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No. 65837-9-I

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

RECEIVED
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COURT OF APPEALS
DIVISION ONE
SEATTLE, WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MOHAMED M. (d.o.b. 7/13/96),

Appellant.

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

The Honorable Chris Washington

BRIEF OF APPELLANT

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A. INTRODUCTION

After watching a basketball game at Van Asselt Community Center, 13-year-old Mohamed M. asked an 18-year-old from his neighborhood for a ride home. The neighbor said yes and told Mohamed to wait in his car while he talked to his friends.

Mohamed waited in the back seat of the car while the neighbor and his friends stood near the car chatting. When a police officer drove into the parking lot, the group of older boys walked back toward the community center to finish their discussion. Mohamed stayed in the car, waiting for his ride home.

The police officer thought it was suspicious that the group of boys walked to the community center when they saw him, and that one boy remained in the car. Three weeks earlier, the police had suspected the car was involved in a robbery, but the police had already investigated the car and returned it to its owner.

The police officer ordered Mohamed out of the car. The owner of the car ran back toward the car and identified himself as the owner, but the officer told him the investigation did not concern him. The officer then frisked Mohamed, and found metal knuckles. Mohamed was charged with unlawful possession of a weapon.

The evidence should have been suppressed because the officer seized and searched Mohamed without individualized suspicion of wrongdoing. Officers must not be permitted to violate the constitutional rights of children who are simply sitting in the back seat of a lawfully parked car waiting for a ride home.

B. ASSIGNMENTS OF ERROR

1. The juvenile court erred in denying Mohamed's motion to suppress the evidence obtained as the result of an unconstitutional seizure and search.

2. The juvenile court erred in concluding the seizure of Mohamed was lawful.

3. The juvenile court erred in concluding the frisk of Mohamed was lawful.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The State meets its burden of proving a lawful Terry¹ investigative seizure only if it presents evidence that the law enforcement officer relied on specific facts that support a substantial possibility that the individual detained committed a crime. Here, Mohamed was sitting in the back of a lawfully parked car, waiting for the car's owner to finish talking to his friends and

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

drive him home. When a police officer drove through the parking lot, the car's owner and his friends walked away from the car. The officer seized Mohamed, explaining, "My suspicion was everything was based off the fact that everybody that was standing around the car loitering left the car when I came and they kind of meandered towards the Community Center, but the individual that was in the car remained in the car." Did the juvenile court err in concluding the officer's seizure of Mohamed was constitutional, and in denying the motion to suppress the evidence obtained thereby?

2. A law enforcement officer may not frisk a person unless the officer has reasonable grounds to believe the person is armed and dangerous. Here, the car Mohamed was sitting in had been suspected of being involved in a robbery three weeks prior, but the police had already investigated the car and returned it to its owner. Also, the owner of the car identified himself to the officer and the officer told him he was not under investigation and was free to leave. Mohamed complied with all of the officer's commands, and the officer did not see him make any furtive movements. Did the juvenile court err in concluding the officer's frisk of Mohamed was constitutional, and in denying the motion to suppress the evidence obtained thereby?

D. STATEMENT OF THE CASE

1. The events of October 23, 2009. On October 23, 2009, 13-year-old Mohamed M. took the bus to Van Asselt Community Center to watch a basketball game. 1 RP 52-54.² After the game ended around 8:00, Mohamed saw a young man from his neighborhood, Zachariah, and asked him for a ride home. 1 RP 55-56. Zachariah said yes and told Mohamed to wait in his car while he talked to his friends. 1 RP 56-57.

Mohamed waited in the back seat of Zachariah's car while Zachariah and his friends stood near the car chatting. After Mohamed had been waiting in the car for about three minutes, a police officer drove into the community center parking lot. 1 RP 59. Zachariah and his friends watched the police officer drive by, then walked back toward the community center to finish their discussion. 1 RP 10, 14-15. Mohamed stayed in the car, waiting for Zachariah to finish talking to his friends. 1 RP 16.

