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Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. ALFONSO VILLA-MORALES, Appellant.	)	No. 79858-8-I DIVISION ONE UNPUBLISHED OPINION

MANN, C.J. — Alfonso Villa-Morales challenges his conviction for two counts of possession of a controlled substance, contending the officers lacked probable cause to arrest him and that all the evidence seized was unlawful. We disagree and affirm.

I.

On December 7, 2017, just after midnight, King County Sheriff's Sergeant Kevin Davis was driving to his precinct in his patrol car. Davis saw a silver car double parked on the north side of the precinct.[1] There were no other cars parked in the area and Davis thought it was unusual for a car to double park in that location. Davis could see a female passenger in the front seat.

King County Sheriff's Deputies Jayms Harris and Greg Soss were dispatched to aid Davis. Before Harris and Soss arrived, Davis approached the vehicle on the driver

[1] The trial court found the car was parked on the south side of the precinct building, but Davis testified that he saw the car parked on the north side of the precinct building.

side and shined his flashlight inside. Davis immediately noticed one glass pipe in the center console with white residue and a second glass pipe on the lap of the passenger, Stephany Burdick, who was looking at one of two phones. Davis also noticed a male, reclined and sleeping in the driver's seat. The male was later identified as Villa-Morales.

Burdick did not acknowledge Davis until he approached on the passenger side. Burdick explained that she was trying to get directions to Tacoma. Burdick gave her name and date of birth to Davis but did not have identification; Davis returned to his vehicle to verify Burdick's information. Soss and Harris arrived; Davis told them he saw two glass pipes, one consistent with methamphetamine use, and asked Soss and Harris to wake Villa-Morales and get identification.

Davis returned to Burdick to ask questions about Villa-Morales and the owner of the vehicle. While Davis was engaged with Burdick, he heard Soss say "stop kicking" and "it's the police." Davis approached the driver side and saw Villa-Morales fighting Soss and Harris. The confrontation continued to escalate; Soss and Harris were unable to subdue Villa-Morales once he was standing. Davis deployed his taser twice, but it failed to cause a neuromuscular interruption. Davis indicated he used the taser because he would not try to fight an individual who is at the driver's side door because it is within the "lunge area" and the individual could reach for weapons inside the vehicle. Eventually, Soss subdued Villa-Morales with a "foot sweep" and put Villa-Morales in handcuffs. Villa-Morales was advised of his Miranda[2] rights after he was handcuffed.

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

While Villa-Morales was on the ground, Davis observed a small bag sticking out of his pocket, which was later identified as heroin. Villa-Morales was searched incident to arrest and officers recovered methamphetamine on his person. While Villa-Morales was being arrested, the driver door remained open and Davis saw a handgun in the driver's side door. Davis did not touch the gun and sealed the car for detectives to obtain a search warrant.

The State charged Villa-Morales with unlawful possession of a firearm in the second degree and two counts of violation of the Uniform Controlled Substances Act. Villa-Morales moved to suppress all the evidence pursuant to CrR 3.6, which the trial court denied. Only Davis testified at the suppression hearing. Villa-Morales contended that the officers needed a reasonable suspicion to wake Villa-Morales and that he was seized as soon as officers opened the car door. The trial court concluded that Villa-Morales was not seized until he started fighting with the officers because before he woke up, he was unconscious and not aware of the deputies' presence and because he was unconscious, there was no evidence suggesting that he felt he could not leave upon their arrival. The court concluded that, nevertheless,

> Even if there was a seizure prior to that point, after Sergeant Davis made his plain view observations at the car, including seeing the two meth pipes in the car, at least one with white residue indicative of meth use, and observing the behavior of the two persons which indicated they were under the influence, there was a reasonable articulable suspicion of a potential drug violation and the officers were authorized to conduct an investigation pursuant to Terry.[3]

The jury found Villa-Morales not guilty of unlawful possession of a firearm but guilty of possession of methamphetamine and heroin.

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

II.

Villa-Morales contends that the trial court erred in denying his motion to suppress because possession of drug paraphernalia is not a felony offense and therefore the officers did not have probable cause to arrest Villa-Morales and subsequently search him incident to arrest.[4] We disagree.

We review challenged conclusions of law from a suppression order de novo and challenged findings of fact for substantial evidence. State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). Villa-Morales has not assigned error to any findings of facts; thus, the findings of fact are verities on appeal. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

The Fourth Amendment of the United States Constitution and article 1, section 7 of the Washington State Constitution prohibit unreasonable searches and seizures without a warrant, unless one of the few exceptions to the warrant requirement applies. State v. Day, 161 Wn.2d 889, 894, 168 P.3d 1265 (2007). "If the evidence was seized without authority of law, it is not admissible in court." Day, 161 Wn.2d at 984. We presume that warrantless searches violate both constitutions. Day, 161 Wn.2d at 894. The presumption can be rebutted if the State shows a search fell within certain "narrowly and jealously drawn exceptions to the warrant requirement." Day, 161 Wn.2d at 894.

[4] The State argues that Villa-Morales waived this argument on appeal because he did not argue it below in the trial court. State v. Garbaccio, 151 Wn. App. 716, 731, 216 P.3d 168 (2009) (waiving the argument on appeal because the defendant "did not seek a ruling on this issue from the trial court."); State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) (challenging a warrantless search for the first time on appeal). Unlike the cases cited by the State, Villa-Morales challenges a conclusion of law and there is a sufficient record from which to review the ruling.

