

64143-3

64143-3

COA NO. 64143-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL SAFFORD,

Appellant.

REC'D
MAR 31 2010
King County Prosecutor
Appellate Unit

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

The Honorable Michael C. Hayden, Judge

REPLY BRIEF OF APPELLANT

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A. SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. The trial court erred in concluding "the cocaine found on the defendant's person during a strip search shall be admissible at trial." CP 97.¹

2. The trial court erred in finding, as part of its oral opinion incorporated into the formal written findings and conclusions, that he was "fully aware of the fact that contraband is hidden in many places, including the crotch area, and between the cheeks." 1RP 20; CP 97.

B. ARGUMENT IN REPLY

1. THE MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED BECAUSE THE STRIP SEARCH VIOLATED SAFFORD'S CONSTITUTIONAL AND STATUTORY RIGHT TO PRIVACY.

a. The Strip Search Was Unlawful Because Police Lacked Individualized, Reasonable Suspicion That Such A Search Was Necessary To Locate Contraband.

In concluding the strip search was lawful, the trial court stated, as part of its oral opinion, that he was "fully aware of the fact that contraband is hidden in many places, including the crotch area, and between the cheeks." 1RP 20. In the body of the opening brief, Safford's appellate

¹ The trial court's "Written Findings of Fact and Conclusions of Law on CrR 3.6 Motion to Suppress Physical, Oral or Identification Evidence" are attached as appendix A. These written findings and conclusions were entered after appellant assigned error to their absence in the opening brief.

counsel challenged the propriety of the court's reliance on its personal knowledge about where dealers hide drugs as opposed to evidence produced by the parties. Brief of Appellant (BOA) at 14-17.

After the opening brief was filed, the State arranged for belated entry of CrR 3.6 written finding and conclusions. The court incorporated by reference "its oral findings and conclusions" into the written findings and conclusions. CP 97.

In its reply brief, the State complains Safford did not assign error to the court's oral statement that he was "fully aware of the fact that contraband is hidden in many places, including the crotch area, and between the cheeks." Brief of Respondent (BOR) at 11-12. According to the State, the "finding" is therefore a verity on appeal. BOR at 12 n.7.

"A court's oral opinion is not a finding of fact." State v. Hescok, 98 Wn. App. 600, 605, 989 P.2d 1251 (1999). Rather, an oral opinion is no more than a verbal expression of the court's informal opinion at the time rendered and "has no final or binding effect unless formally incorporated into the findings, conclusions, and judgment." State v. Head, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998) (quoting State v. Mallory, 69 Wn.2d 532, 533, 419 P.2d 324 (1966)).

The State does not explain how Safford's appellate counsel could assign error to a finding of fact that did not exist at the time the opening

brief was filed. Hescock, 98 Wn. App. at 605. This Court should not allow the State to shirk its responsibility to obtain written findings below and then penalize Safford on appeal for failing to assign error to factual findings that do not yet exist.

Written findings "allow the appealing defendant to know precisely what is required in order to prevail on appeal." State v. Smith, 68 Wn. App. 201, 209, 842 P.2d 494 (1992). Before entry of written findings, appellate counsel has no way of knowing which oral remarks the trial court will treat as formal findings.

Now that the trial court has formally incorporated its oral opinion into the written findings and conclusions, Safford's appellate counsel is in a position to assign error to improper findings and conclusions. This reply brief accordingly assigns error to the court's oral remark at issue here. See A. 2., supra.

Even if the State were not responsible for the lack of assignment of error in the opening brief due to the lack of written findings, Safford's challenge to the court's oral remark would still be properly before this Court. See State v. Olson, 126 Wn.2d 315, 323, 893 P.2d 629 (1995) ("where the nature of the appeal is clear and the relevant issues are argued in the body of the brief and citations are supplied so that the Court is not greatly inconvenienced and the respondent is not prejudiced, there is no

compelling reason for the appellate court not to exercise its discretion to consider the merits of the case or issue.").

