

66107-8

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NO. 66107-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL PIGOTT,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JULIA GARRAT, PRO TEM

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

1. Statements made following an unlawful seizure must be suppressed as "fruit of the poisonous tree" unless the statements were sufficiently distinguishable from any police illegality that the primary taint is purged. The commission of a separate and distinct crime constitutes the kind of independent act that purges the primary taint. Here, Pigott threatened to harm Officer Ellithorpe following an unlawful seizure. Was Pigott's threat admissible when it was sufficiently distinguishable from his unlawful seizure and when it was made after he was released?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Juvenile respondent Michael Pigott was charged by information with one count of harassment. CP 1. The case proceeded by way of a bench trial. Pigott did not file a CrR 3.6 motion to suppress. RP 6.¹ The State requested a CrR 3.5 hearing

¹ The verbatim report of proceedings consists of one volume, which will be referred to as RP.

to determine the admissibility of some of Pigott's statements. RP 6-7. The parties agreed to take the CrR 3.5 testimony at the same time as the trial testimony. Id.

Seattle Police Officer David Ellithorpe was the State's sole witness. RP 11-84. Toward the end of Ellithorpe's direct testimony, Pigott's counsel objected to a line of testimony and added, "I'm also going to make a motion for a 3.6." RP 36. The trial court allowed Pigott to argue for suppression under CrR 3.6. RP 68-69. Pigott argued that Ellithorpe did not have a reasonable suspicion to believe that he was involved in criminal activity. Id. The trial court concluded that Ellithorpe had a reasonable, articulable suspicion to stop Pigott for attempted vehicle prowl. CP 12-15, RP 74-75. The court found Pigott guilty of harassment and imposed a standard range sentence. CP 3-8, 9-11.

2. SUBSTANTIVE FACTS.

At around 8:30 p.m. on November 8, 2009, Officer David Ellithorpe responded to the 6800 block of Holly Park Drive South, in Seattle, following a report of an attempted car prowl. RP 11-13.

The suspects were described as two young black males, dressed in dark clothing. RP 13. They were last seen headed southbound toward John C. Little Park. Id.

Ellithorpe arrived in the area approximately 15 minutes after the 911 call and saw "two young men" sitting on a bench in the park. RP 14. Ellithorpe approached the subjects on foot, asked whether they lived in the area, and mentioned the 911 call. Id. Pigott, who became verbally combative and hostile, complained about racial profiling. RP 14-15. Concerned that Pigott's hostility might escalate into something physical, Ellithorpe patted down Pigott and escorted him to the patrol car to check for warrants. RP 16-17, 19. Ellithorpe instructed Pigott to sit in the back seat while he was running his name. RP 19. Another officer arrived and contacted Pigott's friend. RP 20.

Ellithorpe did not find any warrants, but did note that Pigott had previous contacts with police for threatening a school official. RP 21, 28. With no reason to hold Pigott or his friend, Ellithorpe told them that they were free to leave. RP 21. As they were walking away, Pigott turned around and told Ellithorpe, "I'm gonna bust on ya, nigga." Id. Ellithorpe believed that Pigott was

threatening to shoot him. RP 23. Based on Pigott's demeanor and his previous police contacts, Ellithorpe was afraid that Pigott would carry out this threat. RP 41.

C. ARGUMENT

1. THE STATE CONCEDES THAT THE RECORD IS INSUFFICIENT TO DETERMINE WHETHER ELLITHORPE HAD A REASONABLE, ARTICULABLE SUSPICION TO BELIEVE PIGOTT WAS INVOLVED IN CRIMINAL ACTIVITY.

Under the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution, warrantless seizures are per se unreasonable, unless they fall under one of the "jealously and carefully drawn exceptions" to the warrant requirement. State v. Doughty, 170 Wn.2d 57, 61, 239 P.3d 573 (2010) (quoting Arkansas v. Sanders, 442 U.S 753, 759, 99 S. Ct. 2586, 62 L. Ed.2d 235 (1979)).