Evidence that is in open or plain view is an exception to the warrant requirement. Day, 161 Wn.2d at 894. A Terry stop allows police to "briefly and without warrant, stop and detain a person they reasonably suspect is, or is about to be engaged in criminal conduct." Day, 161 Wn.2d at 895. "A detaining officer must have a reasonable, articulable suspicion, based on specific objective facts, that the person seized has committed or is about to commit a crime." Day, 161 Wn.2d at 896 (internal quotation marks omitted). We review whether the officer had grounds for a Terry stop and search against both an objective standard and the totality of the circumstances, including the officer's subjective belief. Day, 161 Wn.2d at 896.

"Under article I, section 7 of the Washington Constitution, a person is seized when an officer, by physical force or show of authority, restrains the person's freedom of movement and a reasonable person under the circumstances would not have believed he or she was free to go or to decline the officer's request." State v. Cerrillo, 122 Wn. App. 341, 348, 93 P.3d 960 (2004). "No seizure occurs when an officer approaches a person in public and requests to talk to him or her, engages in conversation, or requests identification, so long as the person involved need not answer and may walk away." Cerrillo, 122 Wn. App. at 348 (internal quotation marks omitted).

Villa-Morales's contention that the officers lacked probable cause to arrest him is without merit. We review the search and seizure from the totality of the circumstances and from all that Davis observed, he had a reasonable, articulable suspicion to support a Terry detention to investigate illegal drug possession.[5] Davis noticed a vehicle double parked on the north side of the precinct and, since no other cars were parked in that

[5] RCW 69.50.4013.

location, found that suspicious given the late hour and location. Davis immediately noticed a glass pipe in plain view, with white residue in the center console and another glass pipe on Burdick's lap.[6] Villa-Morales was reclined and sleeping or passed out in the driver's seat. Davis tried to get Burdick's attention, but Burdick did not respond and continued looking at her phone for another minute. Burdick rolled down the window to speak with Davis and said she was trying to get directions to Tacoma. After speaking with Burdick, observing the glass pipes, and seeing Villa-Morales sleeping or passed out in the driver's seat, Davis believed that both occupants were under the influence of a controlled substance.

It is reasonable for an officer to wake a sleeping driver, ask for identification, and ascertain his condition. State v. Cerrillo, 122 Wn. App. at 341, 449, 93 P.3d 960 (2014) (holding that officers could wake sleeping occupants parked in a parking lot); State v. Knox, 86 Wn. App. 831, 833, 939 P.2d 710 (1997), overruled on other grounds by State v. O'Neill, 148 Wn.2d 564, 62 P.3d 409 (2003) (holding it was not a seizure for officers to wake a driver who was sleeping in his car on a ferry and blocking other ferry passengers from driving their cars off the ferry and for the officer to drive the vehicle off the ferry when the occupant appeared to be under the influence of alcohol). A person is seized when an officer, by physical force or show of authority, restrains the person's freedom of movement and a reasonable person under the circumstances would not have believed he or she was free to go or to decline the officer's request. Cerrillo, 122 Wn. App. at 348.

[6] Davis explained at the suppression hearing that, based on his training and experience as a law enforcement officer, white residue indicates that the pipe was likely used to smoke methamphetamine.

From this record, we conclude that Villa-Morales was seized once he regained consciousness and reacted violently to the officers' presence. Davis overheard Soss say "stop kicking" and observed Villa-Morales fighting the officers. All three officers used tactics to subdue Villa-Morales, including using a taser and "foot sweep." Once Villa-Morales reacted in a combative manner, officers had probable cause to arrest him.[7] Villa-Morales was placed in custodial arrest once he was handcuffed and at that point, Davis observed a bag sticking out of Villa-Morales' pants pocket. The search incident to arrest recovered a bag of methamphetamine on his person.

Villa-Morales analogizes to O'Neill to support his argument that possession of drug paraphernalia does not provide probable cause to arrest Villa-Morales. This argument fails because Villa-Morales was not arrested for possession of drug paraphernalia. In O'Neill, the officer saw a spoon on the floor of O'Neill's vehicle, which he believed was a "cook spoon." O'Neill, 148 Wn.2d at 548 n.8. The officer arrested O'Neill with the belief that he had probable cause to arrest because of the residue on the spoon. O'Neill, 148 Wn.2d at 548. The court concluded that the officer "could not have arrested O'Neill for possession of drug paraphernalia or use of drug paraphernalia in any event. Possession of drug paraphernalia is not a crime, and [the officer] could not have arrested for possession of the 'cook spoon'" because, while usingdrug paraphernalia is a misdemeanor, there was no evidence that the "cook spoon" was used in the officer's presence. O'Neill, 148 Wn.2d at 548 n.8 (citing RCW 69.50.412(1)).

[7] Assault in the third degree is a class C felony and includes "assault[ing] a law enforcement officer." RCW 9A.36.031(1)(g).

Here, officers tried to wake Villa-Morales to get identification but seized Villa-Morales because he kicked officers and ignored their commands. Further, the Terry detention while officers tried to wake Villa-Morales was supported by a reasonable, articulable suspicion that Villa-Morales was using or in possession of illegal drugs. Once Soss and Harris attempted to wake Villa-Morales to ask for identification, he reacted violently, requiring the officers to use force to subdue Villa-Morales. At that point, officers saw a bag of suspected drugs sticking out from Villa-Morales's pants pocket. Villa-Morales was then arrested for suspicion of drug possession. We conclude that Villa-Morales was not unlawfully arrested for possession of drug paraphernalia, rather he was seized when he reacted violently to officers waking him, arrested on suspicion of drug possession, and the Terry stop was lawful because Davis had a reasonable, articulable suspicion that Villa-Morales was using or possessing a controlled substance. The trial court did not err in denying Villa-Morales's motion to suppress the evidence.

Affirmed.

Mann, C.J.

WE CONCUR: