSUES</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. PROCEDURAL HISTORY	2
2. CrR 3.6 FACTS	2
C. <u>SUMMARY OF ARGUMENT</u>	6
D. <u>ARGUMENT</u>	7
1. THERE WAS A LAWFUL BASIS TO STOP HARRIS	7
2. MCDANIEL PROPERLY BROUGHT HARRIS HOME	9
a. The Family Reconciliation Act Required That McDaniel Take Harris To His Mother	9
b. McDaniel's Transport Of Harris Home Was A Valid Community Caretaking Function	12
3. HARRIS' DROPPING OF HIS GUN WAS NOT FRUIT OF HIS DETENTION	17
E. <u>CONCLUSION</u>	19

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Cady v. Dombrowski, 413 U.S. 433,
93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973)..... 12

Terry v. Ohio, 392 U.S. 1,
88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)..... 8, 15, 16

Wong Sun v. United States, 371 U.S. 471,
83 S. Ct. 407, 9 L. Ed. 2d 441 (1963)..... 17

Washington State:

State v. Acrey, 110 Wn. App. 769,
45 P.3d 553 (2002)..... 12, 13, 14

State v. Acrey, 148 Wn.2d 738,
64 P.3d 594 (2003)..... 10, 12, 13, 14, 15, 16

State v. Duncan, 146 Wn.2d 166,
43 P.3d 513 (2002)..... 8

State v. Flowers, 57 Wn. App. 636,
789 P.2d 333 (1990)..... 6

State v. Kinzy, 141 Wn.2d 373,
5 P.3d 668 (2003)..... 10, 14, 15, 16

State v. Warner, 125 Wash.2d 876,
889 P.2d 479 (1995)..... 18

State v. White, 97 Wn.2d 92,
640 P.2d 1061 (1982)..... 17

Statutes

Washington State:

RCW 7.80.050..... 7
RCW 7.80.060..... 7, 8
RCW 13.32A.050 9, 10, 11
RCW 13.32A.060 10, 11
RCW 70.155.080..... 7

Rules and Regulations

Washington State:

CrR 3.6..... 2

Other Authorities

Family Reconciliation Act 5, 6, 9, 10, 11, 12, 14

A. ISSUES

1. An officer may detain a person to identify him or her to issue an infraction citation. In this case, Officer McDaniel saw Harris committing the infraction of minor in possession of tobacco. Was Officer McDaniel justified in his stop of Harris?

2. An officer must take a child home when a parent requests the child's transport or when the officer sees the child in danger. Officer McDaniel had previously been told by Harris' mother to take Harris home if he was seen with those he was court-prohibited from contacting, or if he was getting in trouble. Did Officer McDaniel act properly when he honored the mother's request in taking Harris home?

3. Evidence is fruit of the poisonous tree if it is not distinct and attenuated from an illegal detention. Here, Officer McDaniel already released Harris to his mother's custody, before Harris dropped his gun. Was this discovery of the gun distinct from Harris' earlier detention?

B. STATEMENT OF THE CASE

1. PROCEDURAL HISTORY

Juvenile respondent Martin Harris was charged by amended information with Unlawful Possession of Firearm in the Second Degree. CP 3. The State alleged that on November 20, 2008, Harris unlawfully possessed a 9mm handgun after previously being convicted of a felony. CP 3. A CrR 3.6 hearing was held, and the court denied the motion to suppress. RP 154. The trial court then found Harris guilty as charged in a stipulated bench trial. CP 17; RP 159. The trial court imposed a standard range sentence. CP 23; RP 170. Harris now appeals his conviction. CP 20-21.

2. CrR 3.6 FACTS

Seattle Police Officer Kevin McDaniel is a community officer who knew Martin Harris through the "Safe Futures" program in West Seattle. RP 42-44, 48. As a community officer, McDaniel knew Harris and his mother, Maria, for over two years. CP 41; RP 45.

McDaniel and Harris had numerous conversations during this time, often one-on-one, about the importance of staying in school and staying out of trouble. CP 41; RP 46. Maria would

often turn to McDaniel to counsel Harris, who was 15-years old at the time of the incident. CP 41; RP 48-49. Maria testified that her husband had died, and she relied on McDaniel to help Harris from getting into trouble or hanging out with the wrong crowd. CP 41; RP 39.

