

NO. 68073-1-1

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

STATE OF WASHINGTON,

Respondent,

v.

D.R.,

Appellant.

REC'D
MAY 31 2012
King County Prosecutor
Appellate Unit

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

The Honorable Helen Halpert, Judge
The Honorable Michael Trickey, Judge

BRIEF OF APPELLANT

FILED
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STATE OF WASHINGTON
MAY 31 PM 4:24

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by denying appellant's motion to suppress. Supp CP __ (sub no. 77, Written Findings of Fact and Conclusions of Law on CrR 3.6 . . . , 2/6/12).¹

2. The trial court erred in finding appellant was not seized at the point when he was ordered by a deputy to "wait" while the officer approached. Appendix at 2 (Conclusions of Law 1, 2 , 3, 6.).

Issue Pertaining to Assignments of Error

An individual is seized if a reasonable person would not feel free to leave or otherwise terminate an encounter with police. The fruits of an unlawful seizure must be suppressed. Appellant was attempting to leave the Seattle bus tunnel when a deputy ordered him to "wait" as he approached and then questioned Appellant. Appellant obeyed, and was subsequently arrested and found in possession of cocaine. Did the trial court err in denying Appellant's motion to suppress the cocaine when appellant was unlawfully seized because a reasonable person would not have felt free to ignore the deputy's command to wait and where the deputy lacked legal authority to seize appellant?

¹ A supplemental designation of clerk's papers has been filed contemporaneously with this brief. A copy of the written findings and conclusions is attached as an appendix to this brief.

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County Prosecutor charged juvenile appellant D.R. with possession of cocaine and obstructing a law enforcement officer. CP 5-6; RCW 69.50.4013; RCW 9A.76.020(1). D.R. moved to suppress the drugs relied on for the possession charge under criminal rules 3.6, arguing they were the fruit of an unlawful seizure. CP 7-14. The motion was denied. RP 139-44.

The court found D.R. guilty of both charged offenses and imposed 34 days detention. CP 17-20; RP 170. D.R. appeals. CP 21.

2. Substantive Facts²

Between 6 p.m. and 7 p.m. on Saturday, April 16, 2011, King County Sheriff's Deputy Gabriel Morris was on full uniformed patrol at the Metro Pioneer Square Bus Tunnel Station, standing near elevators on the mezzanine level of the tunnel located between street level and the transit platform. RP 11-12, 14-17, 53. According to Morris, he and his partner, Deputy Peter Gaiser "were conducting an area check because there had been complaints of large amounts of illegal drug activity in that particular area." RP 16.

² The facts presented are derived from testimony presented at a single hearing held for purposes of fact-finding, CrR 3.5 and CrR 3.6. See RP 6-7 (court states it will hold a single hearing and parse out the evidence presented for purpose of the fact-finding and suppression issues).

Morris initially testified he first saw D.R. walking on the mezzanine level in the direction of the stairway leading to the platform level. RP 19-20. On cross examination, however, he admitted his report indicates he first claimed to see D.R. as he was walking down the stairs from street level. RP 45. Surveillance video shows D.R. coming down the stairs from street level before encountering Morris. Ex. 6; RP 23. Morris claimed that when D.R. saw him "he had an expression of being startled and then turned and walked to the elevator door" and pushed the call button. RP 20-21. Morris noted that from the mezzanine level the elevator D.R. went to only goes to street level. RP 21.

Morris said he approached D.R. from about eight to ten feet away and, although he could not recall exactly what he said to D.R., testified he asked D.R. why he had come down the stairs simply to return on the elevator to the street. RP 23-24, 54. Morris recalled D.R. replying that he was looking for a bus, which made little sense to Morris because D.R. never went to the platform level where the buses stop. RP 24. Morris admitted that had D.R. run from him at that point, he would have chased him down. RP 54

When Morris eventually got within two to three feet of D.R. he noticed the smell of "previously-burnt marijuana" emanating from D.R., so he promptly arrested him by placing him in handcuffs and walking him to a

nearby ledge so he could more conveniently search him by placing any items he found on the ledge. RP 25-26, 55, 57. During the search Morris found two baggies, "each containing several rocks of crack cocaine". RP 27, 36, 99-101. But for discovering the cocaine, Morris claimed he would have released D.R. RP 62, 67.

