

KHN

NO. 65099-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

SONTAVIA HARRIS,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL HAYDEN

BRIEF OF RESPONDENT

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COURT REPORTER

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A. ISSUES PRESENTED

1. An arrest is lawful if there is probable cause to believe a crime has been committed. Here, Officer David Blackmer witnessed Harris involved in three encounters in an area known for high narcotics activity. Based on Blackmer's 14 years of experience as a police officer, these interactions were consistent with drug transactions. Did Blackmer's observations establish a basis to arrest Harris?

2. Findings of fact and conclusions of law may be submitted and entered while an appeal is pending if, under the facts of the case, there is no appearance of unfairness and the defendant is not prejudiced. Here, the findings of fact were entered by the trial court while the appeal was pending and are consistent with the trial court's oral ruling. Has the trial court properly entered written findings in this case?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Defendant Sontavia Harris was charged by information with Violation of the Uniform Controlled Substances Act ("VUCSA");

specifically, the State alleged that Harris possessed cocaine with the intent to deliver it on August 3, 2009. CP 1.

Trial occurred in January of 2010. The trial court denied Harris's CrR 3.6 motion to suppress. CP 70-72. A jury found Harris guilty as charged. CP 42. The court sentenced Harris to the low end of the standard range. CP 45-53.

2. SUBSTANTIVE FACTS.

Officer David Blackmer has been with the Seattle Police Department for 14 years, five of which have been with the West Precinct Anticrime Team. 2RP 4-5. The Anticrime Team's emphasis is on street-level narcotics enforcement. Id. In his career, Blackmer has been involved in thousands of narcotics contacts and arrests. 2RP 5.

On August 3, 2009, Blackmer was working as the observation officer in a "see-pop" narcotics operation.¹ 2RP² 6-7.

¹ The facts relating to Blackmer's observations are based on his testimony at the CrR 3.6 hearing. Blackmer's testimony at trial was similar to that from the CrR 3.6 hearing. See generally 3RP 11-62.

² The verbatim report of proceedings consists of five volumes. In order to be consistent with the Brief of the Appellant, the volumes will be referred to in this brief as follows: 1RP (January 25, 2010); 2RP (January 26, 2010); 3RP (January 27, 2010); 4RP (January 28, 2010); and 5RP (February 10, 2010).

Blackmer was stationed in the Smith Tower. Using his Steiner binoculars, he had a good view of the area around the "Sinking Ship" garage in the Pioneer Square neighborhood. 2RP 6-7. This area is known for high narcotics activity. 2RP 9.

At around 9:30 p.m., Blackmer saw Harris and her sister, Christina,³ exit the Merchant's Cafe and walk across the street to the Sinking Ship garage. 2RP 8. The sisters loitered outside the middle entrance until two men approached. 2RP 8. Harris motioned for them to follow and they all went into the garage, with Christina bringing up the rear. 2RP 10. Blackmer could not see anyone once they went into the garage. 2RP 11. The four exited about 30 seconds later. 2RP 11. None of the four who entered the garage left in a car. 2RP 11. The two men left the area and the sisters continued to loiter outside the middle entrance to the garage. 2RP 11. This encounter was suspicious to Blackmer because the garage was the subject of many narcotics complaints. 2RP 9. In his experience, people who were not using the garage for a legitimate purpose (accessing vehicles) were there to discreetly sell or use drugs. 2RP 11.

³ To avoid confusion, Christina Harris will be referred to simply as "Christina." This is consistent with the verbatim report of proceedings.

About five minutes later, two other men approached.

2RP 12. After a brief conversation, Harris motioned for them to follow her. 2RP 12-13. As they approached the corner, the men stopped as if to cross the street. Id. Instead, Harris turned the corner and called for them to follow her. Id. Again, Christina was following Harris and the two men. Id. When they reached a pay phone, Harris picked up the phone, but did not attempt to dial or deposit any money. 2RP 13. Rather, she appeared to pull something out of her waistband and place it on the ledge under the phone.⁴ 2RP 13-14. Harris hung up the phone and stepped away. 2RP 15. One of the men then stepped forward and appeared to pick up the object off the ledge, look at it in his hand, and place it in his mouth. 2RP 15-17. This behavior was noteworthy because people who are selling drugs frequently hide their supply in discreet areas. 2RP 13-14. Crack cocaine is often stored in the mouth because it is not water soluble and can be swallowed to avoid detection by the police. 2RP 18.

