No. 32634-9-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

DANIEL BRYON KINGMA,
Defendant/Appellant.

APPEAL FROM THE GRANT COUNTY SUPERIOR COURT
Honorable John D. Knodell, Judge (suppression hearing)
Honorable Evan E. Sperline (trial proceedings)

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. There was no probable cause to arrest Mr. Kingma for criminal trespassing.

2. The trial court erred in denying Mr. Kingma's motion to suppress evidence that was illegally seized.

3. The trial court included "Disputed Facts" in its written order denying the suppression motion. Appellant assigns error to the following "Disputed Facts" to the extent the facts are not supported by the testimony relied upon by the trial court in denying the motion.

> 2.12 On October 6, 2013 Deputy Delarosa contacted Daniel Kingma 4156 Rd. F NE and verbally informed the defendant that he was trespassed from that property. On the same date the information of the defendant being trespassed was entered into the information system "Spillman ". (CP 72)
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> 2.13 Dale Kingma informed Corporal Mansford that Daniel Kingma was trespassing on Dale Kingma' s property. That Daniel had arrived to retrieve Daniel' s golf clubs, and would not leave. When Dale asked him to leave Daniel was attempting to fight Dale. Dale took a picture with his cell phone of Daniel while Daniel was on the property and attempting to fight Dale. (CP 72)
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> 2.14 Dale showed the picture he took of Daniel when Daniel was on the property refusing to leave and attempting to fight to Corporal Mansford. (CP 73)
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> 2.15 Corporal Mansford testified he has been to that residence and property before on the same type of call. At that time Daniel Kingma was asked to leave the property and not return. (CP 73)

> 2.16 Dispatch advised Corporal Mansford that Deputy David Delarosa had notified Dispatch that on October 6th, 2013, Daniel Kingma had been notified by Deputy Delarosa that he was trespassed from going to, or going on, the property located at 4156 Rd F NE, Moses Lake, Washington. (CP 73)
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> 2.17 Deputy David Delarosa testified that on October 6th, 2013 he had informed Daniel Kingma verbally at the scene that Daniel was trespassed from 4156 Rd F NE, Moses Lake Washington and was not to come back. Deputy Delarosa then put the information that Daniel Kingma was trespassed from 4156 Rd. F NE, Moses Lake Washington, in the Spillman system for all officers and dispatches information. (CP 73)
>
> 2.[1]8 Both Deput[ies] testified that Daniel Kingma informed them that he had been on the property but had been told by Dale Kingma he could go on the property to get his golf clubs. Daniel Kingma told the Deputies that he only went on the property when he was told he could go on the property. (CP 73)
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> *Issue Pertaining to Assignments of Error*
>
> Did the police violate the Fourth Amendment to the U.S. Constitution and Article I, § 7 of the Washington Constitution by arresting Mr. Kingma without probable cause?[1]

B. STATEMENT OF THE CASE

On October 14, 2013, the defendant, Daniel Bryon Kingma, was arrested by Grant County Sheriff's Deputy Mansford for criminal trespass

[1] Assignment of error nos. 1 and 2.

on his father Dale Kingma's property. 1/15/14 RP 46–49. Corporal[2] Mansford searched Kingma incident to the arrest and found a small baggie containing methamphetamine. 1/15/14 RP 49; CP 97. The State charged Kingma with criminal trespass in the first degree and possession of a controlled substance (methamphetamine). CP 1–2; 11–12. Kingma moved to suppress the evidence on the ground that the police lacked probable cause to arrest him. CP 15–57. After holding a suppression hearing, the trial court denied the motion. 1/15/14 RP 17–92; CP 71–74.

The following week the State dismissed the charge of criminal trespass in the first degree. CP 75. A jury subsequently convicted Kingma of possession of a controlled substance. CP 108.

In issuing its written ruling on the motion to suppress, the trial court relied on the testimony of three law enforcement officers and Kingma. CP 71. Kingma's father did not testify. Defense counsel filed written objections to the proposed findings. CP 60–68. At hearing, the following testimony was presented.

[2] At the time of the trial court proceedings, the deputy was acting as a patrol supervisor with the title of corporal and will be referred to as "Corporal Mansford" for clarity. 1/15/14 RP 39.

On October 6, 2013, Grant County Sheriff's Deputy David DeLaRosa responded to a theft of a motor vehicle report made by the father. 1/15/14 RP 22–24. The father wanted Kingma to leave the property and not come back. 1/15/14 RP 24, 28. The deputy verbally told Kingma he "had to leave 'cause he was going to be trespassed from the property." 1/15/14 RP 26. Since he thought Kingma did not live at the property, the deputy intended to notify the dispatch center to enter a "flag" in the Spillman database that Kingma was "trespassed" from the property. 1/15/14 RP 26, 28–29. The deputy told Kingma his father wanted Kingma to make arrangements to pick up his property at another time. 1/15/14 RP 29.

One week later, on October 14, 2013, Corporal Mansford responded to a trespassing call at the father's property. 1/15/14 RP 38–40; CP 29. The father explained Kingma had arrived there to get some golf clubs, had come onto the property and wanted to fight his father. 1/15/14 RP 42. The father showed the corporal a picture he'd taken with his phone just before he reported the incident to dispatch, which showed Kingma in an agitated state. 1/15/14 RP 42–44. Corporal Mansford wrote out a written statement that the father signed. 1/15/14 RP 44–45; CP 29. The statement read:

> Danny Kingma trespassed on 10-14-13 wanted a set of golf clubs. Danny came onto my property yelling misc. profanity & wanted to fight. This is my son & I have a business to run, and can't have him on my property.

CP 29.[3]

Kingma was no longer on the property when Corporal Mansford arrived, and the father had last seen him go across the street to a neighbor's house. 1/15/14 RP 42, 46. The corporal asked dispatch to check the law enforcement database referred to as "Spillman" and was advised it showed Deputy DeLaRosa had previously "trespassed" Kingma on October 6, 2013[4]. 1/15/14 RP 45.

Corporal Mansford went to the neighbor's property. He recognized Kingma from prior contact and by the clothing worn in the telephone picture. 1/15/14 RP 46–47. The corporal testified Kingma told him he had gone there to get a set of golf clubs that his father was going to put out there for him, and he only went onto the property when his father invited

[3] Assignment of error 3, paragraph 2.13 and 2.14. The father did not testify at the suppression motion hearing or at the jury trial. Contrary to the rendition of facts set forth by the court, there is no support in Corporal Mansford's testimony for the claims that (1) the father asked Kingma to leave, (2) this request set in motion Kingma's attempting to fight his father, and (3) the father took the picture when his son was supposedly refusing to leave and attempting to fight. 1/15/14 RP 38–54.

[4] Assignment of error 3, paragraph 2.16. There is no testimony to support the elaborate details set forth in this "disputed finding." Corporal Mansford's testimony was merely that he confirmed with Dispatch that Kingma had been "trespassed" from the property on October 6 by Deputy DeLaRosa.

him onto the property.[5] 1/15/14 RP 48. Although the father had not told the deputy he'd invited his son onto the property, Corporal Mansford testified he never asked the father whether he had invited Kingma. 1/15/14 RP 48. Without further investigation, the corporal arrested Kingma for criminal trespass. 1/15/14 RP 48–49

This appeal followed. CP 128.

C. ARGUMENT

The police violated the Fourth Amendment to the U.S. Constitution and Article I, § 7 of the Washington Constitution by arresting Mr. Kingma without probable cause.

Standard of Review. In reviewing a trial court's findings of fact following a suppression hearing, the reviewing court makes an independent review of all the evidence. *State v. Apodaca*, 67 Wn. App. 736, 739, 839 P.2d 352 (1992) (citing *State v. Mennegar*, 114 Wn.2d 304, 310, 787 P.2d 1347 (1990)). Findings of fact on a motion to suppress are reviewed under the substantial evidence standard. Substantial evidence is

[5] Assignment of error 3, paragraph 2.[1]8. The "Disputed Finding" omits Corporal Mansford's testimony that Kingma told him he had been *invited* onto the property to collect his golf clubs. 1/15/14 RP 48. Further, the second officer present when Kingma was contacted was Grant County Sheriff's Deputy Greg Hutchison. 1/15/14 RP 30–37. In relevant part Deputy Hutchison testified only that "Kingma had said something about obtaining or getting some golf clubs …". 1/15/14 RP 33. He did not testify as set forth in the disputed finding. 1/15/14 RP 30–37.

evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. Conclusions of law in an order pertaining to suppression of evidence are reviewed de novo. *State v. Mendez,* 137 Wn.2d 208, 214, 970 P.2d 722 (1999). The determination of whether probable cause exists is also a question of law reviewed de novo. *State v. Chamberlin,* 161 Wn.2d 30, 40–41, 162 P.3d 389 (2007).

General authority. The Fourth Amendment, made applicable to the states by way of the Fourteenth Amendment, guarantees the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. *Mapp v. Ohio,* 367 U.S. 643, 647, 81 S.Ct. 1684, 1687, 6 L.Ed.2d 1081, 84 A.L.R.2d 933 (1961). Article 1, § 7 of the Washington Constitution provides "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

Searches and seizures must be supported by probable cause whether or not formal arrest or search by way of warrant has been made. *Dunaway v. New York*, 442 U.S. 200, 208, 99 S.Ct. 2248, 2254, 60 L.Ed.2d 824 (1979). An arrest either "with or without a warrant must stand upon firmer ground than mere suspicion." *Wong Sun v. United States,* 371 U.S. 471, 479, 83 S.Ct. 407, 413, 9 L.Ed.2d 441 (1963). Probable cause exists where " 'there is reasonable ground for suspicion, supported by

circumstances within the knowledge of the arresting officer, which would warrant a cautious person's belief that the individual is guilty of a crime.' " *State v. Blair*, 65 Wn. App. 64, 69, 827 P.2d 356 (1992) (quoting *State v. Green*, 91 Wn.2d 431, 436, 588 P.2d 1370 (1979), adhered to in part, rev'd in part on reconsideration, 94 Wn.2d 216, 616 P.2d 628 (1980)). Probability, not a prima facie showing, of criminal activity, is the standard for probable cause. *State v. Patterson*, 83 Wn.2d 49, 55, 515 P.2d 496 (1973).

"Any police officer having probable cause to believe that a person has committed or is committing a misdemeanor or gross misdemeanor … involving criminal trespass under RCW 9A.52.070 or 9A.52.080, shall have the authority to arrest the person." RCW 10.31.100(1). "A person is guilty of criminal trespass in the second degree if he knowingly enters or remains unlawfully in or upon premises of another under circumstances not constituting criminal trespass in the first degree." RCW 9A.52.080(1). "A person 'enters or remains unlawfully' in or upon premises when he is not then licensed, invited, or otherwise privileged to so enter or remain." RCW 9A.52.010(5).

Deficiency of the prior admonishment rendered Spillman data unreliable. Corporal Mansford believed he had probable cause to arrest Kingma because dispatch conveyed to him information from law enforcement's Spillman database that Kingma had been "trespassed from the property" the week before this incident. 1/15/14 RP 45. The State's evidence demonstrates the unreliability of any conclusion that Kingma "knew" his return to the property would be unlawful. RCW 9A.52.080(1).

At the CrR 3.6 hearing, Corporal Mansford testified about the method used by the Sheriff's Office when they are asked to "trespass" someone from a given property: "[I]f a property owner or a business owner has somebody that they would like trespassed off their property, we verbally contact them, we advise them that 'You are criminally trespassed from this property and you are [not] to [] return.' " 1/15/14 RP 53–54. No written notice is given.

The oral warning given to Kingma by Deputy DeLaRosa did not conform to this stated policy. Both the deputy and Kingma testified that Kingma was only told that he needed to leave and that he was going to be trespassed.[6] Kingma was not told he could never return to the property in

[6] Assignment of error 3, paragraph 2.12 and 2.17. These disputed findings incorrectly summarize Deputy DelaRosa's testimony. He did not testify he told Kingma that "he *was* trespassed" from the property. The deputy testified he didn't recall word for word what he told Kingma, "but what I said was … he was going to be trespassed from this property

the future. It is questionable whether telling the average person that he is "trespassed" would put the person on notice that he is prohibited from ever returning to the property in the future. Further, at the father's request, Kingma was also told he could make arrangements with his father to come pick up his property at a later date. 1/15/14 RP 29. The circumstances of the oral notice do not support a conclusion Kingma knew the prohibition was absolute and that any return to the property would be unlawful.

Corporal Mansford did not know the details of how Kingma was previously "trespassed" on October 6[7]. He assumed if information that a given person was "trespassed" was entered into the Spillman database, then legally sufficient notice must have been issued to the subject and therefore any return to the restricted property was knowingly unlawful. This assumption might be reasonable only if the information contained in the Spillman database were reliable and therefore sufficient to establish probable cause.

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and could not return." 1/15/14 RP 28. On cross-examination, the deputy testified, "[w]hat I meant was … I told [Kingma] he had to leave 'cause he was going to be trespassed from the property. 1/15/14 RP 26.

[7] Assignment of error 3, paragraph 2.15. Nor did the corporal have any other knowledge on which to base a conclusion that Kingma had been previously warned not to return to this property. Corporal Mansford did not testify that at the time of his own prior contact on the "same type of call" that "Daniel Kingma was asked to leave the property and not return." He testified only that he had "been out there when [the father] has reported that his son had been trespassing on the property." 1/15/14 RP 40.

In contrast, the records of a non-law enforcement agency, the Department of Licensing, have been found to be *presumptively* reliable because the agency is highly regulated and has strict standards governing data accuracy and authority to use the data against citizens. *State v. Gaddy*, 152 Wn.2d 64, 70-73, 93 P.3d 872, 875-77 (2004) ("We are satisfied that DOL should be accorded the status of a citizen informant. We reach this conclusion because DOL is governed by extensive statutes and provisions and the Washington Administrative Code, which establishes its reliability. There are many statutes in place that mandate DOL to maintain current and accurate information. … [and] strict standards in place regarding DOL's authorization to suspend a person's driver's license and how it reinstates driving privileges when it is appropriate to do so. … Such standards support the presumption that the DOL records are accurate and reliable." *Id.* at 73.

The Spillman records are not presumptively reliable. Moreover, the State presented no evidence as to the accuracy of information entered into Spillman stating that a person was previously "trespassed", and no written warning exists that could corroborate the information. Given the discrepancies between the arresting officer's description of the "trespass" procedure and Deputy DeLaRosa's testimony of the actual notice he gave,

the information provided in the Spillman database was not reliable. *See State v. Mance*, 82 Wn. App. 539, 542, 918 P.2d 527, 529 (1996) ("The 'fellow officer' rule justifies an arrest on the basis of a police bulletin, such as a 'hot sheet,' if the police agency issuing the bulletin has sufficient information for probable cause. *See Whiteley v. Warden, Wyo. State Penitentiary*, 401 U.S. 560, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971). The bulletin does not, however, insulate the arresting officer from problems with the sufficiency or reliability of the information known to the issuing police agency. If the issuing agency lacks probable cause, then the arresting officer will also lack probable cause. *Whiteley*, 401 U.S. at 568, 91 S.Ct. at 1037."). Because the information in Spillman was unreliable, Corporal Mansford was not justified in relying upon it to establish probable cause that Kingma's return to the property was knowingly unlawful.

Additional investigation was required to establish the necessary <u>probability</u> of criminal activity. The question is whether another officer's prior admonishment not to return, coupled with Kingma's return to the restricted premises, constituted probable cause for Corporal Mansford to arrest Kingma for criminal trespass on October 14. It is an affirmative defense to criminal trespass that "[t]he actor reasonably believed that the

owner of the premises, or other person empowered to license access thereto, would have licensed him or her to enter or remain". RCW 9A.56.090(3). Thus, whether Corporal Mansford had probable cause to believe that Kingma was committing a crime depends on whether the circumstances known to the corporal indicated that Kingma was not on the property for legitimate purposes.

State v. Blair, supra, is instructive. In *Blair,* the court held that an officer's statement to Blair warning him not to return to Roxbury Village (a public housing complex) did not, in itself, create probable cause to arrest Blair for criminal trespass on a later date when he was observed entering the premises. *Blair*, 65 Wn. App. at 66, 70. The officer's warning to Blair had occurred during a prior arrest on an unrelated charge, and was apparently given because the officer had seen Blair on the Roxbury Village property in the past. *Blair,* 65 Wn. App. at 66. After the warning was issued, the same officer observed Blair walking with a friend into the Roxbury Village property. *Blair*, 65 Wn. App. at 66. Despite Blair's protestations that he was not doing anything and was just going to get his hair braided, the officer placed Blair under arrest and searched him. *Blair,* 65 Wn. App. at 66.

