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62874-7

No. 62874-7-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

CEDRIC BERRY,

Appellant.

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

The Honorable Charles Mertel

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COURT OF APPEALS
STATE OF WASHINGTON
FILED

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

Seattle Police Department officers' seizure of Cedric Berry violated his rights under the Fourth Amendment and Article I, section 7, because the officers lacked reasonable suspicion that Mr. Berry was engaged in criminal activity. The officers stopped Mr. Berry based on the following: he was walking through an apartment complex known for drug-related activity, he appeared surprised and nervous around the officers, the officers incorrectly believed he had been trespassed at this location, and the officers had prior contacts with Mr. Berry related to narcotics activity. These innocuous facts are insufficient to justify a seizure, and all evidence resulting from the illegal stop should be suppressed.

B. ASSIGNMENTS OF ERROR

1. The trial court erred by concluding the officers had specific, articulable suspicion to make a Terry stop.

2. In the absence of substantial evidence, appellant challenges Finding of Fact 7, which provides:

Officer Settle and Nelson decided at that point to contact the defendant to investigate whether or not the defendant was involved in criminal activity, specifically criminal trespass.

3. In the absence of substantial evidence, appellant challenges Finding of Fact 9, which provides:

The officers approached the defendant outside the Parkway Apartments and engaged him in conversation and asked him if he lived in the building. The defendant answered yes.

C. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Police may briefly detain a person for questioning in a criminal investigation only when the stop is based on specific, articulable facts that would cause a reasonable person to believe criminal activity is afoot. A seizure based on less than this violates a person's rights under the Fourth Amendment and Article I, section 7. Officers Settle and Nelson observed Mr. Berry walking through an apartment complex known for narcotics-related activity, and testified that he appeared nervous when he saw the officers and while talking to them. The officers knew Mr. Berry from previous contacts related to drug activity, and believed he was under DOC supervision. Officer Settle incorrectly believed Mr. Berry had been trespassed from that apartment complex. Did the officers lack specific, articulable facts to justify a warrantless Terry stop?

D. STATEMENT OF THE CASE

1. CrR 3.6 Testimony. On December 20, 2007, Cedric Berry was playing videogames at a friend's apartment. RP 64.¹ At approximately 4:30 p.m., Mr. Berry left the apartment to buy a soda at a nearby convenience store. RP 67, 128.

At the same time, Officer Michael Settle and Officer Richard Nelson of the Seattle Police Department were patrolling the area on their bicycles, and they saw Mr. Berry walking in the breezeway of the apartment complex. RP 24; Finding of Fact ("FF") 1; CP 48.² Officer Settle testified that Mr. Berry appeared surprised to see the officers and that his eyes got very large. RP 24; FF 6. Mr. Berry was not loitering or participating in hand-to-hand exchanges with other people. RP 43-44. After seeing the officers, Mr. Berry did not make any furtive movements, did not run away, and did not attempt to return to his friend's apartment. RP 39. Rather, he continued to walk out of the apartment complex and toward the officers. RP 67-68.

After observing Mr. Berry walking in the breezeway of the apartment building, the officers approached him

¹ The verbatim report of proceedings consists of two consecutively paginated volumes, which are herein referred to as "RP."

² The trial court's Findings of Fact and Conclusions of Law are filed at CP 47-51.

[b]ecause of his suspicious behavior and his nervous behavior, and the history that [they] had there with that complex and with him, [. . .] believing that something could be going on with drugs again.

RP 26.

Officer Settle testified that he had prior contacts with Mr. Berry in the area related to narcotics activity, but did not provide details about those contacts. RP 25; FF 3. Officer Settle testified that he knew Mr. Berry was under supervision by the Department of Corrections (DOC). RP 25. Mr. Berry testified that Officer Settle and Officer Nelson stop him every time they see him, and ask him where he is going and what he is doing. RP 84.

Officer Settle testified that drugs and loitering are a significant problem in that area, and that the apartment manager has made several complaints over the years about general narcotics activity at the building. RP 26; FF 4. The apartment manager never made any specific complaints about Mr. Berry. 1RP 45.

Officer Settle testified that during one of the prior contacts with Mr. Berry, he entered Mr. Berry's name into a computer search to see if he had been trespassed from any locations. RP 25, 41. Based on this prior computer search, Officer Settle believed Mr.

Berry had been trespassed from the apartment complex where they observed him. RP 25; FF 5. Officer Settle did not conduct a computer search or use his radio to verify this belief until after he stopped Mr. Berry. RP 31, 42-43. At that time, Officer Settle was informed that Mr. Berry had been trespassed from a different location. RP 31.

The officers stopped Mr. Berry in the parking lot next to the apartment complex. RP 27. Officer Settle testified that he asked Mr. Berry whether he lived at the apartment complex, and that Mr. Berry said that he did, but could not remember the apartment number. RP 28; FF 9, 10. Mr. Berry testified that he told the officers that he had been playing videogames with his friend, and that he did not know the apartment number because he never paid attention to the number. RP 71, 76. Mr. Berry suggested that the officers talk to his friend at the apartment complex, but they did not. RP 72.