After apparently placing the object in his mouth, the man attempted to give Harris money. 2RP 15. Harris directed him to

⁴ Blackmer acknowledged that he never actually saw an object in Harris's hand or on the ledge, but described Harris's movements as being consistent with handling an object. 2RP 16.

give the money to Christina instead. 2RP 15. When drug dealers are working in pairs, often one person handles the drugs while the other handles the money. 2RP 19. The men then headed southbound on Second Avenue, while Harris and Christina headed north and circled around the block. 2RP 21. The entire encounter was consistent with other narcotics transactions that Blackmer had witnessed in the past. 2RP 19. After witnessing this transaction, Blackmer suspected that Harris was selling drugs and that Christina was assisting by acting as a lookout and holding the money. 2RP 19.

The sisters finished circling the block and again reached the middle entrance to the Sinking Ship garage. 2RP 21. They loitered for a few minutes until a man in a checkered shirt approached. 2RP 22. Harris and the man had a brief conversation, after which Harris motioned for the man to follow her eastbound on Yesler Way. 2RP 22. As they were walking, two other men hailed them from across the street. Harris, Christina, and the man in the checkered shirt waited for the other men to cross the street. Once the men had caught up, all five continued eastbound on Yesler. 2RP 24. The man in the checkered shirt had money in his hand. 2RP 25. Because Harris and the others were headed outside of his

field of view, Blackmer asked the arrest team to move in and arrest the Harris sisters. 2RP 25-26.

Officers found 2.8 grams of crack cocaine in Harris's bra. 3RP 97-99. This amount is higher than that usually associated with personal use. 3RP 69-70. Officers found \$493 in Christina's purse. 3RP 87. Rather than being neatly stored in a wallet, the bills, which were in various denominations, were crumpled up and crammed in the purse. 3RP 85-87. The crumpled nature of the bills was consistent with narcotics activity, in which someone might receive money from a transaction and quickly stash the bills without looking. 3RP 87.

C. ARGUMENT

1. **THERE WAS PROBABLE CAUSE TO BELIEVE HARRIS HAD COMMITTED A CRIME.**

Harris contends that the trial court erred in denying her motion to suppress all evidence obtained as a result of an unlawful arrest. However, the trial court's findings clearly support its conclusion that there was probable cause to arrest Harris for being involved in a drug transaction.

Unchallenged findings of fact are verities on appeal. State v. Acrey, 148 Wn.2d 738, 745, 64 P.3d 594 (2003). Whether a trial court's findings of fact support its conclusions of law regarding probable cause for an arrest presents a legal question reviewed de novo. State v. Vasquez, 109 Wn. App. 310, 318, 34 P.3d 1255 (2001).

Probable cause for a warrantless arrest exists when facts and circumstances within the arresting officer's knowledge are sufficient to cause a person of reasonable caution to believe that a crime has been committed. State v. White, 76 Wn. App. 801, 804-05, 888 P.2d 169 (1995). This determination rests on the totality of facts and circumstances within the officer's knowledge at the time of the arrest. State v. Fore, 56 Wn. App. 339, 343, 783 P.2d 626 (1989). In making this determination, reviewing courts must give consideration to an arresting officer's special expertise in identifying criminal behavior. State v. Scott, 93 Wn.2d 7, 11, 604 P.2d 943 (1980). Factors that might appear to an ordinary citizen to be innocent conduct, if found by the court, could provide probable cause to arrest a person. State v. Poirier, 34 Wn. App. 839, 842, 664 P.2d 7 (1983). These factors include whether (1) either party is known to the officer; (2) drug sales or exchanges

regularly take place in the area; (3) the items exchanged were particularly distinctive or characteristic of drugs or narcotics; and (4) either party acted in a suspicious or furtive manner. Id. at 843.

A person commits the crime of Possession with Intent to Deliver a Controlled Substance when she possesses a controlled substance with the intent to deliver the controlled substance.

RCW 69.50.401(1), (2)(a).

In finding that there was probable cause for arrest, the trial court properly concluded that the facts in the case at hand were analogous to State v. Rodriguez-Torres, 77 Wn. App. 687, 893 P.2d 650 (1995). CP 71. In Rodriguez-Torres, a police officer witnessed a man pass Rodriguez-Torres money and then take an object out of his hand. Rodriguez-Torres, 77 Wn. App. at 689. As the officer approached to investigate, someone yelled "Police!" Id. The other man then took his money back from Rodriguez-Torres, dropped the object he had been inspecting on the ground, and fled. Id. Rodriguez-Torres picked up the object and fled in the other direction. Id. After following him for a distance, the officer arrested Rodriguez-Torres and searched him, recovering cocaine. Id. at 690. The court held that, based on his observations, the officer had

probable cause to arrest Rodriguez-Torres for Possession with Intent to Deliver. Id. at 693.