If this Court were to adopt the position urged by the State and treat the court's oral remark as a verity on appeal, then Safford will have demonstrated prejudice from the late entry of written findings and conclusions. If those written findings were entered when they should have been, Safford's appellate counsel would have assigned error to anything inappropriate, including the judge's oral remark demonstrating reliance on evidence outside the record. Safford has been prejudiced if that finding, treated as a verity, is dispositive to the issue on appeal.

The State further complains Safford did not object or dispute the trial court's asserted fact that he knew where dealers hide drugs. BOR at 11-12. The State cites no authority requiring a party to object or dispute some portion of the court's oral suppression ruling before that ruling can be challenged on appeal.

The State asserts there is no problem with the trial court's reliance on its personal awareness "of the fact that contraband is hidden in many places, including the crotch area, and between the cheeks." 1RP 20. The court found Officer Boggs knows narcotics are frequently concealed in the mouth in an attempt to avoid detection. CP 95 (1. e.). The court did not

find Officer Boggs or any other officer knew by training and experience that suspected drug dealers hide drugs in the genital region.

The fact that one officer testified to a similar fact in one case over 15 years ago² does not mean this is a fact that qualifies for judicial notice, nor does it excuse the State from producing sufficient evidence in Safford's case to support the contention. Before a fact can be subject to judicial notice, it must be generally known or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. ER 201(b); Ferree v. Fleetham, 7 Wn. App. 767, 771, 502 P.2d 490 (1972).

A trial judge "should not take judicial notice of testimony given in an earlier case, even if the case is related to the present case and the same judge presided over both cases. Facts that needed to be proved by testimony in the earlier case must similarly be proved by testimony (or other admissible evidence) in the later case." 5 Karl B. Tegland, Washington Practice: Evidence Law and Practice § 201.9 at 175-76 (2007) (citing Vandercook v. Reece, 120 Wn. App. 647, 651-52, 86 P.3d 206 (2004) (trial judge erred in taking judicial notice of fact in earlier proceeding over which he presided)).

² State v. Audley, 77 Wn. App. 897, 908 n.11, 894 P.2d 1359 (1995).

A trial judge cannot rely on extra-record evidence and apply it to the adjudicative facts of a case. State v. Grayson, 154 Wn.2d 333, 340, 111 P.3d 1183 (2005); Lussier v. Runyon, 50 F.3d 1103, 1113-14 (1st Cir. 1995). Due process requires the court to "only consider adjudicative evidence that the parties in an adversarial context have 'the opportunity to scrutinize, test, contradict, discredit, and correct.'" Grayson, 154 Wn.2d at 340 (quoting George D. Marlow, From Black Robes to White Lab Coats: The Ethical Implications of a Judge's Sua Sponte, Ex Parte Acquisition of Social and Other Scientific Evidence During the Decision-Making Process, 72 St. John's L. Rev. 291, 319 (1998)).

The trial determined there was reason to believe Safford was passing drugs and "he had to get those drugs from somewhere." CP 96-97. The record, however, does not show Safford concealed something in an area of his person that required a strip search, i.e., in the genital region. Officers did not find any drugs on Safford's person at the arrest scene, but the extent of the search of his person at the arrest scene was unknown. Moreover, there was no evidence police searched the area of arrest for sloughed drugs and did not find any, which would lend support to the need for a strip search.

For the reasons set forth above and in the opening brief,³ the trial court erred in concluding "the cocaine found on the defendant's person during a strip search shall be admissible at trial." CP 97.

- b. The Strip Search Was Unlawful Because Officers Did Not Obtain Permission From The Jail Unit Supervisor Before Conducting It And Defense Counsel Was Ineffective In Failing To Challenge The Search On This Ground.

Safford argues the strip search was illegal because it was conducted without the specific approval of the jail unit supervisor on duty, as required by RCW 10.79.140(2). BOA at 17-26. RCW 10.79.140(2) applies because Safford was not arrested for a felony drug offense enumerated in RCW 10.79.130(2). BOA at 18-19.