The police officer parked in front of the car Mohamed was waiting in, got out, and walked toward Mohamed. 1 RP 57-59. He rapped on the window, and Mohamed started to open the car door.

² There are two volumes of verbatim reports of proceedings in this case. "1 RP" refers to the volume containing the hearings of June 25 and June 30, 2010. "2 RP" is the transcript of the November 19, 2010 hearing.

The officer opened the door at the same time, and grabbed Mohamed and pulled him out of the car. 1 RP 60. Mohamed was nervous because he did not know what was going on. 1 RP 25, 60.

The officer ordered Mohamed to put his hands on the trunk of the car and stay still. The officer sounded angry when he issued his orders. 1 RP 60-61. Mohamed did as he was told. 1 RP 45.

In the meantime, Zachariah saw that someone was getting into his car without his consent, and he walked back to the car, told the officer it was his, and asked what was going on. 1 RP 27. The officer told the car's owner that the seizure "didn't concern him, but if he wanted to be involved and he wanted to talk to the police, then he was more than welcome to come and put his hands on the trunk of the car." 1 RP 27. "Otherwise, he needed to stay over where he was for the rest of the investigation." 1 RP 27.

The officer called for backup, and two more police cars arrived. The officer then frisked Mohamed, and found metal knuckles in his pocket. Mohamed had them because he thought they were "cool." 1 RP 96. He did not know they were illegal. 1 RP 96. The officer arrested Mohamed and he was later charged with unlawful possession of a weapon. CP 1. The officer did not arrest Zachariah or anyone else at the community center.

2. The officer's testimony at the suppression hearing.

Before trial, Mohamed moved to suppress the metal knuckles on the basis that the officer's seizure of him and subsequent frisk were unconstitutional. CP 2-18. At the hearing on the motion to suppress, the officer testified that he had driven to the community center not because there were any reports of criminal activity that night, but because "we had been receiving numerous disturbance calls in the past with juveniles hanging out as well as car prowls in the area." 1 RP 9-10. "The community staff had just asked that we kind of drive through the area, extra patrols, be extra visible and making sure that everything stayed in order." 1 RP 10.

The officer testified that when he drove into the parking lot, he saw "about eight to ten males hanging around" near the car in which Mohamed was waiting. 1 RP 10. The officer noticed that when he drove in, the group's "attention was immediately focused on me." 1 RP 10. The officer performed a computer check of the car's license plates, and discovered that police had suspected the car was involved in a robbery 20 days earlier. 1 RP 14. The police had seized the car for investigation, but subsequently released it to its owner, Zachariah. 1 RP 40.

The officer testified that he stopped and parked in front of Zachariah's car. After the officer parked, the group of young men "started to meander towards the Community Center doors." 1 RP

15. The officer testified that he "found it suspicious" because:

The first time I drove through, I had seen through the front windshield of the vehicle that there was one person sitting in the back of the car. Then when I drove around all the people that were standing around the car, once they saw that I had parked, they went towards the Community Center, but nobody got out of the back of the car and that individual was still sitting in the back of the car.

At that time once I saw that the males were still watching me from in front of the Community Center doors, I was like something is not right, this vehicle is too suspicious, that they are too focused on my actions and what I'm doing.

1 RP 16. Thus, he decided to seize the person in the back of the car, Mohamed. 1 RP 17. The officer acknowledged that it was a seizure, not a "social contact." 1 RP 44.

The prosecutor asked the officer, "did you have any specific concerns about the individual that was in the back; was there something suspicious about that?" 1 RP 19. The officer responded:

My suspicion was everything was based off the fact that everybody that was standing around the car loitering left the car when I came and they kind of

meandered towards the Community Center, but the individual that was in the car remained in the car.

