95910-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Court of Appeals No. 34511-4-III

STATE OF WASHINGTON, Respondent,

v.

SEAN MICHAEL HEALY, Petitioner.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Sean Michael Healy requests that this court accept review of the decision designated in Part II of this petition.

II. DECISION OF THE COURT OF APPEALS

Petitioner seeks review of the decision of the Court of Appeals filed on April 24, 2018, affirming the Spokane County Superior Court's denial of Healy's motion to suppress evidence and upholding his detention for suspicion of urinating in public, a civil infraction. A copy of the Court of Appeals' unpublished opinion is appended hereto.

III. ISSUES PRESENTED FOR REVIEW

Healy was convicted of possessing a controlled substance after a police officer saw him standing in an alley and approached to investigate whether he was urinating in public, a civil infraction. When he fled, the officer detained him, arrested him for obstructing, and searched him. The Court is asked to decide the following questions:

1. Was the officer's detention was unjustified because Healy had not committed an infraction in the officer's presence, an investigative detention is not permitted for a civil infraction, and Healy did not obstruct police from issuing him a citation?

2. Did the Court of Appeals apply the incorrect legal standard to evaluate the lawfulness of Healy's detention for a civil infraction when it did not evaluate whether Healy committed the violation in the officer's presence, as required by RCW 7.80.050(2), but only whether the officer had probable cause to believe a violation had occurred or might be about to occur?

IV. STATEMENT OF THE CASE

On a Thursday evening in April, Officer Alexander Gordon was on routine patrol in College Hill in Pullman, a notorious party neighborhood. RP 5, 12-13. Around 11:20 p.m., he saw a man standing behind a garbage dumpster outside of a house where a party appeared to be ongoing. RP 19-20. The man was standing with his legs apart, head down, and hands near his waist in a position men often assume when urinating, although Gordon acknowledged men sometimes hold their cell phones in a similar stance. RP 5, 15, 19. Gordon did not see the man's penis, nor any urine, nor did he ever testify to observing the man adjusting his clothing in any way, and he admitted he did not know if the man was actually urinating. RP 44, 64.

When Gordon got out of his car but before he said anything, the man ran. RP 20. Gordon pursued him on foot and commanded him to

stop, stating he would tase him. RP 21, 48. After about half a block, the man stopped and cooperated, answering Gordon's questions. RP 21, 41-42, 54. Gordon handcuffed the man, whom he identified as Sean Healy, and read him *Miranda* warnings. RP 30. After advising him of his rights, Gordon smelled alcohol on Healy and learned that he was under age 21. RP 60. He then placed Healy under arrest. RP 120.

Healy had been carrying a bag of chips during the encounter, which he dropped when Gordon contacted him and told him to put his hands on the wall. RP 120, 122. Gordon looked inside the bag and saw a small plastic baggie inside that contained a white powder. RP 120-21.

The State charged Healy with possessing a controlled substance and being a minor in possession with alcohol. CP 1-2. Pretrial, Healy moved to suppress evidence obtained from his detention, arguing that a *Terry* investigative detention is not permitted when the defendant is only suspected of committing a civil infraction, like urinating in public. CP 18-19. Because performing an illegal detention is not an official police duty, Healy contended that failing to stop when Gordon pursued him could not justify a detention for obstructing a law enforcement officer. CP 20.

At an evidentiary hearing on the motion, Gordon acknowledged he contacted Healy to investigate his suspicion that Healy was urinating in

public, that there was no offense of "attempted" urinating in public, and that no infraction has occurred unless the suspect has actually urinated. RP 24, 38-39, 54, 63-64. Nevertheless, Gordon argued that he had reasonable suspicion to investigate Healy for being a minor in consumption of alcohol, based on generalized allegations about the nature of the neighborhood and his belief that people who flee are always underage or committing some other crime. RP 25-28, 52-53. However, he admitted Healy did not necessarily appear to be under 21, was not in possession of any alcohol containers, and he did not observe any physical effects of alcohol consumption until after detaining Healy. RP 26-27, 51, 57, 60.

The trial court denied the motion, holding that Gordon had probable cause to cite Healy for urinating in public and developed probable cause to arrest him for obstructing when he ran. RP 87, 89. It further held that Healy's flight made it reasonable to believe he was committing some other crime like consuming alcohol while a minor. RP 88. It entered findings of fact and conclusions of law supporting its ruling. CP 79-82.

