72222-1

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COA NO. 72222-1

COURT OF APPEALS, DIVISION I

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

LAVELLE XAVIER MITCHELL, Appellant,

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The Trial Court erred in failing to suppress the fruits of an impermissible seizure.

2. The Trial Court erred in finding that Officer Yagi did not indicate compulsion through words or tone.

3. The Trial Court erred in concluding that the encounter between Officer Yagi and Mr. Mitchell did not mature into a seizure before Officer Yagi arrested Mr. Mitchell.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Subject to a few narrowly drawn and jealously guarded exceptions, warrantless seizures are prohibited under Article I, Section 7. Here, Officer Yagi drove his patrol car into an enclosed parking lot after midnight and stopped less than 20 feet behind Mr. Mitchell. Mr. Mitchell was alone. Officer Yagi was fully-uniformed and, after approaching Mr. Mitchell, began questioning him. Officer Yagi walked to his patrol car to conduct a warrant check using information Mr. Mitchell provided while Mr. Mitchell remained in the same place. Officer Yagi then returned, asking incriminating questions. Did Officer Yagi's conduct constitute a progressive intrusion into Mr. Mitchell's privacy sufficient to elevate the initial social contact to a seizure?

2. After a suppression hearing, the Trial Court found that Officer Yagi did not indicate compulsion through words or tone and relied on that fact in determining whether a seizure had occurred. At that hearing, the State bore the burden of showing by a preponderance of the evidence that Mr. Mitchell's

constitutional rights were upheld during his interaction with Officer Yagi. However, it never addressed the specific language or tone that Mr. Yagi used, even though defense counsel raised concerns about various explanations Officer Yagi offered. Is there substantial evidence to support the Trial Court's finding?

III. STATEMENT OF THE CASE

A. SUBSTANTIVE FACTS

Shortly after midnight on April 14, 2013, Officer Yagi patrolled the area surrounding the Sunset Motel on 25006 Pacific HWY S. CP 62. According to Officer Yagi, that location is a high-crime area where he expects to find narcotics, prostitution, gangs, and fugitives. RP 6.

Officer Yagi saw Mr. Lavelle Xavier Mitchell walking alone down the "breezeway" outside the motel rooms toward a parked 2005 Impala. CP 62. Officer Yagi drove past Mr. Mitchell and then stopped his patrol car 10 to 20 feet behind Mr. Mitchell. CP 62; RP 8. Officer Yagi exited his vehicle and approached Mr. Mitchell. CP 63; RP 7. Officer Yagi was fully uniformed. RP 6. According to Officer Yagi, contact with individuals in the area is a common means of creating "strong police presence" and stopping crime "before it happens." RP 7.

The Sunset Motel is a "U-shaped" building with the parking lot in the center of the units. CP 62. Given that Officer Yagi passed Mr. Mitchell in his patrol car and stopped shortly afterwards, his vehicle was positioned between Mr. Mitchell and the Sunset Motel units. CP 62.

Officer Yagi fist asked Mr. Mitchell what he was doing and for his name and date of birth. CP 63. According to Officer Yagi, the guest Mr. Mitchell had

been visiting, his uncle, Mr. Brown, had a warrant out for his arrest. RP 8. Furthermore, police officers arrived earlier that day looking for Mr. Brown. RP 8.

The name Mr. Mitchell first provided to Officer Yagi was Darnell Brown, the name of Mr. Mitchell's twin brother. CP 63; RP 47. According to Officer Yagi, he did not ask for identification at that time, but rather relied on the name provided by Mr. Mitchell as he walked back to his patrol car to conduct a warrant check. CP 63. Officer Yagi testified that, at that time, he neither affirmatively told Mr. Mitchell that he was free to leave nor that he should wait. *Id.* Regardless, Mr. Mitchell remained in the same location while Officer Yagi conducted a warrant check and returned. RP 11.

The warrant check indicated that Mr. Darnell Brown had a prior conviction for Violation of the Uniform Controlled Substances Act. CP 63. Still allegedly believing that Mr. Mitchell was Mr. Brown, Officer Yagi returned to him and immediately asked if Mr. Mitchell "was still using." *Id.*; RP 11. According to Officer Yagi's testimony, Mr. Mitchell calmly answered in the affirmative. RP 11. Then, Officer Yagi asked a second question: "hey, are you holding?" *Id.* Officer Yagi stated that Mr. Mitchell, again, calmly answered affirmatively. *Id.* This type of confession, according to Officer Yagi, is not unusual because he is a "pretty smooth talker on the street." *Id.*

Officer Yagi then arrested Mr. Mitchell, delivered *Miranda* warnings, searched Mr. Mitchell incident-to-arrest, and located a small baggie of crack cocaine on his person. CP 63-64. Thereafter, Officer Yagi requested and received consent to search Mr. Mitchell's vehicle using a *Ferrier* form. CP 64. Based on

post-*Miranda* information that Officer Yagi received, he searched the center console of the 2005 Impala and located another small quantity of cocaine. *Id.*

Even after discovering that Mr. Mitchell had provided a false name, Officer Yagi made the decision to not book Mr. Mitchell into custody based, in part, on his cooperation, absence of firearms, and small quantity of cocaine. CP 65; RP 22-23. The Trial Court determined that this decision did not evidence any misconduct on the part of Officer Yagi. CP 65; RP 23.

B. PROCEDURAL FACTS

A suppression hearing was conducted after which the Trial Court denied Mr. Mitchell's motion to suppress evidence obtained subsequent to Officer Yagi's unlawful seizure. CP 12, 66. Mr. Mitchell then agreed to proceed by a stipulated bench trial before the Honorable William Downing. RP 78-79. Mr. Mitchell was found guilty of one count of possession of cocaine in violation of the Uniform Controlled Substances Act. RP 96.

IV. ARGUMENT

A. THERE IS INSUFFICIENT EVIDENCE IN THE RECORD TO SUPPORT THE TRIAL COURT'S FINDING OF FACT REGARDING OFFICER YAGI'S LANGUAGE AND TONE.

1. STANDARD OF REVIEW

A court's finding of fact is reviewed for substantial evidence. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). There must be a "sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding." *Id.* Where there is not substantial evidence in the record supporting a challenged fact, those facts are not binding on appeal. *Id.* In addition, the State bears the burden in a suppression hearing of showing by a preponderance of the

evidence that the evidence was obtained by procedures which are constitutionally sound. *See, e.g., State v. Reid*, 98 Wn. App. 152, 988 P.2d 1038 (1999).

2. ARGUMENT

The trial judge erred in finding that Officer Yagi "did not indicate compulsion through words or tone." CP 65. That finding was one of five factors the Trial Court considered critical in finding that Mr. Mitchell was not unlawfully seized. RP 71-72. However, nowhere in the suppression hearing or its briefing did the State provide evidence that Officer Yagi's language or tone of voice was consistent or inconsistent with a compelled seizure. The only specific evidence regarding tone and language was testimony at the suppression hearing indicating that Mr. Mitchell was "very cordial [and] laid back." RP 11. The extent of any discussion regarding Officer Yagi's demeanor was his own testimony that he is a "smooth talker," which enables him to obtain more confessions than other officers. *Id.* Mr. Mitchell does not challenge the Trial Court's credibility determinations. Rather he challenges the sparse information upon which it made its findings.

The finding regarding Officer Yagi's language and tone is problematic because it weighed heavily in the Trial Court's conclusions of law. *See* RP 71 (citing *State v. Young* factors). The lack of support for this finding is especially troublesome given that the State left completely unexplained certain aspects of the interaction between Mr. Mitchell and Officer Yagi. For example, Mr. Mitchell allegedly remained by his car while Officer Yagi returned to his own vehicle to conduct a warrant check without any affirmative or implied statement from Officer Yagi. CP 62.

B. BEFORE MR. MITCHELL ADMITTED TO POSSESSING COCAINE, OFFICER YAGI UNLAWFULLY SEIZED MR. MITCHELL BY IMPLYING THAT MR. MITCHELL WAS NOT FREE TO LEAVE.

1. STANDARD OF REVIEW

This Court reviews *de novo* a Trial Court's conclusions of law following a suppression hearing. *State Armenta*, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997). Whether police have seized a person is a mixed question of law and fact. *Id.* What the police said and did and what the defendant said and did are questions of fact. *State v. Montague*, 73 Wn.2d 381, 389, 438 P.2d 571 (1968). However, the ultimate determination of whether those facts constitute a seizure is one of law and is reviewed de novo. *State v. Harrington*, 167 Wn.2d 656, 662, 222 P.3d 92 (2009).

