

71507-1

71507-1

No. 71507-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

DEANDRE S. EATON,

Appellant.

~~FILED~~
STATE OF WASHINGTON
COURT OF APPEALS
DIVISION ONE
JAN 14 2011
FBI 1 10

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

The Honorable William L. Downing

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. In the absence of a warrant or individualized probable cause to believe he had committed a crime, Mr. Eaton was unlawfully arrested, in violation of the Fourth Amendment and Article I, section 7.

2. Insufficient evidence was presented to prove beyond a reasonable doubt Mr. Eaton had in his possession or control a firearm, an essential element of the crime of unlawful possession of a firearm in the first degree.

3. The trial court erred in admitting Mr. Eaton's custodial statements that were made following his unlawful arrest.

4. To the extent it could be considered a Finding of Fact and in the absence of substantial evidence in the record, the court erred in entering CrR 3.6 Conclusion of Law 2.

5. To the extent it could be considered a Finding of Fact and in the absence of substantial evidence in the record, the court erred in entering CrR 3.6 Conclusion of Law 3.

6. To the extent it could be considered a Finding of Fact and in the absence of substantial evidence in the record, the court erred in entering CrR 3.6 Conclusion of Law 4.

7. To the extent it could be considered a Finding of Fact and in the absence of substantial evidence in the record, the court erred in entering

CrR 3.6 Conclusion of Law 5, insofar as it finds Mr. Eaton was inferentially linked to the gun and that link supported probable cause to arrest him.

8. To the extent it could be considered a Finding of Fact and in the absence of substantial evidence in the record, the court erred in entering CrR 3.6 Conclusion of Law 6.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The constitutional protection against unlawful seizures prohibits a warrantless arrest in the absence of individualized probable cause to believe the person has committed or is about to commit a crime. When Mr. Eaton was arrested with his two companions, and in the absence of individualized probable cause that Mr. Eaton had committed a crime, was Mr. Eaton unlawfully arrested, requiring suppression of all evidence obtained and statements made following his arrest? (Assignments of Error 1, 3-8)

2. The constitutional right to due process requires the State to prove beyond a reasonable doubt every essential element of the crime charged. An essential element of the crime of unlawful possession of a firearm in the first degree is possession or control of a firearm. Where the evidence established that Mr. Eaton and at least two other people were in the vicinity of a dumpster in which an officer found a firearm and partially

burned cigarette that appeared to have been discarded simultaneously, but the firearm had no usable prints or DNA and the partially burned cigarette had female DNA only, was Mr. Eaton's right to due process violated when he was convicted of unlawful possession of a firearm? (Assignment of Error 2)

C. STATEMENT OF THE CASE

On the night of October 31, 2012, Detective Josh Rurey, Detective Robert Thomas, and Officer Jeremy Pinkerton, each assigned to the Seattle Police gang unit, were on proactive patrol because Halloween is "a problem night for gangs." 10/21/13 RP 46; 10/22/13 RP 117, 148. Their patrol vehicle was a black Crown Victoria with a subtle police emblem that was not visible in the dark. 10/21/13 RP 47, 48; 10/22/13 RP 149. Around 10 p.m., they drove by a group of five people standing outside a high school. 10/21/13 RP 49, 52; 10/22/13 RP 151. According to Detective Rurey, some members of the group looked away as the patrol car drove by, which he considered somewhat suspicious given that they were on school grounds when it was closed. 10/21/13 RP 52-53. On the other hand, according to Detective Thomas, everyone turned and watched the patrol car, which he considered suspicious. 10/22/13 RP 152.

The officers turned around, drove into the school parking lot, and turned on a spotlight. 10/21/13 RP 53-54; 10/22/13 RP 152. Three

members of the group ran around a corner of the school building. 10/21/13 RP 53, 57. The other two people ran across a field and were not located. 10/21/13 RP 55, 67.

One of the group of three people, later identified as Mr. Eaton, was running with both hands on his waistband, an unnatural gait that possibly indicated he was carrying a heavy object such as weapon. 10/21/13 RP 57-58; 10/22/13 RP 59, 64, 155-56. The officers briefly lost sight of Mr. Eaton and his companions as they ran behind the school building. 10/21/13 RP 57; 10/22/13 RP 6-7, 155. When the three people re-appeared on the other side of the school, they were walking nonchalantly. 10/22/13 RP 60, 156-57.

The officers got out of the patrol car and asked to speak to the three people. 10/22/13 RP 157. In response, Mr. Eaton turned slightly sideways and moved his hand to his waistband, as if to draw a weapon. 10/22/13 RP 119-20, 157-58. Concerned for their safety, Detective Thomas and Officer Pinkerton drew their handguns and ordered everyone to the ground. 10/22/13 RP 120, 129, 158. Mr. Eaton and his companions were frisked and found to be unarmed. 10/22/13 RP 158-59.