1 RP 19-20. When asked to clarify, the officer said:

[I]n my personal opinion, if they were going to the Community Center to play ball or hang out or whatever, once the rest of the males left the vehicle, it would have been reasonable in my mind if that person would have gotten out of the car and gone with the rest of the group. But the fact that he stayed in the vehicle – and I don't know if he stayed in the vehicle because of he knew that I was in the parking lot, he knew that I was watching the car and the people that were associated that were loitering around the car, I had no idea. But I wanted to find out what was going on as to why he was staying in the vehicle.

1 RP 20.

The officer acknowledged that as he removed Mohamed from the car, Zachariah identified himself as the owner of the vehicle. 1 RP 23. The officer testified that he responded to Zachariah by saying, "Stop. This doesn't concern you. If you want to talk to the police, you're going to come over here, you're going to place your hands on the trunk of my car and follow my commands. If you don't, otherwise, you need to stay over there." 1 RP 23.

The prosecutor again asked the officer to explain his purpose in seizing Mohamed. The officer again said, "[t]o find out his reason for sitting in the car when the rest of the [people] around the car had left and kind of meandered towards the Community

Center. I wanted to know what was going on, why he was still in the car." 1 RP 26-27.

On cross-examination of the officer, the following exchange occurred:

Q: So your suspicion is aroused by the history of the vehicle and in general the movements, the movements and actions of eight to ten other people, all of which are not [Mohamed]?

A: Correct. Well, his action being that he just remained seated in the car by himself.

Q: Okay. So we're talking about his inaction by remaining seated in a properly parked vehicle?

A: Correct.

1 RP 43.

The officer testified that after the two backup officers arrived, he frisked Mohamed. 1 RP 27-28, 48. He explained that he did so because:

Number one, officer safety; number two, approach the vehicle as involved in an armed robbery some 20 days earlier; number three, it was getting dark, I couldn't see in the car and the movements he was making.

1 RP 28.

Mohamed argued that the metal knuckles found during this frisk should be suppressed because they were found as a result of

an unconstitutional seizure. The officer did not have an individualized suspicion that Mohamed was engaged in criminal activity. Mohamed's attorney pointed out:

What did he do? He sat lawfully as a passenger in a lawfully parked and lawfully registered motor vehicle. That's it. And from that, they wanted you to justify detaining him and frisking him, and that was the extent of his behavior. It's ludicrous to justify that an armed government agent can drag him out of a car which was his testimony and subject him to a warrantless seizure, a warrantless search, and then say it was okay. He didn't do anything.

1 RP 79. Mohamed further argued that even if the seizure had been constitutional, the frisk was improper because there was no reasonable suspicion that he was armed and dangerous. 1 RP 80.

The trial court denied the motion, and Mohamed was convicted after a stipulated-facts bench trial. CP 34-42. He timely appeals. CP 44-50.

E. ARGUMENT

THE EVIDENCE SHOULD HAVE BEEN SUPPRESSED BECAUSE IT WAS OBTAINED PURSUANT TO AN UNLAWFUL SEIZURE AND SEARCH.

The conviction in this case should be reversed for two independent reasons. First, the seizure was unconstitutional because the officer lacked reasonable suspicion that Mohamed was committing a crime. Second, even if the seizure had been

proper, which it was not, the frisk was unconstitutional because the officer lacked reasonable suspicion that Mohamed was armed and dangerous. Mohamed was simply sitting in the back seat of a lawfully parked car waiting for a ride home. His actions did not warrant the “serious intrusion” inflicted by the officer. Terry v. Ohio, 392 U.S. 1, 17, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

1. Under both the state and federal constitutions, the Terry stop is an exception to the warrant requirement, and as such must be jealously and carefully drawn. Article I, section 7 of the Washington Constitution prohibits government invasion of private affairs absent authority of law. Const. art. I, § 7. The Fourth Amendment prohibits unreasonable searches and seizures. U.S. Const. amend. IV.