A jury subsequently convicted Healy, and the trial court sentenced him to community service and declined to place him on community

custody. RP 243, 253, 255; CP 86. On appeal, the Court of Appeals affirmed the trial court's ruling, holding that Gordon had probable cause to detain Healy for urinating in public and therefore, his subsequent seizure was lawful. *Opinion*, at 7, 8.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Under RAP 13.4(b)(1), (3), and (4), review will be accepted if the decision conflicts with a published decision of the Supreme Court, presents a significant question of law under the Constitution of the State of Washington or of the United States, or involves an issue of substantial public interest that should be determined by the Supreme Court. All three factors are satisfied in the present case, which asks the Court to decide if police had reasonable cause to cite Healy for urinating in public and probable cause to detain him for obstructing a police officer after he fled, when the police officer did not see him urinating in the officer's presence and never cited him for urinating in public.

Procedurally, the trial court and the Court of Appeals have indulged different justifications for Officer Gordon's actions. The trial court concluded that Gordon had reasonable cause to believe Healy "was about to [u]rinate in [p]ublic, or that he already was or had done so" and further found that Gordon had reasonable suspicion to investigate Healy

for being a minor exhibiting the effects of consuming alcohol in public despite no individualized evidence that Healy either had consumed alcohol or was underage. CP 81. On review, the Court of Appeals upheld the detention solely on Gordon's authority to detain Healy to investigate and cite him for urinating in public. *Opinion*, at 6-7.

In reaching this conclusion, the Court of Appeals noted that *Terry* stops may not be used to investigate nontraffic civil infractions such as urinating in public. *Opinion*, at 5. However, it concluded that sufficient facts existed "to establish probable cause to believe that Healy committed the infraction of UIP" and Gordon therefore had authority under RCW 7.80.050(2) to issue a notice of infraction. *Opinion*, at 7. Notably, Gordon did *not* issue a notice of infraction to Healy at any point, nor file a declaration with the court asking for a citation to be issued. CP 80. Nevertheless, reasoning that Gordon *could* have issued a citation, the Court of Appeals concluded that Healy's subsequent flight from Gordon amounted to obstructing a law enforcement officer by hindering its issuance. *Opinion*, at 8. Based upon this circuitous logic, the Court of Appeals affirmed Healy's detention and arrest. *Id.*

The Court of Appeals' tenuous reasoning derives from its effort to avoid the application of *State v. Duncan*, 146 Wn.2d 166, 43 P.3d 513

(2002), which held that police may not rely upon *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968) to detain individuals to investigate them for nontraffic civil infractions. As such, more than reasonable suspicion is required to authorize a person's seizure when only a civil violation is suspected. In declining to adopt an expansive interpretation of the *Terry* exception to the warrant requirements of the Fourth Amendment and article I, section 7 of the Washington Constitution, *Duncan* emphasized that the *Terry* exception applies only when there is a reasonable suspicion of a crime. 146 Wn.2d at 172-73. The exception furthers the public interest of preventing criminal activity in progress and justifies the intrusion into individual privacy, but the State's interest in preventing civil infractions is less weighty. *Id.* at 176. Accordingly, for a warrantless seizure to be constitutionally legitimate, it must be "(a) based upon a reasonable suspicion of criminal activity, in accordance with *Terry* principles, or (b) a proper detention to issue a notice of a civil infraction." *Id.* at 173.

Here, the Court of Appeals evaluated whether Gordon had probable cause to cite Healy for urinating in public. *Opinion*, at 6-7. But the applicable standard recognized in *Duncan* is not probable cause to believe an infraction has been committed, but whether the infraction was committed in the officer's presence. 146 Wn.2d at 179; RCW

7.80.050(2). The *Duncan* standard is both more stringent and more specific than the standard the Court of Appeals applied.