The State claims the strip search was legal because Safford was arrested for a felony drug offense as specified in RCW 10.79.130(2) and therefore the approval requirement found in RCW 10.79.140(2) is inapplicable. BOR at 5. There are two problems with the State's claim.

First, the trial court did not find Safford was arrested for a felony drug offense listed in RCW 10.79.130(2). Rather, the court found, as an undisputed fact, that Safford was arrested for Drug Traffic Loitering, which is a misdemeanor offense under the Seattle Municipal Code. CP 96 (FF 1. j.); 1RP 18-19; SMC 12A.20.050(E). That offense is not "[a]n

³ BOA at 12-17.

offense involving possession of a drug or controlled substance under chapter 69.41, 69.50, or 69.52 RCW or any successor statute." RCW 10.79.130(2)(c). RCW 10.79.130(2) therefore does not apply. RCW 10.79.140(2) applies.

Second, the State on appeal takes the opposite position it took at the trial level. The State maintained before the trial court that Safford was arrested for Drug Traffic Loitering, not a felony drug offense. CP 84. In its response brief on appeal, the State curiously omits any mention of the inconsistent position it took on a point of fact at the trial level. Judicial estoppel prevents a party from making assertions of fact inconsistent with a position that party previously took in litigation. 14A Karl B. Tegland, *Washington Practice: Civil Procedure* § 35.57 (2006); King v. Clodfelter, 10 Wn. App. 514, 521, 518 P.2d 206 (1974); Holst v. Fireside Realty, Inc., 89 Wn. App. 245, 259, 948 P.2d 858 (1997). The State is judicially estopped from arguing on appeal that Safford was not arrested for Drug Traffic Loitering.⁴

The State points to an "x" marked next to a boilerplate statement found in the strip search record as the basis for its argument that Safford was strip searched pursuant to his felony arrest of "Possession of Drug or

⁴ In its response brief, the State acknowledges in its statement of facts that officers arrested Safford for "Drug Traffic Loitering." BOR at 4.

controlled Substance (RCW 69.41, 69.50, 69.52)." BOR at 5 (citing CP 20).⁵ The contention is irrelevant. The court found Safford was arrested for Drug Traffic Loitering, not a felony drug offense. CP 96 (FF 1. j.); 1RP 18-19. Again this fact was not disputed at the trial level and the State affirmatively maintained this was the case. 1RP 9-13; CP 3, 84. The certification of probable cause and other documents in the strip search record show Safford was arrested for Drug Traffic Loitering. CP 3, 15, 35, 39, 42, 45-46, 50.

The State claims the search was legal even if Safford was arrested for Drug Traffic Loitering because the requisite supervisory approval under RCW 10.79.140(2) was obtained. BOR at 16-17. It is undisputed Sergeant Hazard was not a "jail unit supervisor" as specified in RCW 10.79.140(2). The State breezes past the plain language of the statute to suggest approval from any supervisor, not just a "jail unit" supervisor, will do. The State's interpretation of the statute disregards its plain language, which requires specific approval from a "jail unit supervisor" before a strip search can be conducted under RCW 10.79.140(2).

Language cannot be deleted from an unambiguous statute. State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003). "Statutes must be

⁵ The form cited by the State does not even contain an option for checking arrest for a misdemeanor drug loitering. CP 20.

interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous." Whatcom County v. City of Bellingham, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996). RCW 10.79.140(2) unambiguously requires approval from a jail unit supervisor and no such approval was obtained here. This Court should reject the State's contrary interpretation.

The State asserts defense counsel was not ineffective in failing to challenge the legality of the strip search on the ground that it was performed without the required supervisory approval. BOR at 19-21. The State contends defense counsel's failure was part of a legitimate strategy to limit the CrR 3.6 record. Id. According to the State, if counsel had challenged the legality of the search on this ground, the strip search record would have shown Safford was arrested for a felony drug offense rather than Drug Traffic Loitering. Id. This argument fails because, as set forth above, Safford was plainly arrested for Drug Traffic Loitering.

One report contained in the strip search record states "when [Safford] saw Officers, he concealed something on his person." CP 20. The State asserts this allegation would have undermined defense counsel's argument that there was no reasonable suspicion for the strip search and her second claim that there was insufficient probable cause for his arrest. BOR at 20-21. This theory also fails.

First, argument related to insufficient probable cause to arrest was meritless based on the record that existed apart from the strip search record. CP 95-96. As pointed out by the State, officers saw Safford loitering in front of a business while engaging in three hand-to-hand transactions in a short period of time. CP 2-3, 84; 1RP 12-15. Safford and his cohort engaged in a number of acts that the surveillance officer recognized as drug dealing activity based on her training and experience. CP 2-3. Counsel was wrong to argue the officer did not see "something being passed back and forth." 1RP 6. The record plainly showed otherwise. CP 3. In arguing lack of probable cause, counsel's emphasis on events that happened after the arrest was misplaced. 1RP 7-9. Probable cause is determined by facts and circumstances known to officers at the time of arrest, not by facts determined afterwards. State v. Mance, 82 Wn. App. 539, 541, 918 P.2d 527 (1996).

Probable cause to arrest clearly existed. Counsel does not perform competently by passing up a viable means of suppressing evidence by advancing an argument that has no reasonable chance of success.

Second, the additional piece of evidence contained in the strip search record would not have not undermined defense counsel's argument that reasonable suspicion was lacking to justify the strip search as necessary. Evidence that Safford concealed "something on his person"

when he saw officers does not show Safford concealed something in the genital region. As argued earlier, the extent of the search of Safford's person at the arrest scene was unknown and there was no evidence police searched the area of arrest for sloughed drugs and did not find any. While counsel argued the evidence did not show Safford concealed anything on his body,⁶ the viability of counsel's argument that police lacked reasonable suspicion to conduct a strip search would have remained despite an additional piece of evidence showing he concealed something somewhere on his body.

In any event, the record shows defense counsel was unprepared to meet the issue. The trial court raised the legality of the strip search sua sponte after counsel failed to raise it. 1RP 10-11. Counsel's argument on that issue was conducted on the fly as a result. 1RP 12. Her decision making process regarding how to challenge the legality of the strip search was not the result of deliberation that took place before the CrR 3.6 hearing. Counsel has a duty to know the law and the facts of the case to properly advocate for a client. State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); State v. Jury, 19 Wn. App. 256, 263, 576 P.2d 1302 (1978). Lack of preparation accounts for counsel's failure to challenge the strip search on supervisory approval grounds.

⁶ 1RP 15-17.

The failure to bring a plausible motion to suppress potentially unlawfully obtained evidence is a deficient decision. State v. Meckelson, 133 Wn. App. 431, 433, 135 P.3d 991 (2006). "[B]oth Strickland prongs will be satisfied if counsel fails to seek suppression where the record suggests that a motion likely would have succeeded." State v. Horton, 136 Wn. App. 29, 36, 146 P.3d 1227 (2006). That standard is satisfied here.

D. CONCLUSION

For the reasons stated, this Court should vacate Safford's conviction and dismiss the charge with prejudice.

DATED this 31~~st~~ day of March 2010.

Respectfully Submitted,

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APPENDIX A

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

MICHAEL D'ANDRE SAFFORD,

Defendant,

No. 09-1-00722-1 SEA

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON CrR 3.6
MOTION TO SUPPRESS PHYSICAL,
ORAL OR IDENTIFICATION
EVIDENCE

A hearing on the admissibility of physical, oral, or identification evidence was held on August 10, 2009 before the Honorable Judge Michael C. Hayden. After considering the evidence submitted by the parties, to wit: the Certification for Determination of Probable Cause signed by SPD Officer Daina Boggs on 11.29.08 and the State and defense trial briefs, and hearing argument; the court makes the following findings of fact and conclusions of law as required by CrR 3.6:

1. THE UNDISPUTED FACTS:

- a. On the evening of 11.29.08 Officer Boggs was conducting surveillance in the Belltown neighborhood.
- b. As Officer Boggs watched, the defendant, and another man, Dion Duggins, attempted to make contact with a few individuals passing by.
- c. Approximately two minutes after Officer Boggs began watching the defendant, she saw the defendant engage in a hand-to-hand exchange, one that was consistent with a narcotics transaction.
- d. The male who was involved with the transaction with the defendant took the item he received from the defendant and placed it in his mouth.
- e. Officer Boggs knows that narcotics are frequently concealed in the mouth in an attempt to avoid detection.

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 1

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- 1 f. After the first transaction, the defendant got into a truck and left.
2 g. A short time later, the defendant was back.
3 h. The defendant walked to a group of people and started unfolding an item in his hands.
4 i. The defendant then engaged in two additional transactions in which he took a small
5 piece of something from the unfolded item, and handed it over to another. Each time,
6 the defendant took something in return.
7 j. The defendant was arrested for Drug Traffic Loitering.
8 k. Suspect Duggins was also arrested and at the scene .8g of crack cocaine was
9 recovered from his mouth.
10 l. The defendant was strip searched back at the precinct at which point 7.9g of cocaine
11 was located.

12 2. CONCLUSIONS OF LAW AS TO THE ADMISSIBILITY OF THE EVIDENCE
13 SOUGHT TO BE SUPPRESSED:

14 There was probable cause to arrest the defendant for a violation of the Seattle ordinance
15 (Drug Traffic Loitering.) The relevant inquiry is the nature of the loitering, and what it means to
16 repeatedly beckon, stop, attempt to stop, or attempt to engage in conversations with passersby.
17 In this case, there's more than that. The defendant did stop at least three passersby. However
18 there was also the motion that is consistent with a drug transaction, that is, the passing of items
19 from hand-to-hand. Furthermore at least one of the recipients put the item received in his/her
20 mouth. That is highly indicative, specifically indicative, of a drug transaction. These
21 observations, in that location and at that time of night, are not consistent with an innocuous
22 transaction. Rather, in the court's experience, these observations are consistent with the passing
23 of rocks of cocaine.

It's possible that the defendant and suspect Duggins were working together. Either way,
there was probable cause to believe that the defendant was involved in drug loitering and,
beyond that, there's pretty good reason to believe that the defendant was involved in passing
cocaine. Given this, coupled with the fact that the defendant was going to be placed into a
detention facility, the suspicion that the defendant may have drugs on his person is a reasonable

1 one. There was certainly reason to believe that the defendant was passing drugs, and he had to
2 get those drugs from somewhere.

3 As a result, the cocaine found on the defendant's person during a strip search shall be
4 admissible at trial.

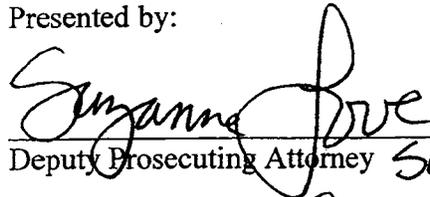
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6 In addition to the above written findings and conclusions, the court incorporates by
7 reference its oral findings and conclusions.

8 Signed this 26 day of January, 2010.

9
10 

11 JUDGE

12 Presented by:

13 

14 Deputy Prosecuting Attorney Suzanne Love 37701

15 
16 Attorney for Defendant 23152

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 64143-3-I
MICHAEL SAFFORD,)	
)	
Appellant.)	

DECLARATION OF SERVICE

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

THAT ON THE 31ST DAY OF MARCH, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MICHAEL SAFFORD
DOC NO. 863266
WASHINGTON STATE CORRECTIONS CENTER
P.O. BOX 900
SHELTON, WA 98584

SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF MACRCH, 2010.

x *Patrick Mayovsky*