2. OFFICER YAGI SEIZED MR. MITCHELL

The Fourth Amendment to the United States Constitution and Article I, section 7 of the Washington State Constitution generally prohibit a police officer from seizing a person without a warrant supported by probable cause. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *State v. Doughty*, 170 Wn.2d 57, 61, 239 P.3d 573, 575 (2010). It is now well-established that Article I, section 7, of the state constitution has broader application than does the Fourth Amendment of the United States Constitution. *State v. Ladson*, 138 Wn.2d 343, 348, 979 P.2d 833 (1999). Therefore, the Supreme Court of Washington has stated that "[w]here the police have ample opportunity to obtain a warrant, we do not look kindly on their failure to do so." *State v. Leach*, 113 Wn.2d 735, 744, 782 P.2d 1035 (1989). A warrantless seizure is considered *per se* unconstitutional

unless it falls within a small class of "jealously and carefully drawn" exceptions to the warrant requirement. *Doughty*, 179 Wn.2d at 61.

One of those exceptions to the warrant requirement is the *Terry* investigative stop, which permits the brief investigatory seizure of a person based on "a reasonable suspicion, grounded in specific and articulable facts, that the person stopped has been or is about to be involved in a crime. *Id.* at 61-62. A seizure cannot be justified based on a speculative criminal investigation. *Ladson*, 138 Wn.2d at 351, 979 P.2d 833.

A seizure occurs when "an individual's freedom of movement is restrained and the individual would not believe he or she is free to leave or decline a request due to an officer's use of force or display of authority." *State v. Rankin*, 151 Wn.2d 689, 695, 92 P.3d 202 (2004). This is an objective standard. *Id.*

Not all contacts between an individual and an officer establish an official intrusion which would require objective justification. *State v. Mote*, 129 Wn. App. 276, 282, 120 P.3d 596 (2005) (*citing United States v. Mendenhall*, 446 U.S. 544, 551-55, 100 S.Ct. 1870 (1980)). Police officers in Washington may, without reasonable articulable suspicion, engage in social contacts with individuals in public places so long as the encounter does not rise to an investigative detention. *State v. Harrington*, 167 Wn.2d 656, 222 P.3d 92 (2009) (citing *Armenta*, 134 Wn.2d at 11, 948 P.2d 1280). To determine whether a social contact has evolved into a seizure, courts in Washington look objectively at the totality of the circumstances to determine whether a reasonable person would have believed he was free to leave or decline an officer's requests. *State v. Young*, 135 Wn.2d

498,506-10, 957 P.2d 681 (1998) (citing *Mendenhall*, 446 U.S. at 554, 100 S.Ct. 1870).

Under Article I, section 7, it is unnecessary to determine at what specific point the line into a constitutional disturbance was crossed; the appropriate inquiry considers the combination of all the circumstances of the particular incident to determine if a seizure occurred. *See, e.g., State v. Jackson*, 150 Wn.2d, 264, 76 P.3d 217 (2003); *Harrington*, 167 Wn.2d at 661-62, 222 P.3d 92. An underlying concern is that a "social contact should be just that—a social contact—not an opportunity for police to investigate, provoke, or "find" criminal activity." *Harrington*, 144 Wn. App. at 564, 222 P.3d 92 (Sweeney, J., dissenting).

Courts in Washington highlight a variety of factors which indicate a social contact has matured into a seizure. For example, in *Young*, the Supreme Court of Washington embraced a nonexclusive list of police actions likely to result in seizure: "'the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.'" *Young*, 135, Wn.2d at 512, 957 P.2d 681 (quoting *Mendenhall*, 446 U.S. at 554-55, 100 S.Ct. 1870)).

A permissive encounter may also ripen into a seizure when an officer commands the defendant to wait, *see State v. Ellwood*, 52 Wn. App. 70, 757 P.2d 547 (1988); *State v. Barnes*, 96 Wn. App. 217, 978 P.2d 1131 (1999), seizes identification or personal property from the individual during an investigation, *State v. Thomas*, 91 Wn. App. 195, 200-01, 955 P.2d 420 (1998) (seizure occurred

"when the officer retained his license and stepped back to do a warrants check"); *State v. Coyne*, 99 Wn. App. 566, 573, 995 P.2d 78 (2000), block the individual from leaving, or request consent to conduct a search, *State v. Soto-Garcia*, 68 Wn. App. 20, 841 P.2d 1271 (1992); *Harrington*, 167 Wn.2d at 666-69, 222 P.3d 92.

In this case, the Trial Court erroneously determined that Officer Yagi's social contact never matured into a seizure. CP 66. In reaching this conclusion, the Trial Court relied heavily on the factors listed in *Young*. RP 71. It mentioned five factors in particular as weighing "in favor of the propriety of the interaction that occurred in this case": (1) Officer Yagi was alone, (2) he did not display his weapon, (3) he did not place a hand on Mr. Mitchell, (4) he did not indicate compulsion through his words or tone of voice, and (5) he did not take possession of any of Mr. Mitchell's property. RP 71-72. In addition, the Trial Court concluded that once Mr. Mitchell responded that he was "holding" cocaine in his vehicle, Officer Yagi had probable cause to believe Mitchell was violating the Uniform Controlled Substances Act. CP 66. Therefore, the subsequent searches were valid as incident-to-arrest and pursuant to written consent. CP 66.