Detective Rurey went behind the school where the group had run and saw a dumpster in which he found a gun and a partially burned cigarette on top of sealed trash bags. 10/68-69; Ex. 8, 47, 49, 50.

According to Detective Rurey, the cigarette and gun appeared to have been discarded “simultaneously.” 10/21/13 RP 69. Detective Rurey notified the other officers of his discovery and Mr. Eaton and his companions were immediately placed in handcuffs. 10/22/13 RP 10-11, 164.

Shortly thereafter, the officers heard several gun shots in the area. 10/22/13 RP 13-14, 166. Detective Rurey and Detective Thomas ran in the direction of the shots but did not locate anyone. 10/22/13 RP 166. As they walked back to the patrol car, Detective Thomas found a glove on the ground that matched a glove later found on Mr. Eaton during a search incident to arrest. 10/22/13 RP 168, 169.

Concerned for their safety, backup officers took the three people to the police station while Detective Rurey and Detective Thomas went to the Seattle Public School Safety and Security Department to retrieve the video from the school surveillance cameras. 10/22/13 RP 12, 14, 171. According to Detective Rurey, the video showed a person near the dumpster who “probably” was Mr. Eaton. 10/22/13 RP 38-39.

The detectives returned to the police station where Detective Thomas advised Mr. Eaton of his *Miranda*¹ rights and interviewed him. 10/22/13 RP 172. Mr. Eaton denied running from the police, denied

¹ *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

having a gun, and stated that he had just gotten off a bus near the school. 10/22/13 RP 174-76. Detective Thomas told Mr. Eaton that he was identifiable on the school surveillance video, which was not true. 10/22/13 RP 175. In response, Mr. Eaton's shoulders drooped and he stated, "I'm stuck. It doesn't matter," and "This is not the first time I have done something like this." 10/22/13 RP 177.

Based on a juvenile conviction for residential burglary, Mr. Eaton was charged with unlawful possession of a firearm in the first degree, in violation of RCW 9.41.040(1)(a). CP 1. Pursuant to CrR 3.6, Mr. Eaton moved to suppress all evidence obtained as a result of his arrest, on the grounds he was unlawfully seized. CP 49-71; 10/17/13 RP 121-26. The motion was denied.² CP 111-14; 10/17/13 RP 130-34.

At trial, a Seattle Public School security specialist testified that the surveillance video captured images in two-second intervals. 10/22/13 RP 91. Because the school is in an area of frequent gang activity, she was not surprised to learn that a gun had been recovered from the school dumpster. 10/22/13 RP 93.

Detective Rurey testified that one frame of the surveillance video showed a person who resembled Mr. Eaton standing by the dumpster. 10/22/13 RP 35-39. A latent print examiner testified that the gun had no

² Mr. Eaton also moved to suppress his custodial statements, pursuant to CrR 3.5, which also was denied. CP 59-71, 108-10.

usable prints. 10/22/13 141. A forensic scientist testified that the gun had DNA from at least four different people, preventing any comparisons, and the partially burned cigarette had female DNA only. 10/23/13 RP 20-26.

After more than seven hours of deliberation over two days, Mr. Eaton was convicted as charged. CP 48; Supp. CP ___, sub. no. 100D (Clerk's Minutes at 9-10).

D. ARGUMENT

1. Mr. Eaton was wrongfully arrested in the absence of individualized probable cause that he had committed a crime.

- a. A warrantless arrest must be based on individualized probable cause that the arrestee has committed or is about to commit a crime.

Under the federal and state constitutions, a lawful warrantless arrest must be predicated on individualized probable cause to believe the arrestee has committed or is about to commit a crime. U.S. Const. Amend. IV; Const. art. I, § 7; *Wong Sun v. United States*, 371 U.S. 471, 479, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); *State v. Grande*, 164 Wn.2d 135, 138, 187 P.3d 248 (2008). The constitutional protections against an illegal search or seizure are “possessed individually.” *Ybarra v. Illinois*, 444 U.S. 85, 92, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979). In addition, RCW 10.31.110 provides, “A police officer having probable cause to believe that a person has committed or is committing a felony shall have the

authority to arrest the person without a warrant.” Consistent with these constitutional protections, the statutory phrase “a person” requires individualized probable cause before an officer may make a warrantless arrest. *Grande*, 164 Wn.2d at 140.

“Probable cause exists were the facts and circumstances within the arresting officer’s knowledge and of which the officer has reasonably trustworthy information are sufficient to warrant a person of reasonable caution in a belief that an offense has been committed.” *State v. Graham*, 130 Wn.2d 711, 724, 926 P.2d 227 (1996) (quoting *State v. Terrovona*, 105 Wn.2d 632, 643, 716 P.2d 295 (1986)). “Probable cause” is distinguishable from the less stringent standard of “reasonable suspicion” that can justify an investigatory stop. “[A]n arrest with or without a warrant must stand upon firmer ground than mere suspicion.” *Wong Sun*, 371 U.S. at 479.

The State bears the burden of proving individualized probable cause. *Grande*, 164 Wn.2d at 141. Whether individualized probable cause exists is a question of law reviewed *de novo*. *Id.* at 140.

b. The officers lacked individualized probable cause to arrest Mr. Eaton.

Mr. Eaton and his companions³ were under arrest when they were handcuffed immediately following the discovery of the gun and partially burned cigarette in the dumpster. 10/17/13 RP 91, 117; 10/22/13 RP 164; CP 113 (CrR 3.6 Conclusion of Law 5: “Defendant’s arrest ... was effectuated by placing him in handcuffs.”). Although the record does not specify the crime of arrest, all three were arrested immediately after the discovery of the gun, in the absence of individualized probable cause that any of them had committed a crime.

In *Grande*, during a traffic stop, the officer detected the odor of marijuana coming from inside the car. 164 Wn.2d at 139. Based on the odor, both the driver and the passenger were arrested, handcuffed, and searched. *Id.* The driver had a pipe containing a small amount of marijuana and the passenger claimed ownership of marijuana found in the car ashtray. *Id.* The driver was charged with possession of marijuana and drug paraphernalia, but the trial court suppressed the evidence on the grounds the general odor of marijuana did not create probable cause specific to the driver. *Id.* The Supreme Court agreed and stated:

³ The record is unclear whether the female companion was handcuffed at the scene, but she was detained and taken into custody together with Mr. Eaton and another companion. 10/17/13 RP 91, 94, 115, 117; 10/22/13 RP 13, 164.

Our state constitution protects our individual privacy, meaning that we are free from unnecessary police intrusion into our private affairs unless a police officer can clearly associate the crime with the individual. We cannot wait until the people we are associating with “alleviat[e] the suspicion” from us. Unless there is specific evidence pinpointing the crime on a person, that person has the right to their own privacy and constitutional protection against police searches and seizures.

Id. at 145-46.

Similarly here, the presence of a gun and a partially burned cigarette in an area accessible to the public where Mr. Eaton and his companions had run did not create probable cause specific to Mr. Eaton. Detective Rurey testified that it appeared the gun and the cigarette had been deposited simultaneously, but there was no testimony that Mr. Eaton or his companions were observed smoking a cigarette or depositing the gun and the cigarette in the dumpster.

Probable cause requires more than “mere suspicion or personal belief.” *State v. Neth*, 165 Wn.2d 177, 183, 196 P.3d 658 (2008). Mr. Eaton’s arrest on less than individualized probable cause that he had committed a crime was illegal.

- c. The proper remedy for an unlawful arrest is suppression of all evidence obtained as a result of the arrest.

“The exclusionary rule mandates the suppression of evidence gathered through unconstitutional means.” *State v. Garvin*, 166 Wn.2d 242, 254, 207 P.3d 1266 (2009); *Wong Sun*, 371 U.S. at 485. Statements made and evidence obtained following an unlawful arrest must be suppressed. *State v. Franklin*, 41 Wn. App. 409, 417, 704 P.2d 666 (1985). Therefore, the glove found on Mr. Eaton after his unlawful arrest and his custodial statements were wrongfully admitted.

Failure to suppress the tainted evidence is a constitutional error and presumed prejudicial. *State v. Shupe*, 172 Wn. App. 341, 351, 289 P.3d 741 (2012). The State bears the burden of proving beyond a reasonable doubt that the error was harmless. *Shupe*, 172 Wn. App. at 351-52. An error is harmless beyond a reasonable doubt if the overwhelming untainted evidence necessarily leads to a finding of guilt. *State v. Davis*, 154 Wn.2d 291, 305, 111 P.3d 844 (2005).

The State cannot meet its burden here. The evidence against Mr. Eaton was very thin, at best. The surveillance video merely showed a person who resembled Mr. Eaton near the dumpster, but did not show the person opening or closing the dumpster. The gun did not have usable prints or DNA and the partially burned cigarette that appeared to have

been deposited at the same time as the gun had female DNA only. Mr. Eaton's custodial statements were equivocal at best and added nothing to the equation. Even with the tainted evidence of Mr. Eaton's glove and his custodial statements, the jury deliberated for more than seven hours over two days. Supp. CP ___, sub. no. 100D (Clerk's Minutes at 9-10). In the absence of "overwhelming untainted evidence" that Mr. Eaton possessed the gun, the wrongful admission of the tainted evidence was not harmless. Reversal is required.