Under both the federal and state constitutions, warrantless searches and seizures are unreasonable per se unless an exception applies. State v. Loewen, 97 Wn.2d 562, 565, 647 P.2d 489 (1982); State v. Lennon, 94 Wn. App. 573, 579, 976 P.2d 121 (1999). One narrow exception to the warrant requirement is the Terry stop. See Terry, 392 U.S. at 21. Under Terry, an officer may briefly detain a person if the officer harbors a reasonable suspicion,

based on specific articulable facts, that the individual is engaging in criminal activity. Id.

As an exception to the warrant requirement, the Terry stop must be narrowly construed and “jealously and carefully drawn.” State v. Martinez, 135 Wn. App. 174, 179, 143 P.3d 855 (2006). When the “reasonable suspicion” standard is not strictly enforced, the exception swallows the rule and “the risk of arbitrary and abusive police practices exceeds tolerable limits.” Brown v. Texas, 443 U.S. 47, 52, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979).

The Terry exception must be limited to those situations in which there is a “substantial possibility” that a crime has been committed and that the individual detained is the offender. Martinez, 135 Wn. App. at 180; 4 Wayne R. LaFare, Search and Seizure § 9.5(b) at 489 (4th ed. 2004). “[A] hunch does not rise to the level of a reasonable, articulable suspicion.” State v. O’Cain, 108 Wn. App. 542, 548, 31 P.3d 733 (2001). “Innocuous facts do not justify a stop.” Martinez, 135 Wn. App. at 180; State v. Armenta, 134 Wn.2d 1, 13, 948 P.2d 1280 (1997). “Race or color alone is not a sufficient basis for making an investigatory stop.” State v. Almanza-Guzman, 94 Wn. App. 563, 567, 972 P.2d 468 (1999).

The Terry exception is more narrowly construed under our state constitution than under the Fourth Amendment. See State v. Gatewood, 163 Wn.2d 534, 539, 182 P.3d 426 (2008). The State bears the burden of proving the legality of a warrantless seizure. State v. Williams, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). An appellate court reviews the constitutionality of a warrantless stop de novo. Martinez, 135 Wn. App. at 179.

2. The seizure was unconstitutional because Mohamed was simply sitting in the back seat of a lawfully parked car, waiting for the owner to return to the car and drive him home. Again, the Terry exception must be limited to those situations in which there is a **“substantial possibility”** that a crime has been committed **and that the individual detained is the offender.** Martinez, 135 Wn. App. at 180; LaFave at 489. Neither of these conditions was satisfied here, let alone both.

First, there was not a substantial possibility that a crime had been committed. The officer knew that police had suspected the car in which Mohamed was waiting was involved in a robbery three weeks prior, but the officer also knew that the police had already seized the car for investigation and subsequently released it to its owner, Zachariah. 1 RP 14, 40. The officer had no reasonable

suspicion that anyone was committing a crime; he just found it suspicious that the group of young men watched him as he drove into the parking lot, and that they meandered toward the community center after he parked his car. 1 RP 19-20.

Second, the officer had no individualized suspicion as to Mohamed. The Constitution “requires that the suspicion be individualized.” State v. Thompson, 93 Wn.2d 838, 841, 613 P.2d 525 (1980). A person’s “mere proximity to others independently suspected of criminal activity does not justify the stop.” Id. Here, even if it were reasonable to investigate the car again because of the prior robbery, the officer did not suspect Mohamed of having been involved in the robbery. 1 RP 48. And the officer told the car’s owner that the investigation did not concern him and that he was free to leave. 1 RP 27. Thus, concerns about the car cannot support the seizure of Mohamed.

The officer testified that he was suspicious because when the group of young men meandered back to the community center, Mohamed stayed in the car. The officer said he seized Mohamed “[t]o find out his reason for sitting in the car when the rest of the [people] around the car had left and kind of meandered towards the

Community Center. I wanted to know what was going on, why he was still in the car.” 1 RP 26-27.

Q: So your suspicion is aroused by the history of the vehicle and in general the movements, the movements and actions of eight to ten other people, all of which are not [Mohamed]?