In September of 2008, Harris was convicted of felony possession of stolen property, and Maria became even more concerned about his safety. RP 20. She thought he might soon be killed on the streets. RP 20. As a condition of his sentence, the court prohibited his contact with any of those he was with during the commission of the crime. CP 42; RP 50-51. Over the next two months, Maria called McDaniel at least weekly about Harris staying out of the house without permission and not obeying house rules. CP 41; RP 16, 21, 49. She was worried that Harris was hanging with the same "wrong crew" he was with when he committed the felony offense. RP 16-17.

During this time, Maria specifically told McDaniel to bring Harris home if he saw Harris with those whom the sentencing court had prohibited contact. CP 41; RP 50. She also asked McDaniel to bring Harris home if McDaniel saw him getting in trouble or in an unsafe place. CP 41; RP 50. McDaniel knew that the earlier

no-contact order included Mark Skinner, who was one of Harris' friends involved in the earlier felony. CP 42; RP 51-52.

While on patrol on November 20, 2008, around 4:30 p.m., McDaniel saw Harris and Skinner at a bus stop, along with several others. CP 41; RP 55, 78, 80. Harris was smoking some sort of cigarette, which he tossed away when he saw McDaniel approach. CP 42; RP 55. McDaniel told Harris to come over to his patrol car, away from Skinner. CP 42; RP 55. When asked, Harris confirmed that he was smoking tobacco. RP 55.

McDaniel told Harris that he was not to be in contact with Skinner and told him to wait by the patrol car. RP 55. McDaniel went over to the bus stop and told Skinner and the others that if they were not waiting for a bus they should leave. RP 55. As he approached the bus stop, McDaniel smelled marijuana. CP 42; RP 55. McDaniel was aware that this bus stop was known for high crime and narcotics activity, and he did not feel that this was a safe place for Harris. CP 41-42; RP 58, 84.

McDaniel returned to his patrol car and asked Harris if his mother was home; Harris said yes. RP 56. McDaniel then said to Harris, "Come on, I'm going to take you home." RP 56. Harris opened the front door of the patrol car and got in the passenger

seat at McDaniel's direction. RP 55. McDaniel never handcuffed or frisked Harris throughout this courtesy ride. CP 42; RP 56-57, 92. During this two-minute drive, McDaniel had no intention of arresting Harris; he just wanted to get him home to his mother. RP 62, 87. McDaniel did not smell any marijuana in the car. CP 42; RP 88.

Upon reaching Maria's house, McDaniel and Harris exited the car and McDaniel knocked on the front door. CP 43; RP 59. McDaniel explained to Maria that he thought Harris might have been smoking marijuana. CP 43; RP 59. He asked to come inside so as to not have the neighbors overhear the conversation. CP 43; RP 59. Maria agreed to go upstairs and all three went into the stairwell. CP 43; RP 59.

As they walked upstairs, Harris was shifting his waistband, and a 9mm handgun fell to the floor. CP 43; RP 60. McDaniel yelled to Maria that there was a gun, and he quickly arrested Harris and recovered the weapon from the ground. RP 27-28, 60, 64-65. Harris exclaimed that he needed the gun for his protection. RP 66.

The trial court found that Harris was not seized and voluntarily joined McDaniel in the ride home. CP 42-43; RP 151-53. Alternatively, the court found that the Family Reconciliation Act and community caretaking obligations required that McDaniel

bring Harris home because the mother requested it and McDaniel had reasonable concern for Harris' safety at the bus stop. CP 42-42; RP 149-54.

C. SUMMARY OF ARGUMENT

Regardless of whether Harris' contact with McDaniel was voluntary or involuntary,¹ there was a lawful basis to detain Harris at the bus stop, because he committed a civil infraction. McDaniel properly brought Harris home from the bus stop due to his mother's request and McDaniel's concern for his safety under the Family Reconciliation Act. The transport home was also required as a valid community caretaking function.

¹ Harris argues on appeal that there is insufficient evidence to support the trial court's factual finding that Harris voluntarily joined McDaniel in the transport home, thus making his initial stop and subsequent transport home involuntary, and an unlawful seizure. Because there were sufficient other lawful bases to stop and take Harris home, this brief will address those bases specifically. State v. Flowers, 57 Wn. App. 636, 640-41, 789 P.2d 333 (1990) (holding that this Court can affirm a trial court's denial of a suppression motion based on alternative theories from those relied upon at the trial court when established by unchallenged findings of fact and the record.).