Contrary to the Trial Court's conclusion, the circumstances indicated that, prior to Mr. Mitchell's response to any incriminating questions, a person in Mr. Mitchell's shoes would not have felt free to leave or decline any of Officer Yagi's requests. *See State v. Morse*, 156 Wn.2d 1, 9-10, 123 P.3d 832 (2005) (pointing out that, unlike the Fourth Amendment, the relevant inquiry under *Washington's constitution focuses on the expectations of the people being searched*). This case highlights the importance of considering all of the circumstances of each

particular incident rather than relying too strongly on a single list of illustrative factors addressed in another case. The Trial Court's over-reliance on the factors found in *Young* reflects a concern the Supreme Court of Washington previously raised—that there is ever a "triumph of form over substance; a triumph of expediency at the expense of reason." *Ladson*, 138 Wn.2d at 351, 979 P.2d 833.

Several factors that were not addressed by the Trial Court in this case weigh strongly in favor of finding that Officer Yagi's seized Mr. Mitchell. First, Officer Yagi stopped his patrol car a short distance behind Mr. Mitchell and was fully-uniformed when he initiated the contact. *See Mendenhall*, 446 U.S. at 554-55 (listing an officer's uniform as a relevant factor); *Harrington*, 167 Wn.2d at 661-62, 222 P.3d 92 (including the fact that an officer's car remained out of sight as a relevant factor); *State v. Guevara*, 172 Wn. App. 184, 188-91, 288 P.3d 1167, 1170-71 (2012) (mentioning that the officer parked about 20 feet behind two boys near a high school).

Another relevant factor that the Trial Court did not discuss is that Mr. Mitchell was alone when Officer Yagi stopped him on his way to the parking lot. The presence of companions or other members of the public could surely weigh on an individual's belief that he or she was free to decline an officer's requests or leave the scene. *Rankin*, 151 Wd.2d at 695. This rational is consistent with other cases which expressly considered the relative number of officers relevant when inquiring whether an "environment of investigation" had been created. *See State v. Bailey*, 154 Wn. App. 295, 301-02, 224 P.3d 852 (2010) (finding that the presence of fewer officers weighed less in favor of seizure).

Other factors relevant to this inquiry include the fact that Officer Yagi approached Mr. Mitchell well after midnight and the contact occurred in an enclosed, "U-shaped" parking lot in the center of a motel complex. Both of these factors weigh in favor of finding that there was an "environment of investigation" rather than a mere social interaction. *Bailey*, 154 Wn. App. at 301-02, 224 P.3d 852. The Trial Court found that after Officer Yagi entered the parking lot, noted as a high-crime area, he "overshot" Mr. Mitchell, leaving his 2005 Impala unblocked and his path to the street unimpeded. CP 62. However, a scenario involving an officer who approached an individual in a parking lot after midnight is clearly distinguishable from cases where an officer approaches individuals in the day-time alongside a street or public park. *See Bailey*, 154 Wn. App. 295, 224 P.3d 852; *State v. Johnson*, 156 Wn. App. 82, 231 P.3d 225 (2010).

Finally, Officer Yagi's initial social contact was dispelled by when he conducted a warrant check and returned with questions directly related to criminal activity. In *Guevara* a social contact ended when an officer accused three boys of smoking marijuana and asked them to "rabbit ear" their pockets. 172 Wn. App. at 186-87. One of the factors the Court of Appeals cited as important to its analysis was the fact that the officer has expressed suspicion that the kids were using drugs. *Id.* Similarly, *Soto-Garcia* involved an officer who directly questioned a man about his cocaine use and then asked for consent to search. 68 Wn. App. at 22-25. The officer's warrant check and direct questioning about drug possession were two of the factors the Court of Appeals considered relevant in finding that the officer's acts had aggregated to establish a seizure. *Id.* at 25.

The Trial Court distinguished cases where a social contact evolved into a seizure because the officers in those cases "made a request to search" prior to finding probable cause. *See, e.g., Harrington*, 16 Wn.2d at 666-69; *Soto-Garcia*, 68 Wn. App. 20, 841 P.2d 1271; *State v. Guevara*, 172 Wn. App. 184, 188-91, 288 P.3d 1167, 1170-71 (2012). However, the present case involves additional circumstances absent in previous cases which weigh in favor of finding that Officer Yagi seized Mr. Mitchell. The fact that there was no express request to search Mr. Mitchell prior to his admission is insufficient to preclude that finding.