A: Correct. Well, his action being that he just remained seated in the car by himself.

Q: Okay. So we're talking about his inaction by remaining seated in a properly parked vehicle?

A: Correct.

1 RP 43.

Sitting in a lawfully parked car while other people walk to a community center is not a crime. An officer is not permitted to seize a person simply because he “wanted to know what was going on, why he was still in the car.” 1 RP 27. The officer’s seizure of Mohamed was unconstitutional.

Prior decisions of this Court and the Supreme Court are instructive. In Gatewood, for example, the defendant saw police officers drive by the bus stop where he was sitting, and his “eyes got big ... like he was surprised to see [the officers].” Gatewood, 163 Wn.2d at 537. The defendant then twisted his body as though he were trying to hide something. Id. The officers turned around to

investigate the defendant because the wide eyes and twisting body aroused their suspicions. Id. The defendant then left the bus shelter and jaywalked across the middle of the street, and the officers seized him. Id. at 538. The Supreme Court reversed the denial of a suppression motion, finding this combination of events “insufficient for a Terry stop.” Id. at 540.

In Martinez, an officer was patrolling an apartment complex located in a high-crime area. Martinez, 135 Wn. App. at 177. There had been reports of vehicle prowling there in the past. Id. The officer saw the defendant, who did not live in the complex, near several parked cars. Id. When the defendant saw the officer, he walked away quickly. Id. The officer detained and frisked the defendant, finding drugs. Id. at 178.

This Court reiterated that in order for officers to seize an individual, “the circumstances must suggest a substantial possibility that the particular person has committed a specific crime or is about to do so.” Martinez, 135 Wn. App. at 180. The court reversed the denial of a suppression motion because the seizure “was not based on a particularized suspicion of criminal activity by Mr. Martinez.” Id. at 177.

If the defendants' actions in the above cases were insufficient to justify a seizure, there is no question that Mohamed's actions here were insufficient to justify a seizure. As the officer acknowledged, Mohamed simply sat in the backseat of a lawfully parked car, waiting for his ride home. There was no reasonable suspicion that Mohamed was committing a crime. This Court should reverse.

3. Even if the seizure were proper – which it was not – the frisk was unconstitutional. Even where a Terry investigative stop is justified, an officer may not frisk a person unless the officer has reasonable grounds to believe the person is armed and dangerous. State v. Walker, 66 Wn. App. 622, 629, 834 P.2d 41 (1992); State v. Galbert, 70 Wn. App. 721, 725, 855 P.2d 310 (1993) (citing Sibron v. New York, 392 U.S. 40, 64, 88 S.Ct. 1889, 20 L.2d.2d. 917 (1968)). The Terry frisk exception, like the investigative seizure exception, must be narrowly construed because a frisk “is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.” Terry, 392 U.S. at 17.

A generalized suspicion cannot justify a frisk. Galbert, 70 Wn. App. at 725. Article I, section 7 provides even greater

protection against unconstitutional frisks than the Fourth Amendment. State v. Setterstrom, 163 Wn.2d 621, 626, 183 P.3d 1075 (2008).

Here, even if the officer had properly seized Mohamed – which he did not – the frisk was unconstitutional. The officer did not have reasonable grounds to believe Mohamed was armed and dangerous. The officer testified that he frisked Mohamed for officer safety because the car had been suspected three weeks earlier in a robbery. 1 RP 28. But as explained above, the officer knew that the car had already been investigated and released back to its owner, and knew that Mohamed was not the owner of the car. 1 RP 27, 40.

The officer also stated that he frisked Mohamed because it was dark outside, but the fact that it was dark has nothing to do with whether there was reasonable suspicion to believe this 13-year-old boy was armed and dangerous. 1 RP 28. Similarly, the officer testified that because the car's windows were tinted, he could not tell if Mohamed had made any movements inside the car. 1 RP 22, 28. But an officer may not frisk a person just because he could not see what, if anything, the person was doing prior to the seizure.