D. ARGUMENT

1. THERE WAS A LAWFUL BASIS TO STOP HARRIS.

Harris claims that he was unlawfully seized when he was stopped by McDaniel at the bus stop. Because McDaniel observed Harris committing an infraction, his stop was lawful.

It is a civil infraction for someone less than 18 years old to possess tobacco.² RCW 70.155.080. When police observe an infraction, the officer may stop and detain the individual suspected long enough to obtain the name, address, date of birth, and identification card from the suspect. RCW 7.80.060³; State v.

² "A person under the age of eighteen who purchases or attempts to purchase, possesses, or obtains or attempts to obtain cigarettes or tobacco products commits a class 3 civil infraction under chapter 7.80 RCW and is subject to a fine as set out in chapter 7.80 RCW or participation in up to four hours of community restitution, or both. . . ." RCW 70.155.080.

³ Civil Infractions: Person receiving notice--Identification and detention

A person who is to receive a notice of civil infraction under RCW 7.80.050 is required to identify himself or herself to the enforcement officer by giving his or her name, address, and date of birth. Upon the request of the officer, the person shall produce reasonable identification, including a driver's license or identicard.

A person who is unable or unwilling to reasonably identify himself or herself to an enforcement officer may be detained for a period of time not longer than is reasonably necessary to identify the person for purposes of issuing a civil infraction.

Each agency authorized to issue civil infractions shall adopt rules on identification and detention of persons committing civil infractions.

RCW 7.80.060.

Duncan, 146 Wn.2d 166, 174, 43 P.3d 513 (2002) (holding that a non-traffic civil infraction limits a suspect's detention to a length only long enough to receive this identifying information and does not extend to a full Terry⁴ investigatory stop.).

In this case, McDaniel observed Harris smoking either marijuana or tobacco. CP 42; RP 55. While he did not know his exact birth date, McDaniel knew that Harris was under 18, thereby making it unlawful for Harris to possess tobacco, and the stop valid. CP 42; RP 55.

Harris argues that this infraction did not provide a basis to "arrest or detain" him. App. Br. at 19. While he is correct that he cannot be arrested or subject to a Terry frisk pursuant to a civil infraction, Harris may be detained as necessary to get all required information to issue a citation. See RCW 7.80.060; Duncan, 146 Wn.2d at 174. Without detaining a person for this purpose, it would be impossible for police to enforce infractions.

Accordingly, Harris could be lawfully detained for a short period of time. After seeing Harris commit this civil infraction, McDaniel was lawfully justified in stopping him at the bus stop.

⁴ Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

2. MCDANIEL PROPERLY BROUGHT HARRIS HOME.

Harris claims that McDaniel unconstitutionally detained him when McDaniel took him to his house from the bus stop. Because McDaniel had a duty to honor the request by Harris' mother to take him home pursuant to the Family Reconciliation Act and McDaniel's community caretaking functions, his claim fails.

a. The Family Reconciliation Act Required That McDaniel Take Harris To His Mother.

Pursuant to the Family Reconciliation Act ("the Act"), a police officer must take a child into custody when: (1) the officer has been contacted by the child's parent that the child is absent from the parent's custody without consent; or (2) if the officer reasonably believes that there is a danger to the child's safety due to the child's age, the location, and the time of day. RCW 13.32A.050(1)⁵.

An officer who takes a child into custody for either of these reasons shall inform the child of the reason that the officer is taking

⁵ "A law enforcement officer shall take a child into custody: (a) If a law enforcement agency has been contacted by the parent of the child that the child is absent from parental custody without consent; or (b) If a law enforcement officer reasonably believes, considering the child's age, the location, and the time of day, that a child is in circumstances which constitute a danger to the child's safety or that a child is violating a local curfew ordinance. . . ." RCW 13.32A.050(1).

the child into custody. RCW 13.32A.060(1). The officer must then transport the child home, if a parent is home. RCW 13.32A.060(1)(a). Upon releasing the child to the parent's custody, the officer must inform the parent why the child was taken into custody. RCW 13.32A.060(1)(b). The Act "clearly is designed to promote the public interest in the safety of children." State v. Acrey, 148 Wn.2d 738, 751, 64 P.3d 594 (2003) (quoting State v. Kinzy, 141 Wn.2d 373, 389, 5 P.3d 668 (2003)).

In this case, McDaniel performed his duties under the Act. Harris' mother, Maria, contacted McDaniel at least weekly to report that Harris should be taken home if he was seen with those he was court-prohibited from contacting. Maria also directed McDaniel to take Harris home also if he saw Harris getting into trouble.