Duncan relied on *State v. Hornaday*, 105 Wn.2d 120, 713 P.2d 71 (1986) to emphasize that probable cause to believe a crime has been committed is a lower burden than the applicable standard of reasonable cause to believe the offense is presently being committed in the officer's presence. 146 Wn.2d 179-80. In *Hornaday*, the Washington Supreme Court held that a minor who appeared intoxicated did not commit the crime of possessing alcohol as a minor in the presence of a police officer. 105 Wn.2d at 130. "Evidence of present possession, not past possession, is needed to satisfy the 'in the presence of' requirement." *Id.* at 126-27. Because, in *Hornaday*, the officer did not observe the defendant possess or consume alcohol, and in *Duncan*, the officer did not observe the defendant exercising control over the open container, no violations occurred in the presence of police to justify the seizure.

Here, the Court of Appeals' application of a "probable cause" standard is inconsistent with *Duncan* and *Hornaday*. Instead, because Healy was suspected only of committing a civil infraction, the requirement that the violation occur in the officer's presence set forth in RCW 7.80.050(2) was triggered. Here, the trial court's conclusion that the facts

were sufficient "to find it reasonable to believe the Defendant was about to [u]rinate in [p]ublic, or that he already was or had done so" was insufficient to meet the "presence" standard established in *Duncan* and *Hornaday*. CP 81. By applying a lesser standard of mere probable cause to believe the infraction had been committed, the Court of Appeals expanded the authority of police to intrude into private affairs beyond the specific limits established in RCW 7.80.050(2).

Furthermore, *Duncan* recognized that warrantless detentions are only acceptable in two situations: (1) investigations of criminal activity under *Terry*, and (2) to issue a notice of violation for a civil infraction. 143 Wn.2d at 173. Here, Duncan did not cite Healy for urinating in public; to the contrary, he immediately shifted his attention to investigating unrelated suspicions that Healy may have been consuming alcohol as a minor. Nevertheless, the Court of Appeals concluded that because Duncan *could* have cited Healy, even though he did not and even though Duncan frankly acknowledged he did not see Healy urinate, never confirmed he had urinated, and issued his command to stop in order to investigate whether Healy was in violation of the ordinance, Healy's flight therefore obstructed Gordon from issuing a citation that Gordon never apparently tried to issue. *Opinion*, at 8; RP 46-48. This ruling vastly expands the power of the State to restrict the movement of citizens who

are not engaged in criminal activity by bootstrapping their right to avoid unwanted police contact into an arrest for obstruction.

The case presents compelling and significant questions affecting Fourth Amendment and article I, section 7 privacy rights. The public interests justifying the privacy intrusions recognized under *Terry* do no apply to preventing civil infractions. Under RCW 7.80.050(2) and *Duncan*, detentions for civil infractions are only justified when the officer observes the violation in his presence and detains the violator to issue a notice of violation. The Court of Appeals' application of a probable cause standard instead calls for clarification of the requirements of RCW 7.80.050(2) and correction of its misapplication of the *Duncan* standard. Accordingly, review under RAP 13.4(b)(1), (3), and (4) are appropriate.

VI. CONCLUSION

For the foregoing reasons, the petition for review should be granted under RAP 13.4(b)(1), (3), and (4) and this Court should enter a ruling that Gordon unlawfully detained Healy when he merely suspected the Healy had committed an infraction and did not observe Healy commit the violation in his presence.

RESPECTFULLY SUBMITTED this 24 day of May, 2018.

ANDREA BURKHART, WSBA #38519
Attorney for Petitioner

CERTIFICATE OF SERVICE

I, the Undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the foregoing Petition for Review upon the following parties in interest by depositing it in the U.S. Mail, first-class postage pre-paid, addressed as follows:

Daniel F. LeBeau
Denis Paul Tracy
Whitman County Prosecutor
PO Box 30
400 N. Main St.
Colfax, WA 99111

Sean Healy
5820 11th St. SW
Mukilteo, WA 98275

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 24 day of May, 2018 in Walla Walla, Washington.

Andrea Burkhart

APPENDIX

FILED
APRIL 24, 2018
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	No. 34511-4-III
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
SEAN MICHAEL HEALY,	)	
	)	
Appellant.	)	

LAWRENCE-BERREY, C.J. — Sean Healy appeals after his conviction for possession of a controlled substance—cocaine. He argues that the trial court erred in denying his motion to suppress based on an unlawful *Terry*[1] stop. We disagree and affirm the trial court.