Harris contends that her case is distinguishable from Rodriguez-Torres because Blackmer could not see an object in Harris's hand and because Harris never fled the scene. Much like fingerprints, no two cases are ever *exactly* alike. The trial court properly concluded that, despite some minor differences, the facts in this case are substantially comparable to Rodriguez-Torres. 2RP 60-65.

Even if Rodriguez-Torres were not comparable, Harris's case is also remarkably similar to the facts of State v. White, 76 Wn. App. 801, 888 P.2d 169 (1995). White was a lookout person in what appeared to be a drug transaction. White, 76 Wn. App. at 803. The observing officer was using binoculars from the top floor of a parking garage, looking at the street below. Id. He saw White and a co-defendant on the sidewalk, where they were eventually approached by another man. Id. White directed the buyer to the co-defendant, who took money from the man and dropped something on the ground. Id. The buyer picked up the object and put it in his mouth. Id. After this, White looked behind him, made hand movements with the co-defendant, and all three then walked

in different directions. Id. The officer could not tell what, if anything, had passed between White and the co-defendant. Id.

The court found that, based on the observing officer's narcotics training and experience in reviewing these facts, it appeared that White was part of a drug transaction. Id. at 804-05. Accordingly, the court held that these observations were sufficient to give police probable cause to believe that White had participated in a drug transaction. Id.

In light of Blackmer's training and experience, there were facts sufficient for a reasonably cautious person to believe that Harris was carrying drugs with the intention of delivering them. The trial court found that Harris and her sister were involved in three encounters in an area known for high narcotics activity. CP 70-72. In the first interaction, Harris led two men into the Sinking Ship garage, where they spent less than a minute. Id. In the second interaction, Harris appeared to place something on the ledge under the pay phone, which the buyer subsequently put in his mouth. Id. The buyer tried to give Harris money, but was directed to give it to Christina instead. Id. Just as in White, it was not necessary for Blackmer to actually see the object exchanged in the transaction. White, 76 Wn. App. at 803-05. Based on Blackmer's experience,

both of these interactions were consistent with narcotics activity. 2RP 61. It was therefore reasonable for Blackmer to suspect that when Harris instructed the third set of men to follow her, she was carrying drugs that she intended to sell. There was probable cause to arrest Harris for Possession with Intent to Deliver.

Likewise, officers had probable cause to arrest Harris for Drug Traffic Loitering.⁵ According to Seattle Municipal Code 12A.20.050(B), "[a] person is guilty of drug-traffic loitering if he or she remains in a public place and intentionally solicits, induces, entices, or procures another to engage in [illegal drug activity]." The code provision provides a non-exclusive list of circumstances that an officer may consider in determining whether probable cause exists, including whether an individual "[r]epeatedly beckons to, stops or attempts to stop passersby, or engages passersby in conversation ... " SMC 12A.20.050(C).

⁵ At the CrR 3.6 hearing, the State argued that the officers had probable cause to arrest for either Possession with Intent or Drug Traffic Loitering. 2RP 55-58. The court explained that its ruling was not based on the drug traffic loitering ordinance. 2RP 62. The court indicated it had "a problem with the drug loitering statute, too," but never ruled on Harris's challenge to the constitutionality of the ordinance. 2RP 64. However, the court did note that Blackmer "observed more than is required by the drug loitering ordinance." 2RP 64. State v. Hudson, 79 Wn. App. 193, 195, 900 P.2d 1130 (1995) (an appellate court may affirm the trial court on any alternative theory argued to the trial court), affirmed, 130 Wn.2d 48, 921 P.2d 538 (1996).

Here, the trial court found that Blackmer was conducting surveillance of a known high narcotics area. CP 70-72. Blackmer watched Harris as she was approached by individuals loitering in the area. Id. On each occasion, Blackmer saw Harris engage individuals in a brief conversation before leading them to specific locations. Id. In the second encounter, Harris appeared to engage in a hand-to-hand transaction with them. Id. Based upon Blackmer's training and experience, he had probable cause to believe Harris was actively soliciting customers for drug transactions. Blackmer thus had probable cause to arrest Harris for Drug Traffic Loitering.