McDaniel knew Harris was with Skinner in violation of court order, and that Maria had directed McDaniel to take him home in this circumstance. Additionally, McDaniel saw Harris committing the infraction of possession of tobacco by a minor, perhaps even criminally possessing marijuana; thus undoubtedly getting "in trouble." In either circumstance, the directive from Harris' mother to police could not be clearer. McDaniel knew Harris' mother wanted him returned to her custody. See RCW 13.32A.050(1)(a).

Moreover, these circumstances constituted a danger to Harris' safety. McDaniel was focused on Harris' safety and honoring his mother's request that he be removed from an unsafe environment. Harris was prohibited from contacting at least one of the persons with him. The unsupervised, 15-year old Harris was at a location, which smelled of marijuana and was known for its criminal and drug activity. The weight of the total circumstances endangered Harris' safety, implicating the Act. See RCW 13.32A.050(1)(b).

Accordingly, McDaniel complied with his obligations under the Act. He first notified Harris why he was being taken into custody: Harris' improper contact with Skinner. See 13.32A.060(1). McDaniel then confirmed with Harris that his mother was home, and drove the two minutes to take him to her. See 13.32A.060(1)(a). Upon connecting with the mother at her house and releasing Harris to her, McDaniel began to inform her why Harris had been taken into custody. See 13.32A.060(1)(b). Every action taken by McDaniel was not only consistent with the directive of the Act, but also was mandated by it.

b. McDaniel's Transport Of Harris Home Was A Valid Community Caretaking Function.

In complying with the requirements of the Family Reconciliation Act, McDaniel was also serving in a valid community caretaking role when he transported Harris home. This community caretaking function forms a lawful basis for the transport of Harris to his mother.

A child has a freedom of movement that should not be interfered with unless it is outweighed by the State's interest in his welfare. Acrey, 148 Wn.2d at 750-51. Protecting the safety of children is a valid community caretaking function that permits the detention of a child. Id. This community caretaking role by police is totally divorced from a criminal investigation. Id. at 749 (citing Cady v. Dombrowski, 413 U.S. 433, 441, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973)). Because it is not a criminal investigation, this Court has clarified that the traditional warrant-based analysis is not used to evaluate police conduct. State v. Acrey, 110 Wn. App. 769, 774, 45 P.3d 553 (2002).

A balancing test is used to determine the reasonableness of the child's detention in relation to the community caretaking task at hand. Acrey, 148 Wn.2d at 748-49. The particular facts of each

police encounter determine whether an officer was reasonable in his or her conduct. Id.

In this case, there was no criminal investigation. McDaniel's sole interest was the return of Harris to his mother, whose house was only two minutes away. McDaniel did not frisk or handcuff Harris as he rode in the patrol car's front passenger seat.⁶ He had no intention of arresting him at that point. The relationship of McDaniel to Harris as a community officer with the "Safe Futures" program was one based on the personal welfare and development of Harris. McDaniel's intent to take Harris home was completely detached from any criminal investigation.

Harris claims that the facts of this case do not make McDaniel's actions reasonable. However, when police contact a mother regarding her child's safety they act reasonably and in a community caretaking function. See Id. at 753-54. Acrey involved a mother who, after learning of the situation, asked police to give her 12-year old son, Acrey, a ride home from an isolated area around midnight where he was with four other unsupervised boys. Id. at 752. This Court has held that "once his mother requested the

⁶ Even in a community caretaking role, this Court has held that the officer is entitled to frisk for weapons for officer safety before putting a person in a patrol car. Acrey, 110 Wn. App at 777.

officers' assistance in bringing him home, their community caretaking duties required them to comply with her request." Acrey, 110 Wn. App. at 775.

The issue in Acrey was not whether it was reasonable to transport the child home after the mother's request, but instead whether it was reasonable to detain the unknown Acrey until his mother could be contacted to determine if she wanted him brought home. Acrey, 148 Wn.2d at 753-54. This Court held that given the age, time, and location of Acrey, and since police initially detained Acrey to investigate a crime, it was appropriate to detain Acrey further until the mother was able to say whether he should be transported home.⁷ Id. at 755.