The officer made no attempt to find out whether Blair was on the premises for a legitimate purpose. *Blair,* 65 Wn. App. at 66. The court held that while the officer could have stopped Blair, asked him what he was doing on the premises, and investigated to see if his purposes were legitimate, he had no probable cause to arrest him based solely on the prior admonishment not to return. *Blair,* 65 Wn. App. at 70.

Here, the facts are similar to those in *Blair*. Although the corporal arrested Kingma across the street from his father's property and had not actually seen him on the restricted property, Kingma admitted he had been there. As in *Blair*, Kingma offered an explanation for his presence, that he had been invited onto the property by his father to collect his golf clubs. As in *Blair*, Corporal Mansford simply arrested him without further investigation.

Even assuming the Spillman information received from dispatch were reliable, Kingma stated he had come onto the property by invitation. "Probable cause requires a probability of criminal activity, not a *prima facie* showing of criminal activity." *State v. Maddox,* 152 Wn.2d 499, 510, 98 P.3d 1199, 1204 (2004), *citing Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317 (1982); *State v. Seagull*, 95 Wn.2d 898, 907, 632 P.2d 44 (1981). Once Kingma told Corporal Mansford he had only come onto the

property by invitation, there was less than a probability of criminal activity having taken place. An express invitation from the property owner would trump the prior trespass notice. *See* RCW 9A.56.090(3). Deputy DeLaRosa and Kingma testified future return to the property to pick up belongings was part and parcel of resolution of the prior incident. The corporal had no reason to believe Kingma was being untruthful. As in *Blair,* Corporal Mansford still needed to conduct follow up investigation to establish the necessary *probability* of criminal activity. Had the corporal taken a few minutes to re-contact the father to ask whether it was true he had invited his son onto the property to collect his golf clubs, he could have determined whether Kingma was in fact present as an invitee or was trespassing. But he did not do so.

Because he knew Kingma had been warned on October 6 not to return to his father's property, Corporal Mansford had an articulable suspicion that Kingma might be trespassing on October 14. Based on this information, Corporal Mansford could properly stop Kingma, ask him why he was on the premises, and investigate to see if his purpose for being there was in fact legitimate. *See State v. Little,* 116 Wn.2d 488, 496, 806 P.2d 749. However, the fact that one officer had previously told Kingma not to return to the premises does not, in itself, create probable cause for

another officer to arrest him on the charge of criminal trespass. *Blair,* 65 Wn. App. at 70.

Corporal Mansford's conduct in this case was not justified on any other ground. The fact that the officer had a basis for believing Kingma was trespassing did not give rise to reasonable suspicion that he was in possession of narcotics. *Blair,* 65 Wn. App. at 70 (referencing *State v. Glover,* 116 Wn.2d 509, 516, 806 P.2d 760 (1991) (Guy, J., concurring)). During a *Terry* stop, a limited search for weapons is warranted when the investigating officer has reason to believe the suspect is armed and dangerous. *Blair,* 65 Wn. App. at 70 (referencing *Terry v. Ohio,* 392 U.S. 1, 30, 88 S.Ct. 1868, 1884, 20 L.Ed.2d 889 (1968)). Here, however, the officer had no reason to suspect that Kingma might be armed and dangerous. Therefore, had Corporal Mansford conducted an investigatory stop, a search incident to the stop would not have been justified.

Because Corporal Mansford lacked probable cause to arrest Kingma, the trial court should have suppressed the methamphetamine seized in the search incident to the arrest. *Wong Sun v. United States,* supra; *Mapp v. Ohio,* supra. The order denying suppression of the evidence must be reversed. *Blair,* 65 Wn. App. at 71.

D. CONCLUSION

For the reasons stated, the trial court's denial of the suppression motion must be reversed and the conviction dismissed.

Respectfully submitted on February 20, 2015.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on February 20, 2015, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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