FACTS

Late one night, Officer Alexander Gordon was patrolling an area in Pullman, Washington, known as "College Hill." Report of Proceedings (RP) at 12. The area includes bars and fraternities, and is where many college parties are held. The area is where officers often see college students urinating in public.

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[1] *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

While patrolling the College Hill area, Officer Gordon saw a young man who appeared to be urinating in public. The man was near a house where college-age people were partying. The man had partly concealed himself behind a garbage bin and stood with his feet apart at shoulder width, hands near his groin, and head down. Officer Gordon could not actually see a urine stream.

Officer Gordon exited his marked patrol car. The man, later identified as Sean Healy, took off running. Officer Gordon gave chase, and shouted several times for Healy to stop. After about one block, Healy stopped. Officer Gordon told Healy to place his hands on a wall. Healy complied and dropped a bag of chips that he had been holding. Officer Gordon handcuffed Healy to ensure he would not flee and for officer safety. He also advised Healy of his *Miranda*[2] rights. Officer Gordon then smelled alcohol on Healy and learned that Healy was under age 21. Officer Gordon then looked inside the bag of chips and found a small plastic "baggie" of cocaine.

The State charged Healy with possession of a controlled substance—cocaine.

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

PROCEDURE

Prior to trial, Healy filed a motion to suppress. In the CrR 3.6 portion of his motion, he argued that Officer Gordon did not have authority to conduct a *Terry* stop based on a civil infraction, urinating in public (UIP).

Officer Gordon testified at the hearing. In addition to the above facts, Officer Gordon testified about his experience recognizing UIP. Officer Gordon testified that he has contacted men for UIP on a regular basis during his six years with the Pullman Police Department. He is very familiar with the unique stance of a man urinating, i.e., feet apart, head down, and hands near groin.

After evidence and argument, the court denied Healy's motion. The court found "[t]here were sufficient facts combined with the Officer's experience to find it reasonable to believe the Defendant was about to [u]rinate in [p]ublic, or that he already was or had done so, even without a stream of urine or the residue thereof."[3] Clerk's Papers (CP) at 81. The court concluded that Officer Gordon had probable cause to believe that Healy had committed the UIP infraction in his presence and that this gave the officer authority to briefly detain Healy to issue a citation or give a warning. In addition, the court

[3] This finding was mislabeled as a conclusion of law. We nevertheless treat it as a finding of fact. *Kunkel v. Meridian Oil, Inc.*, 114 Wn.2d 896, 903, 792 P.2d 1254 (1990).

concluded that Officer Gordon had probable cause to believe that Healy committed the crime of obstructing a law enforcement officer when he fled from Officer Gordon and failed to immediately stop as repeatedly commanded.

The case proceeded to a jury trial. The jury found Healy guilty of the charged offense, and the trial court later entered a judgment of conviction. Healy appeals.

ANALYSIS

A. STANDARD OF REVIEW

In reviewing the denial of a defendant's motion to suppress evidence, the appellate court determines whether the factual findings are supported by substantial evidence. *State v. Aase*, 121 Wn. App. 558, 564, 89 P.3d 721 (2004). This court reviews conclusions of law from an order pertaining to the suppression of evidence de novo. *State v. Duncan*, 146 Wn.2d 166, 171, 43 P.3d 513 (2002). The constitutionality of a warrantless stop is a question of law reviewed de novo. *State v. Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008).

Healy does not challenge the trial court's factual findings. Our review therefore is de novo.

B. CONSTITUTIONAL DETENTION FOLLOWED BY CONSTITUTIONAL ARREST

Healy contends that because his convictions stemmed from an unlawful *Terry* stop, this court should reverse his conviction. He argues that because UIP is a civil infraction, the officer cannot conduct a *Terry* stop.

Warrantless seizure synopsis

"As a general rule, warrantless searches and seizures are per se unreasonable, in violation of the Fourth Amendment [to the United States Constitution] and article I, section 7 of the Washington State Constitution." *Duncan*, 146 Wn.2d at 171. "There are, however, a few jealously and carefully drawn exceptions to the warrant requirement which provide for those cases where the societal costs of obtaining a warrant . . . outweigh the reasons for prior recourse to a neutral magistrate." *State v. Williams*, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984) (internal quotation marks omitted). "These jealously and carefully drawn exceptions include consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view searches, and *Terry* investigative stops." *Duncan*, 146 Wn.2d at 171-72.