An investigatory stop is one such exception to the warrant requirement. Id. (citing Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed.2d 889 (1968)). To justify a Terry stop, the police officer must be able to point to "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Terry, 392 U.S. at 21.

Under article I, section 7, a person is seized when a reasonable person would not feel free to leave. State v. Rankin, 151 Wn.2d 689, 701, 92 P.3d 202 (2004). In a police-questioning context, a seizure occurs if a reasonable person would not feel free to refuse the officer's request for identification and end the encounter. Id.

In this case, the trial court never determined at what point Pigott was first seized. CP 12-15. It does not appear that Ellithorpe's initial contact with Pigott constituted a seizure because he simply asked Pigott a few questions while Pigott was sitting on the park bench. Pigott clearly was seized, however, when Ellithorpe escorted him to his patrol car and instructed Pigott to sit in the back seat.

The trial court concluded that Ellithorpe had a reasonable, articulable suspicion to believe that Pigott and his friend were involved in the attempted vehicle prowl. CP 14. This conclusion was based, in part, upon the trial court's finding that Pigott and his friend "fit the description of the suspects." Id. However, a careful review of the record reveals that Ellithorpe only described Pigott and his friend as "young males." RP 14, 45. Ellithorpe never testified about their clothing and never indicated whether the subjects fit the description given by the 911 caller. Ellithorpe spotted Pigott 15 minutes after the

911 call. It is not clear how far away Pigott was from the attempted car prowl, whether Pigott matched the vague description of the suspects, or whether a crime had actually occurred.

Although Pigott does not assign error to the factual basis of the stop, based on the record, it does not appear that Ellithorpe had a reasonable, articulable suspicion to believe that Pigott and his friend were involved in an attempted vehicle prowl. It is possible that Ellithorpe had a sufficient basis to suspect Pigott of criminal activity. However, the record does not support such a conclusion. The deficiencies in the record appear to be due, in part, to the fact that the motion to suppress was raised late in Ellithorpe's testimony. RP 36. Prior to Pigott raising the motion, the trial court sustained objections to testimony that would have been relevant and helpful in considering the motion to suppress. RP 13, 16-17. Based on this record, the State concedes Pigott was unlawfully seized.

For the first time on appeal, Pigott argues that officers cannot conduct a Terry stop to investigate the completed misdemeanor of attempted vehicle prowl. This is an issue of first impression Washington. Pigott did not raise this specific theory at the trial court level and has thus not preserved the issue for appeal. RAP 2.5(a). Moreover, because the stop was not supported by a reasonable,

articulable suspicion, this Court does not need to reach the issue of whether officers may conduct a Terry stop to investigate a completed attempted vehicle prowl. See State v. Speaks, 119 Wn.2d 204, 207, 829 P.2d 1096 (1992) (noting that an appellate court should avoid deciding constitutional issues if a case can be decided on nonconstitutional grounds).² Still, for the reasons argued below, Pigott's conviction should be affirmed.

2. PIGOTT'S THREATS WERE PROPERLY ADMITTED BECAUSE THEY WERE NOT FRUIT OF THE UNLAWFUL SEIZURE.

Pigott contends that he would not have threatened Ellithorpe "if not for the unlawful stop." Therefore, he argues, the threat was fruit of the poisonous tree and must be suppressed. Pigott's claim should be rejected because, whether or not the stop triggered the threats, a citizen may not threaten to harm a police officer following an unlawful seizure.

As a general rule, evidence discovered pursuant to an illegal search or seizure must be suppressed as "fruit of the poisonous

² Furthermore, because of the unusual procedural history and because this particular issue was not raised in the trial court, this case is not an appropriate vehicle to decide an issue of first impression.

tree." State v. Warner, 125 Wn.2d 876, 888, 889 P.2d 479 (1995) (citing Wong Sun v. United States, 371 U.S. 471, 484, 83 S. Ct. 1416, 16 L. Ed.2d 441 (1963)). However, contrary to Pigott's suggestion, the "fruit of the poisonous tree" test is not a "simplistic 'but for' analysis." State v. Mierz, 127 Wn.2d 460, 474, 901 P.2d 286 (1995) (quoting Commonwealth v. Saia, 372 Mass. 58, 360 N. Ed.2d 329 (1977)). Rather, the test is "whether, granting the primary illegality, the evidence to which 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." Wong Sun, 371 U.S. at 488.