After finding the cocaine but before Morris could complete the search, however, D.R. broke free and tried to escape by running back of the stairs that led to the street. RP 28-29. Both Morris and Gaiser, who was coming down the stairs at the time, caught D.R. and regained control of him. RP 29, 81-82. This conduct formed the basis of the obstruction charge against D.R. RP 131-33.

D.R. testified for purposes of the CrR 3.5 and 3.6 motions only. RP 105. According to D.R., he was smoking marijuana with friends before being dropped off at the bus tunnel entrance. RP 105. He entered the bus tunnel intending to catch the number 41 bus to meet his girlfriend at the Northgate Mall. RP 106. After going down a flight of stairs he saw an elevator, which he assumed would take him down to where the busses came. RP 107.

After pressing the call button for the elevator, D.R. noticed Officer Morris approaching him and telling him to "wait". RP 107, 109. D.R. testified that he did not feel free to leave after this command from Morris,

fearing Morris would "Tase" him if he tried to leave. RP 111. Officer Morris then began questioning D.R. as to why he was getting on an elevator back to the street where he had just come from. RP 109. D.R. recalled replying, "I thought this elevator goes down, I'm trying to get on the 41 bus to head towards Northgate." RP 109. According to D.R., Morris then sniffed the air and said, "I smell weed", to which D.R. replied, "Yeah, I am high, sir." D.R. recalled Morris then promptly grabbed and handcuffed him. RP 109.

In arguing the trial court should find Morris unlawfully seized D.R., defense counsel noted Morris testified he was unable to recall what his initial words to D.R. were, and that D.R.'s testimony that Morris's first words were a command to "wait" was therefore undisputed. RP 119. The prosecution seemed to concede Morris did command D.R. to wait, but argued that even if he did it did not constitute an unlawful seizure because D.R. was already waiting, albeit for the elevator. RP 121-22, 125. The prosecutor then argued Morris did not stop D.R. because the clothes he was wearing were indicative of gang membership, but instead because he perceived D.R. actions of walking down the stairs only to take an elevator back up to constitute "curious, odd behavior". RP 122.

In rebuttal, defense counsel noted that failure to comply with a police officer's command to "wait" would likely result in prosecution for

obstruction. RP 126-27. As such, counsel argued, it was reasonable for D.R. or any other person to believe that when an officer tells you to "wait", you are not free to leave and therefore have been seized. RP 127.

The trial court denied D.R.'s motion to suppress. Appendix; RP 144.

In its oral ruling the court noted:

[Morris] was in full uniform, did not have his gun drawn or otherwise display force. There is no information from either [Morris or D.R.] about the volume or tone of voice used by [Morris], whether the word "wait" was used as a command or a request or whether it was any different than, hey, I want to talk to you. . . . The word "wait" by itself is not sufficient to amount to a seizure and [D.R.] has not met his burden of proof of establishing that a seizure occurred [prior to Morris noticing the smell of burnt marijuana emanating from D.R.].

RP 143.

In its written finding the court found Morris "told [D.R.] to wait. . . .

At that moment, [Morris] had no articulable suspicion that would justify a Terry stop[.]" Appendix (finding of fact 3). The court concluded, however, that Morris did not need authority of law to tell D.R. to wait so he could be questioned, and that the subsequent arrest and search were therefore not unlawful. Appendix (conclusions of law 3 & 6).

C. ARGUMENT

THE TRIAL COURT ERRED WHEN IT DENIED D.R.'s MOTION TO SUPPRESS UNDER CrR 3.6.