The State concedes that *Duncan* prohibits *Terry* stops for nontraffic civil infractions. The State argues that the detention was legal because Officer Gordon had reasonable cause to detain Healy to obtain his identification to issue a citation for UIP;

but when Healy fled, Officer Gordon had probable cause to believe that Healy had committed a crime in his presence, thus warranting the arrest. More plainly, the State relies on the "valid arrest" exception to warrantless seizures, not the "*Terry* stop" exception. Our review of the trial court's ruling confirms that the trial court, too, relied on this exception. We therefore review the trial court's "valid arrest" analysis.

Probable cause for issuance of UIP infraction and authority to detain

"Probable cause exists where 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. Terrovona*, 105 Wn.2d 632, 643, 716 P.2d 295 (1986). Probable cause requires more than "[a] bare suspicion of criminal activity." *Id.* However, it does not require facts that would establish guilt beyond a reasonable doubt. *State v. Conner*, 58 Wn. App. 90, 98, 791 P.2d 261 (1990). The probable cause determination "rest[s] on the totality of facts and circumstances within the officer's knowledge at the time of the arrest." *State v. Fricks*, 91 Wn.2d 391, 398, 588 P.2d 1328 (1979).

We reject Healy's claim that Officer Gordon did not have authority to briefly detain him. Officer Gordon observed Healy behind the garbage bin, shielding himself with his head down and his hands at his groin, in what appeared to Officer Gordon to be

the stance of urinating. Officer Gordon also had substantial experience recognizing the posture of a man urinating. The totality of the facts and circumstances within Officer Gordon's knowledge were sufficient to establish probable cause to believe that Healy committed the infraction of UIP.

RCW 7.80.050(2) states that a "notice of civil infraction may be issued by an enforcement officer when the civil infraction occurs in the officer's presence." "When issuing a notice of a civil infraction, an officer may briefly detain a person long enough to check his or her identification." *Duncan*, 146 Wn.2d at 174 (citing RCW 7.80.060). Because the UIP infraction occurred in Officer Gordon's presence, he had the authority to briefly detain Healy to issue a civil infraction.

Authority to seize without a warrant

A seizure under the Fourth Amendment to the United States Constitution is reasonable if the officer can point to specific and articulable facts giving rise to a reasonable suspicion that the person stopped is, or is about to be, engaged in criminal activity. *State v. Armenta*, 134 Wn.2d 1, 10, 948 P.2d 1280 (1997). The reasonableness of the officer's suspicion is determined by the totality of circumstances known to the officer at the inception of the stop. *State v. Gleason*, 70 Wn. App. 13, 17, 851 P.2d 731 (1993).

We must first determine at what time Healy was seized for purposes of the analysis. A person is seized under the Fourth Amendment only if in view of the circumstances, a reasonable person would have believed that he or she was not free to leave. *Armenta*, 134 Wn.2d at 10. Healy was seized for purposes of the Fourth Amendment at the time Officer Gordon yelled for him to stop. At that point, a reasonable person would have felt that he or she was not free to leave.

We next determine what crime, if any, might have occurred in Officer Gordon's presence to justify Healy's seizure. RCW 9A.76.020 makes it a gross misdemeanor for a person to "obstruct[ ] 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." As noted above, Officer Gordon had authority to issue a civil infraction to Healy for UIP. Once Healy began to run, he hindered, delayed, or obstructed Officer Gordon's ability to issue a civil infraction. Because the crime of obstructing occurred in Officer Gordon's presence, the officer was not required to apply for a warrant prior to seizing and arresting Healy. We therefore uphold the trial court's order denying Healy's motion to suppress evidence.

Appellate costs

Healy filed a motion requesting that appellate costs be denied in the event that the

State is the substantially prevailing party on appeal. We deem the State the substantially prevailing party. The State has not taken a position on appellate costs. Should the State seek appellate costs, we defer the award of such costs to our commissioner or clerk-administrator in accordance with RAP 14.2.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Lawrence-Berrey, C.J.

WE CONCUR:

Korsmo, J.

Siddoway, J.

BURKHART & BURKHART, PLLC

May 24, 2018 - 12:17 PM

Transmittal Information

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