Ultimately, it is a parent's decision to determine how to direct her child's upbringing, including when a child is allowed out of the home. Id. at 752. The seizure in Acrey was appropriate because the police deferred to Acrey's mother's decision as to whether he should be brought home. Id. As such, "this brief seizure served the

⁷ The Supreme Court indicated in a footnote that in addition to Acrey's detention being permissible as a general community caretaking function, police were also justified in their action pursuant to the Family Reconciliation Act, "which is clearly designed to promote the public interest in the safety of children." Acrey, 148 Wn.2d at 751 n.44 (quoting Kinzy, 141 Wn.2d at 389).

additional purpose of advancing a mother's right to direct her child's upbringing." Id.

In Acrey, the Supreme Court distinguished Kinzy, where it had earlier held in a plurality opinion that it was unreasonable for police in their caretaking function to detain an unknown, young-looking 16-year old, who was in a high narcotics area at night with older individuals.⁸ Kinzy, 141 Wn.2d at 396-97. The Kinzy Court was concerned that police were unlawfully using a community custody exception as an excuse for de facto implementation of child curfew laws. Acrey, 148 Wn.2d at 752. It held that while police properly contacted Kinzy to determine if she needed assistance, once they determined that assistance was not necessary, it was improper for them to continue the detention that included a Terry frisk, which resulted in a drug discovery. Id. at 396-97. In Acrey, to the contrary, while first contacting the child for a criminal investigation, police then turned to their role as

⁸ The cases were factually distinguished because:

The 12-year-old Petitioner [in Acrey] was younger than the 16-year-old juvenile in Kinzy. The officers encountered Petitioner after midnight. They were acting on a reasonable, articulable suspicion of criminal activity when they initially detained Petitioner in the company of other youth and no adults in an isolated commercial area with no open businesses and no nearby residences.

Acrey, 148 Wn.2d at 753-54.

community caretakers when they further detained Acrey in a non-investigatory effort to contact his mother. Acrey, 148 Wn.2d at 753-54.

Since there was no Terry frisk of Harris, Kinzy is inapposite to our case. As in Acrey, the police role here was simply to connect a child with his mother. McDaniel knew that Harris needed assistance before he first contacted him. McDaniel simply honored Harris' mother's wishes and his concern for Harris' safety, when he saw Harris with Skinner, getting into trouble, at a location known for crime and narcotics activity, and that smelled of marijuana.

Since it was already known to McDaniel that Harris' mother wanted him brought home in these circumstances, Harris' non-criminal detention for a few minutes to take him home at the mother's request was a reasonable part of police caretaking functions. The regular and clear directive from Harris' mother made Harris' short detention for this caretaking purpose constitutionally permissible.

3. HARRIS' DROPPING OF HIS GUN WAS NOT FRUIT OF HIS DETENTION.

In the event that this Court finds that Harris' transport home was an unlawful criminal detention, rather than a proper exercise of the community caretaking exception, the discovery of the gun is attenuated from the detention and is not fruit of the poisonous tree.

"[A]ll evidence which is the product of an illegal search or seizure is suppressed." State v. White, 97 Wn.2d 92, 101, 640 P.2d 1061 (1982) (citing Wong Sun v. United States, 371 U.S. 471, 485-86, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963)). However, all evidence is not "'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police." Wong Sun, 371 U.S. at 488. "Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which the instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" Id.

In other words "if the 'fruit' is sufficiently attenuated from the original illegality, then it may be admitted." State v. Warner, 125 Wash.2d 876, 888, 889 P.2d 479 (1995).

In this case, McDaniel transported Harris home and released him to the custody of his mother. McDaniel no longer had custody of Harris. It was only after Harris was home that he started to rearrange his pants, which led to the gun being exposed. When Harris dropped the gun at the house, this action was attenuated from the original transport home.

Thus, even if Harris had been unlawfully detained in his transport home, once his mother reclaimed custody of him, the plain view discovery of the gun was a lawful discovery distinct from any earlier detention of him. Accordingly, it is not a result of the earlier transport home, and cannot be fruit of the poisonous tree.

E. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Harris' conviction.

DATED this 22nd day of February, 2010.

Respectfully submitted,

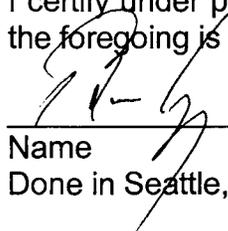
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Andrew Zinner, the attorney for the appellant, at Nielsen, Broman, & Koch, 1908 E. Madison St., Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. MARTIN HARRIS, Cause No. 63934-0-1, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



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