Under the Fourth Amendment to the United States Constitution and

article 1, § 7 of the Washington Constitution, warrantless searches and seizures are *per se* unreasonable unless the State demonstrates that they fall within one of the "jealously and carefully drawn exceptions" to the warrant requirement. State v. Hendrickson, 129 Wn.2d 61, 70, 917 P.2d 563 (1996) (quoting Arkansas v. Sanders, 442 U.S. 753, 759, 61 L. Ed. 2d 235, 99 S. Ct. 2586 (1979)). Here the trial court correctly found Morris had no lawful basis to seize or detain D.R. before he noticed the smell of burnt marijuana emanating from him. RP 143. It erred, however, when it found D.R. was not seized at the point when a fully uniformed Deputy Morris commanded D.R. to "wait". Appendix (conclusion of law 3); RP 143. Whether a person has been seized is a mixed question of law and fact. State v. Thorn, 129 Wn.2d 347, 351, 917 P.2d 108 (1996). A person is seized "when, by means of physical force or a show of authority, his or her freedom of movement is restrained and a reasonable person would not have believed he or she is (1) free to leave, given all the circumstances, or (2) free to otherwise decline an officer's request and terminate the encounter." State v. O'Neill, 148 Wn.2d 564, 574, 62 P.3d 489 (2003) (internal quotations and citations omitted)

Nothing prevents a law enforcement officer from approaching an individual and attempting to engage him or her in conversation. O'Neill, 148 Wn.2d at 577-78; see also United States v. Mendenhall, 446 U.S. 544, 555, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980) (finding no seizure where law

enforcement "did not summon the respondent to their presence, but instead approached her"); State v. Nettles, 70 Wn. App. 706, 707-08, 711, 855 P.2d 699 (1993) (no seizure where officer exited her car first and then merely asked suspects if they would come to her car and speak with her), review denied, 123 Wn.2d 1010 (1994). Notably, however, statements such as "halt," "stop, I want to talk to you" "wait right here," and the like qualify as seizures. See State v. Whitaker, 58 Wn. App. 851, 854, 795 P.2d 182 (1990), review denied, 116 Wn.2d 1028 (1991); State v. Friederick, 34 Wn. App. 537, 541, 663 P.2d 122 (1983); Deputy Morris's statement falls within this latter category. With the intent to question D.R. about what he considered "curious, odd behavior", Morris commanded D.R. to "wait". RP 109, 122. A reasonable person under these circumstances would not feel free to simply ignore the officer's command and leave the area before Morris could question him. As defense counsel correctly noted in argument, a person who refuses to comply with such a command may face prosecution for obstructing a law enforcement officer. See RCW 9A.76.020.³

³ RCW 9A.76.020 provides:

(1) A person is guilty of obstructing a law enforcement officer if the person willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties.

(2) "Law enforcement officer" means any general authority, limited authority, or specially commissioned Washington peace officer or federal peace officer as those terms are

The trial court's speculation that Morris telling D.R. to "wait" could have been interpreted as a mere *request* to talk to D.R. is untenable. There is no evidence to suggest Morris directed the statement to D.R. as anything but a command to remain where he stood. Morris's command to D.R. was a seizure just as similar commands were in Whitaker, *supra* and Friederick, *supra*.

Any evidence derived directly or indirectly from an illegal seizure must be suppressed unless sufficiently attenuated from the initial illegality to be purged of the original taint. Wong Sun v. United States, 371 U.S. 471, 484-88, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963); State v. Warner, 125 Wn.2d 876, 888, 889 P.2d 479 (1995); State v. Chapin, 75 Wn. App. 460, 463, 879 P.2d 300 (1994), *review denied*, 125 Wn.2d 1024 (1995). The courts apply a "but-for analysis." State v. Aranguren, 42 Wn. App. 452, 457, 711 P.2d 1096 (1985).

Prior to D.R.'s unlawful seizure, there was no evidence to support his arrest and search by Deputy Morris. Rather, it was only after Morris was able to approach D.R. after ordering him to remain where he was that Morris was able to notice the smell of burnt marijuana emanating from D.R., which

defined in RCW 10.93.020, and other public officers who are responsible for enforcement of fire, building, zoning, and life and safety codes.

(3) Obstructing a law enforcement officer is a gross misdemeanor.

ultimately led to probable cause to arrest and search him. Appendix (conclusion of law 4).

But for the unlawful seizure, there would not have been evidence to prosecute D.R. for drug possession. There was nothing to purge the taint of that seizure. All subsequent evidence had to be suppressed.