Courts have consistently held that the commission of a separate and distinct crime constitutes the kind of independent act that purges the primary taint of the unlawful detention. United States v. Bailey, 691 F.2d 1009, 1017 (11th Cir. 1982) (finding that "extending the fruits doctrine to immunize a defendant from arrest for new crimes gives a defendant an intolerable carte blanche to commit further criminal acts so long as they are sufficiently connected to the chain of causation started by the police misconduct."). Washington appellate courts also have rejected the notion that an illegal entry or arrest could immunize a defendant

from crimes committed after the constitutional violation, holding that "the constitutional right to be free from unreasonable searches and seizures does not create a constitutional right to react unreasonably to an illegal detention." State v. Mather, 28 Wn. App. 700, 703, 626 P.2d 44 (1981).

In State v. Owens, the defendant was charged with attempting to elude a pursuing police vehicle after he recklessly fled a police officer who was attempting to stop him. 39 Wn. App. 130, 131, 692 P.2d 850 (1984). Finding that the officer did not have sufficient reasons to justify the original stop, the trial court suppressed the officer's testimony regarding the Owens's subsequent flight and reckless driving. Id. at 132. The appellate court reversed, finding that the Owens's actions "were sufficiently distinguishable from the unauthorized intrusion." Id. at 135.

Courts have applied a similar analysis in cases involving crimes against officers. In State v Mierz, the defendant was convicted of two counts of third degree assault and one count of unlawful possession of wildlife. 127 Wn.2d 460, 468, 901 P.2d 286 (1995). Department of Wildlife agents entered Mierz's property without a warrant to confiscate two coyotes. Id. at 465. Mierz commanded his dogs to attack the agents. Mierz also bit an agent.

Id. at 465-66. On appeal, Mierz argued that his attorney was ineffective for failing to suppress evidence obtained as a result of the agent's illegal entry into his yard. Id. at 471-72. The Supreme Court concluded that the evidence of Mierz's assaultive behavior was properly admitted because "the evidence of the assault did not arise due to exploitation of any unconstitutional entry or arrest." Id. at 473-75. The court reasoned that "an assault against police officers following an illegal entry is outside the scope of the exclusionary rule, because it is sufficiently distinguishable from any initial police illegality 'to be purged of the primary taint.'" Id. at 473-74 (citing State v. Aydelotte, 35 Wn. App. 125, 132, 665 P.2d 443 (1983)).

The court recognized further policy reasons for refusing to suppress evidence of crimes against officers after an illegal search or seizure, holding that excluding such evidence would allow one whose constitutional rights were violated to "respond with unlimited force and, under the exclusionary rule ... be effectively immunized from criminal responsibility." Id. at 474 (quoting Aydelotte, 35 Wn. App. at 132). The commission of a separate and distinct crime

following an unlawful seizure was the type of intervening act that purges the primary taint. Clark V. United States, 755 A.2d 1026, 1030 (2000).

Just as in Owens and Mierz, Ellithorpe's detention of Pigott did not create a right for Pigott to threaten Ellithorpe. Unlike Owens and Mierz, here the seizure had ended, as Ellithorpe had told Pigott he was free to go before any threats were made. Because Ellithorpe did not "exploit" his original unlawful stop so as to provoke Pigott's threat, the exclusionary rule does not apply. People v. Puglisi, 51 A.D.2d 695, 380 N.Y.S.2d 221 (1976).

D. CONCLUSION

For all of the foregoing reasons, the State asks this court to affirm Pigott's convictions.

DATED this 21 day of June, 2011.

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 Maureen Cyr, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. MICHAEL PIGOTT, Cause No. 66107-8-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.



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Done in Seattle, Washington

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