2. Insufficient evidence was presented to support Mr. Eaton's conviction for unlawful possession of a firearm in the first degree.

- a. The State was required to produce sufficient evidence to establish beyond a reasonable doubt every element of the crime of unlawful possession of a firearm.

The State bears the burden of producing sufficient evidence to prove beyond a reasonable doubt every essential element of a crime charged. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Deer*, 175 Wn.2d 725, 731, 287 P.3d 539 (2012). A criminal defendant's fundamental right to due process is violated when a conviction is based upon insufficient evidence. *Winship*, 397 U.S. at 358; *City of Seattle v. Slack*, 113 Wn.2d 850, 859, 784 P.2d 494 (1989); U.S. Const. amend. VI, XIV; Const. art. I, § 3. Evidence is sufficient to support a conviction only if, "after viewing the evidence in the light most

favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 318, 99 S.Ct. 628, 61 L.Ed.2d 560 (1970); *accord State v. Rose*, 175 Wn.2d 10, 14, 282 P.3d 1087 (2012).

- b. The State presented insufficient evidence to establish Mr. Eaton had a firearm in his possession or control, an essential element of the offense of unlawful possession of a firearm in the first degree.

The State failed to prove beyond a reasonable doubt that Mr. Eaton had in his possession or control a firearm, an essential element of RCW 9.41.040(1)(a). The State’s case was entirely circumstantial. Mr. Eaton was observed running in a manner that possibly indicated he was hiding something in his waistband but possibly was for a completely innocuous reason. 10/22/13 RP 59, 64. A glove found on the ground near the dumpster that matched a glove found on Mr. Eaton and established that he was in the vicinity of the dumpster, and the surveillance video showed a person near the dumpster who was either Mr. Eaton or someone who matched his description, but the video does not show the person opening or closing the dumpster lid. 10/22/13 RP 38-39, 77-78, 168, 169. The gun and the partially burned cigarette appeared to have been discarded “simultaneously,” but the gun had no usable fingerprints or DNA and the cigarette had female DNA only, thereby excluding Mr. Eaton. 10/21/13

RP 69; 10/22/13 RP 141; 10/23/13 RP 20, 23, 26. The school security specialist was not surprised to learn that a gun had been recovered from the school dumpster because the school is in an area of frequent gang activity. 10/22/13 RP 93. Moreover, Mr. Eaton's custodial statements that he did not run from the officers, he was "stuck," it did not matter what he said, and he had "done something like this before" are hardly a confession that he unlawfully possessed a firearm. Although some of the evidence is arguably suspicious, it does not add up to proof beyond a reasonable doubt that Mr. Eaton possessed the firearm found in the dumpster.

c. The proper remedy is reversal of Mr. Eaton's conviction for unlawful possession of a firearm.

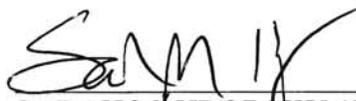
Mr. Eaton's conviction for unlawful possession of a firearm was based on insufficient evidence that he possessed the gun found in the dumpster. A conviction based on insufficient evidence cannot stand. *State v. Veliz*, 176 Wn. App. 849, 865, 298 P.3d 75 (2013). To retry Mr. Eaton for the same conduct would violate the prohibition against double jeopardy. *Burks v. United States*, 437 U.S. 1, 18, 98 S. Ct. 2141, 57 L.Ed.2d 1 (1979); *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). Mr. Eaton's conviction must be reversed and the charge dismissed with prejudice.

E. CONCLUSION

Mr. Eaton was unlawfully arrested in the absence of individualized probable cause to believe he had committed or was about to commit a crime. Accordingly, the evidence obtained as a result of the unlawful arrest, that is, the glove and his custodial statements were wrongfully admitted. In addition, the State failed to produce sufficient evidence, tainted or untainted, to prove beyond a reasonable doubt Mr. Eaton possessed the gun found in the dumpster. For the foregoing reasons, Mr. Eaton requests this Court reverse his conviction for unlawful possession of a firearm in the first degree.

DATED this 30th day of July 2014.

Respectfully submitted,



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Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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)	
Respondent,)	
)	NO. 71507-1-I
v.)	
)	
DEANDRE EATON,)	
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Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 31ST DAY OF JULY, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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