Harris cites to State v. Poirier, 34 Wn. App. 839, 664 P.2d 7 (1983), to support her contention that Blackmer lacked probable cause to arrest her. Harris's reliance on Poirier is misplaced, as Blackmer's observations certainly surpass the minimal factual findings entered by the Poirier court to support its suppression ruling. In Poirier, the factual findings, in their entirety, were as follows:

I.

On or about the 13th day of September, 1980, officers Scott and Bennett of the Tacoma Police Department were working as security officers for a restaurant known as the Dynasty. *[sic]*

II.

That on that date, the officers were standing in a position outside the business near an open door and observed defendant Poirier standing in the parking lot.

III.

The officers then observed defendant Dimercurio arrive at the location of the restaurant in the parking lot. The defendant exited the vehicle and approached Mr. Poirier.

IV.

The officers then observed Mr. Poirier and Mr. Dimercurio exchange items that appeared to be white envelopes or packages. Both defendants were then arrested and searched, and during said search a package of suspected cocaine and a package of money were removed from the defendants.

Id. at 841-42. The court noted that, although the testimony would have supported different and stronger findings, specifically regarding the officers' training and experience and the appearance of the objects exchanged, it was bound by the written findings prepared by the prosecutor and entered by the court. Id. at 840-42. The court concluded that the written factual findings failed to establish (1) the officer's familiarity with either party; (2) that this area was known for drug sales; or (3) that the envelopes exchanged had any distinctive characteristics making them recognizable as packages of drugs. Id. at 843. The court thus held that the findings did not support the conclusion that the officers had

probable cause to arrest, and suppressed the subsequently discovered evidence. Id.

In contrast, here, we have evidence of two of the factors lacking in the Poirier court's findings. This particular area is known to Blackmer as a high narcotics area. CP 70-72. Further, several aspects of the encounters were consistent with narcotics transactions. 2RP 60-61. Based upon Blackmer's training, experience, and detailed observations of illegal activity, there was probable cause to arrest Harris.

2. THERE WAS NO PREJUDICE IN THE TRIAL COURT'S DELAYED CrR 3.6 FINDINGS.

Harris asserts that the trial court failed to enter Findings of Fact and Conclusions of Law as required by CrR 3.6(b). On October 18, 2010, the trial court entered the required written findings. CP 70-2.

Findings of fact and conclusions of law may be submitted and entered while an appeal is pending if there is no prejudice to the defendant by the delay and no indication that the findings and conclusions were tailored to meet the issues presented on appeal. State v. Quincy, 122 Wn. App. 395, 398, 95 P.3d 353 (2004).

The delay in the entry of the findings does not in and of itself establish a valid claim of prejudice. In State v. Smith, this Court held that the State's request at oral argument for a remand to enter the findings would have caused unnecessary delay and was thus prejudicial. 68 Wn. App. 201, 208-09, 842 P.2d 494 (1992). However, unlike Smith, here the court entered findings that have not delayed resolution of Harris's appeal. There is no resulting prejudice.

Nor can Harris establish unfairness or prejudice resulting from the content of these findings. A review of the findings illustrates that the State did not tailor them to address the defendant's claims on appeal. CP 70-72. The language of the findings is consistent with the trial court's oral ruling. 2RP 60-64. Moreover, the trial prosecutor who drafted the findings of fact had no knowledge of the issues in this appeal. CP 73-74.

In light of the above, Harris cannot demonstrate an appearance of unfairness or prejudice. The trial court's CrR 3.6 findings of fact and conclusions of law are properly before this Court.

D. CONCLUSION

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

DATED this 2 day of December, 2010.

Respectfully submitted,

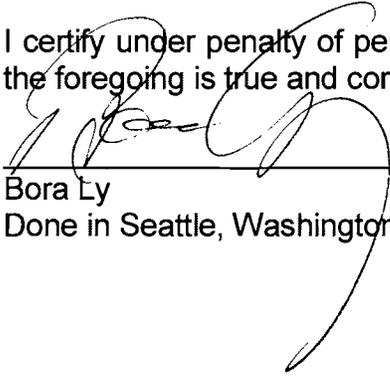
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to David B. Koch, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. SONTAVIA HARRIS, Cause No. 65099-8-I, 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.



Bora Ly
Done in Seattle, Washington

12-08-10
Date