Finally, the officer testified that Mohamed appeared “nervous,” but he acknowledged that this was probably “because the police were contacting” him. 1 RP 24-25. The officer also acknowledged that Mohamed complied with all of his commands. 1 RP 45. There was no reasonable suspicion that Mohamed was armed and dangerous.

In United States v. Milton, 456 F.3d 1154 (9th Cir. 2006), the court listed several factors that “can support a reasonable belief that an individual is armed,” none of which is present here: (1) “an officer’s observation of a visible bulge in an individual’s clothing that could indicate the presence of a weapon,” (2) “sudden movements by defendants, or repeated attempts to reach for an object that was not immediately visible,” and (3) the nature of the crime suspected. Id. at 1157-58. In Mohamed’s case, first, there was no bulge. Second, Mohamed did not make sudden movements and did not reach for invisible objects. Third, Mohamed was not suspected of any crime, let alone a dangerous crime. Accordingly, none of these factors supports the frisk of Mohamed.

Indeed, this case is like the cases in which frisks have been invalidated and unlike cases in which they have been approved. In State v. Glossbrener, for example, a driver who was stopped for a

traffic violation was frisked for weapons because he made a furtive movement and then lied about why he had made the movement.

State v. Glossbrener, 146 Wn.2d 670, 681, 49 P.3d 128 (2002).

The Supreme Court reversed the denial of the suppression motion because the defendant eventually acknowledged that he had been trying to hide an open container of alcohol, and he otherwise complied with the officer's requests. Id. at 681-82.

Here, Mohamed never made a furtive movement and never lied. He simply sat in the backseat of a car waiting for a ride home, and complied with all of the officer's requests once he was seized. Furthermore, he did not commit a traffic infraction, and in fact was not suspected of any type of violation whatsoever. Accordingly, if the frisk was improper in Glossbrener, it was certainly improper here.

In Setterstrom, the individual in question lied about his name, acted nervous, and appeared to be under the influence of methamphetamine, a drug the officer knew could cause people to become erratic and violent. Setterstrom, 163 Wn.2d at 624. Still, the Court unanimously held the ensuing frisk was unconstitutional, because notwithstanding the above behaviors, there were "no threatening gestures or words." Id. at 627. Here, there were no

threatening gestures or words, and, unlike in Setterstrom, Mohamed did not lie about anything and did not appear to be under the influence of a violence-inducing drug. Therefore, if the frisk was unconstitutional in Setterstrom, it was also unconstitutional here.

In sum, “a frisk is a narrow exception to the rule that searches require warrants. The courts must be jealous guardians of the exception in order to protect the rights of citizens.”

Setterstrom, 163 Wn.2d at 627. The frisk of Mohamed cannot be justified by this narrow exception.

4. The remedy is reversal and suppression. The remedy for a violation of the Fourth Amendment and article I, section 7, is suppression of the fruits of the improper search or seizure. State v. White, 97 Wn.2d 92, 110-12, 640 P.2d 1061 (1982); Williams, 102 Wn.2d at 742. Because neither the seizure nor the frisk of Mohamed was supported by reasonable suspicion, the conviction should be reversed, and the evidence suppressed. Gatewood, 163 Wn.2d at 542.

F. CONCLUSION

Because the evidence against Mohamed was obtained as a result of an unconstitutional seizure and search, the evidence should have been suppressed, and the conviction must be reversed.

DATED this 2nd day of March, 2011.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Lila J. Silverstein", written over a horizontal line.

Lila J. Silverstein – WSBA 38394
Washington Appellate Project
Attorneys for Appellant

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

STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.)
)
 MOHAMED M. ,)
)
 Juvenile Appellant.)

NO. 65837-9-I

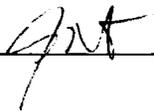
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DIVISION ONE
SEATTLE, WA

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