The Division III Court of Appeals' analysis in *State v. Bailey* offers a useful comparison. 154 Wn. App. 295, 224 P.3d 852. In that case, an officer observed a man walking on a deserted street in Yakima. *Id.* at 298. The officer approached the man and asked, first, if he "had a minute." *Id.* The man approached the officer and was questioned about what he was up to and asked to provide identification. *Id.* The officer's volume remained low and he never asked any questions that insinuated he was investigating a particular type of crime. *Id.* at 299. Before the officer left to conduct a warrant check, the man stated that he "likely had an outstanding warrant." *Id.* at 299. As soon as the officer confirmed this information, he returned to arrest the man. *Id.* The Court of Appeals found that, prior to finding probable cause, the officer had not escalated the social contact into a seizure. *Id.* at 302.

There are two critical distinguishing factors between *Bailey* and the present case. First, Mr. Bailey admitted to having an outstanding warrant before the officer conducted a warrant check. *Id.* at 299. Second, his incriminating

admission was not the result of a warrant check and incriminating questions regarding drug possession, as seen in this case.

3. OFFICER YAGI DID NOT HAVE REASONABLE ARTICULABLE SUSPICION TO JUSTIFY AN INVESTIGATORY SEIZURE

A reasonable, articulable suspicion means that there is a "substantial possibility" that criminal conduct has occurred or is about to occur. *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445, 448 (1986). There must be suspicion of a particular crime connected to the particular person, rather than a mere generalized suspicion that the person detained may have been "up to no good." *See State v. Bliss*, 153 Wn. App. 197, 204, 222 P.3d 107, 110 (2009); *State v. Martinez*, 135 Wn. App. 174, 181-82, 143 P.3d 855 (2006). Furthermore, the merits of an investigative stop exception are evaluated under the "totality of the circumstances" presented to the investigating officer. *Doughty*, 170 Wash.2d at 62. The focus of that analysis is on what the officer knew at the time of the stop without consideration of subsequent events or circumstances. *Kennedy*, 107 Wn.2d at 15; *see also State v. Lee*, 147 Wn. App. 912, 917, 199 P.3d 445 (2008).

It is not sufficient that a person behaves nervously in the presence of police officers in a high crime area. *State v. Cardenas-Muratalla*, 179 Wn. App. 307, 319 P.3d 811 (2014).

Officer Yagi did not observe any conduct that raised reasonable suspicion of criminal conduct. Mr. Mitchell was merely walking to his car in a high-crime at area at night when he was stopped. Even if Officer Yagi believed that Mr. Mitchell was up to no good in the parking lot at that time, there was no justification for the subsequent seizure.

C. THE TRIAL COURT ERRED IN DENYING MR. MITCHELL'S MOTION TO SUPPRESS, AS OFFICER YAGI'S SEIZURE VIOLATED ARTICLE I, SECTION 7

Where police unconstitutionally seize an individual prior to arrest, the exclusionary rule requires that any evidence obtained as a result of the government's illegality be suppressed. *State v. Garvin*, 166 Wn.2d 242, 254, 207 P.3d 1266 (2009).

Officer Yagi's warrantless seizure of Mr. Mitchell violated Article I, section 7. Because Mr. Mitchell's admission regarding cocaine-use was obtained through the exploitation of an illegal seizure, exclusion of the fruits of the subsequent search as well as reversal of Mr. Mitchell's conviction are required. *Id.* (*citing Wong Sun v. United States*, 371 U.S. 471, 485, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)).

V. CONCLUSION

For the foregoing reasons, Mr. Mitchell respectfully requests this Court find that he was illegally seized by Officer Yagi, requiring the suppression of the fruits of the impermissible seizure, and reverse his conviction for possession of cocaine.

Dated, December 23, 2014

Mitch Harrison, ESQ.,
WSBA#43040
Attorney for Appellant

CERTIFICATE OF SERVICE

I, Christopher Wieting, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

1. I am employed by the law firm of Harrison Law.

2. At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

3. On the date set forth below, I served in the manner noted a true and correct copy of this **Brief of Appellant** on the following persons in the manner indicated below:

Court of Appeals, Division I Attn: Court Clerk 600 University St Seattle, WA 98101-1176	☒U.S. Mail ☐Email: ☐Fax: ☐In Person
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DATED this 30th day of December, 2014 at Seattle, Washington.

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