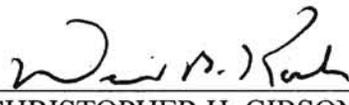
D. CONCLUSION

The trial court erred when it denied the defense motion to suppress. D.R.'s drug possession conviction should be reversed and the case dismissed

DATED this 31st day of May, 2012.

Respectfully submitted,

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APPENDIX

FILED
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KING COUNTY
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SEATTLE, WA

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY
JUVENILE DEPARTMENT

STATE OF WASHINGTON,

Plaintiff,

No 11-8-00923-0

vs

DARRIN J RAVENEL,
B D 05/10/1995,

Respondent

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON CrR 3 6
MOTION TO SUPPRESS PHYSICAL
EVIDENCE

A HEARING ON THE ADMISSIBILITY OF PHYSICAL EVIDENCE was held on
November 29, 2011 before the Honorable Judge Helen Halpert After considering the evidence
submitted by the parties and hearing argument, to wit testimony of King County Detective
Gabriel Morris, testimony of the Respondent, and arguments of counsel, the court makes the
following findings of fact and conclusions of law as required by CrR 3 6

I Findings of Facts

On April 16, 2011, just before 6 30 p m , the Respondent entered the Downtown
Seattle Bus Tunnel's Pioneer Street Station (PSS) by walking down the stairs from the
Yesler Way entrance The Respondent had just been dropped off by friends at street level
after smoking marijuana with them in their car

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON CrR 3 6 MOTION TO
SUPPRESS PHYSICAL EVIDENCE - 1

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3 At the time that Detective Morris approached and began speaking to the Respondent, the Respondent was not seized and Detective Morris did not need any articulable suspicion to act as he did

4 The strong odor of marijuana, particularized to the Respondent, provided probable cause to arrest the Respondent

5 After lawfully placing the Respondent under arrest, Detective Morris conducted a justified warrantless search incident to arrest and recovered the baggies of crack cocaine from the pocket of the Respondent

6 The baggies of crack cocaine and the Respondent's subsequent statements are admissible because they are not the result of an unlawful seizure or an unlawful search

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

Signed this 6 day of ^{Feb} ~~January~~, 2012

Helen d. Halpert

JUDGE HELEN HALPERT

Presented by
[Signature]

Danika Adams, WSBA #39265
Deputy Prosecuting Attorney

[Signature]

Amy Parker, ACA
Attorney for Respondent *3598*

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FILED
KING COUNTY, WASHINGTON

JAN 31 2012

SUPERIOR COURT CLERK
BY MICHELLE GIVNIN
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY
JUVENILE DEPARTMENT

STATE OF WASHINGTON,

Plaintiff,

vs

DARRIN J RAVENEL,
B D 05/10/1995,

Respondent

No 11-8-00923-0

FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON CrR 3 5
MOTION TO ADMIT THE
RESPONDENT'S STATEMENTS

A hearing on the admissibility of the Respondent's statement(s) was held on November 29, 2011, before the Honorable Judge Helen Halpert

The Court informed the Respondent that (1) he may, but need not, testify at the hearing on the circumstances surrounding the statement, (2) if he does testify at the hearing, he will be subject to cross examination with respect to the circumstances surrounding the statement and with respect to his credibility, (3) if he does testify at the hearing, he does not by so testifying waive his right to remain silent during the trial, and (4) if he does testify at the hearing, neither this fact nor his testimony at the hearing shall be mentioned to the jury unless he testifies concerning the statement at trial After being so advised, the Respondent testified at the hearing

FINDINGS OF FACT AND CONCLUSIONS OF LAW
ON CrR 3 5 MOTION TO ADMIT THE
RESPONDENT'S STATEMENTS - 1

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1 After considering the evidence submitted by the parties and hearing argument regarding
 2 the admissibility of statements, the Court enters the following findings of fact and conclusions of
 3 law as required by CrR 3.5

4 A UNDISPUTED FACTS

5 1 When first contacting the Respondent, King County Detective Gabriel Morris
 6 asked the Respondent why he was taking the elevator back up to street level when he had
 7 just taken the stairs down into Pioneer Square Station. Detective Morris was walking
 towards the Respondent when he asked the question, moving from ten feet away to three
 feet away. The Respondent gave a mumbling response.

8 2 After the Respondent was arrested and hand-cuffed, he attempted to escape from
 9 Detective Morris and was caught on the stairs of Pioneer Square Station by King County
 Deputy Peter Gaiser. While struggling with Deputy Gaiser, the Respondent made
 statements to try to get Deputy Gaiser to release him.

10 3 When Detective Morris rejoined the Respondent, the Detective read the
 11 Respondent his Miranda warnings from his departmentally issued card and the
 Respondent waived those rights. The Respondent asserted that he found the cocaine a few
 12 minutes earlier.

13 4 Later, when Detective Morris was trying to complete a search incident to arrest of
 14 the Respondent, the Respondent complained about what Detective Morris was doing with
 his cigarettes and money and demanded that the Detective harm him so that he could sue
 the County.

15 5 While placing the Respondent in the back of his patrol car, King County Deputy
 16 George Drazich noticed the strong odor of marijuana coming from the Respondent and
 asked the Respondent about it. The Respondent admitted being "high" to Deputy Drazich.

17 B DISPUTED FACTS

18 1 Whether, when he was first contacted by Detective Morris, the Respondent was in
 19 the custody of Detective Morris.

20 C CONCLUSIONS AS TO THE DISPUTED FACTS

21 1 Upon contacting the Respondent, Detective Morris was engaging in social contact
 and the Respondent was not arrested or in custody.

22 D CONCLUSIONS OF LAW AS TO THE ADMISSIBILITY OF THE
RESPONDENT'S STATEMENTS.

23 The following statements of the Respondent are admissible in the State's case-in-chief

1 The Respondent's non-responsive mumbled answer to Detective Morris that he was looking for the bus

2 This statement is admissible because the Respondent was not in custody with respect to
3 Miranda and it was not responsive to the question asked

4 2 The Respondent's volunteered statements to Deputy Gaiser that he was only 15
5 years old, and asking to just let him go home

6 These statements are admissible because although the Respondent was under arrest when
7 they were made, and had not been given his Miranda warnings, they were spontaneously given
8 and not the result of interrogation

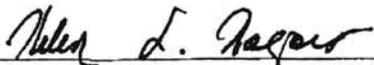
9 3 The Respondent's admission to Detective Morris that he found the cocaine a few
10 minutes earlier at the bus stop at 3rd and Yesler

11 4 The Respondent's volunteered admission to Deputy Drazich that he was "high," in
12 response to Deputy Drazich noting the odor of marijuana

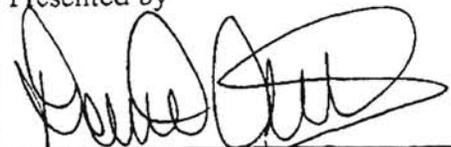
13 These statements are admissible because although the Respondent was under arrest when
14 they were made, he had been read his Miranda warnings by Detective Morris, and the
15 Respondent had already made a knowing, intelligent, and voluntary waiver of those rights

16 In addition to the above written findings and conclusions, the court incorporates by
17 reference its oral findings and conclusions

18 Signed this 31 day of January 2012

19 
20 JUDGE HELEN HALPERT

21 Presented by

22 

23 Danika Adams, WSBA #39265
24 Deputy Prosecuting Attorney

25 

26 Amy Parker, ACA
27 Attorney for Respondent

28 36598

29 FINDINGS OF FACT AND CONCLUSIONS OF LAW
30 ON CrR 3.5 MOTION TO ADMIT THE
31 RESPONDENT'S STATEMENTS - 3

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 68073-1-I
)	
DARRIN RAVENEL,)	
)	
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 MAY 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DARRIN RAVENEL
168 25TH AVENUE
SEATTLE, WA 98122

SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF MAY 2012.

x *Patrick Mayovsky*

2012 MAY 31 PM 4:24
COURT OF APPEALS DIV 1
STATE OF WASHINGTON