Officer Settle testified that Mr. Berry appeared nervous because he was looking around and did not pay close attention to what the officers were saying. RP 28; FF 11. Based on these observations, Officer Settle believed Mr. Berry was thinking about fleeing, and told him to sit down on the stairs near the parking lot.

RP 29; FF 12. Officer Settle explained that this position would make it more difficult for Mr. Berry to run away, and that if he had attempted to leave, they would have gone after him. RP 47-48; FF 13.

Officer Settle then contacted dispatch to find out if Mr. Berry had any warrants or had been trespassed from that location. RP 31; FF 14. He was informed that Mr. Berry did not have any warrants or DOC violations, and had not been trespassed from that location. RP 31, 48; FF 15.

Officer Settle testified that while he was using his radio, Mr. Berry threw a baggie of suspected crack cocaine over his shoulder. RP 31; FF 16. Officer Settle retrieved the baggie, and believed it contained crack cocaine. FF 17, 18. Officer Settle placed Mr. Berry in handcuffs and read him his rights. RP 32-33; FF 18, 19.

Officer Settle testified that Mr. Berry told him, "Sorry I should have told you about that," and indicated that the baggie had been hidden in his pants cuff. RP 35; FF 20, 21, 22. Mr. Berry testified that he did not say these things. RP 73. Rather, he sarcastically told the officers that because it was his word against theirs, if the officer said he threw it, he must have thrown it. RP 73.

2. CrR 3.6 Ruling. At the CrR 3.6 hearing, Mr. Berry moved to suppress the evidence obtained as a result of the stop. CP 4-9. The trial court denied this motion. CP 47-51. The trial court concluded that the stop was a lawful Terry stop, but did not specifically define at what point the stop occurred.³ CP 49; Conclusion of Law 2. The State conceded that the stop occurred when the officers told Mr. Berry to sit on the stairs. RP 94.

The Court found that the stop was lawful based on (1) the officers' knowledge of narcotics activity at that apartment complex, (2) the officers' prior contacts with Mr. Berry and their knowledge that he was involved in narcotics activity in that neighborhood, (3) the officers' belief Mr. Berry was on probation with DOC, (4) the officers' belief Mr. Berry had been trespassed from that apartment building, (5) Mr. Berry's surprised look when he saw the officers, (6) Mr. Berry's nervous "glancing back and forth" and inability to recall the apartment number while talking to the officers, and (7) Officer Settle's observation that Mr. Berry tossed a baggie of suspected crack cocaine. CP 49-50; Conclusion of Law 2.

Mr. Berry also moved to limit the officers' testimony regarding their prior contacts with him in that area. RP 6-9. The

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

trial court ordered the officers to testify that they stopped Mr. Berry because they suspected him of trespass, and to not mention the previous drug-related contacts. RP 106-07.

3. Trial Testimony. At trial, Officer Settle's testimony was consistent with his testimony at the CrR 3.6 hearing. He added that on December 20, 2007, he and Officer Nelson were working a "proactive unit that looks for street crime." RP 167. Officer Nelson also testified that the officers were doing "proactive police work" in the area. RP 129.

Officer Nelson testified that when he asked Mr. Berry what he was doing at the apartment complex, Mr. Berry said he had been playing a game with a friend and that he did not know the number of his friend's apartment. RP 132-33. Officer Nelson verified that Mr. Berry never tried to run away or return to his friend's apartment. RP 146. Officer Nelson testified that Mr. Berry was compliant with all of the officers' commands. RP 152.

4. Trial Outcome. Following the trial, the jury found Mr. Berry guilty of one count of possession of cocaine. CP 30. Mr. Berry appeals. CP 60-68.

E. ARGUMENT

THE OFFICERS LACKED REASONABLE SUSPICION TO JUSTIFY A TERRY STOP

The Fourth Amendment prohibits unreasonable searches and seizures. Article 1, section 7 of the Washington Constitution provides: “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” It is well established that that “our Washington State Constitution affords individuals greater protections against warrantless searches than does the Fourth Amendment.” State v. Gatewood, 163 Wn.2d 534, 539, 182 P.3d 426 (2008) (quoting State v. Stroud, 106 Wn.2d 144, 148, 720 P.2d 436 (1986)).

Warrantless searches and seizures are unreasonable *per se* unless an exception applies. State v. Loewen, 97 Wn.2d 562, 565, 647 P.2d 489 (1982); State v. Lennon, 94 Wn. App. 573, 579, 976 P.2d 121 (1999). It is the State’s burden to prove a warrantless search or seizure was lawful. State v. Williams, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). The State must establish that an exception to the warrant requirement applies by clear and convincing evidence. State v. Smith, 115 Wn.2d 775, 789, 801 P.2d 975 (1990).

a. The seizure occurred when the officers told Mr. Berry to sit on the stairs. A seizure occurs where, “in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.” State v. Armenta, 134 Wn.2d 1, 10, 948 P.2d 1280 (1997) (citing United States v. Mendenhall, 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980)). The question is “whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers’ requests or otherwise terminate the encounter.” Armenta, 134 Wn.2d at 11 (quoting Florida v. Bostick, 501 U.S. 429, 439, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991)). “This determination is made by looking objectively at the actions of the law enforcement officer.” State v. Mote, 129 Wn. App. 276, 282-83, 120 P.3d 596 (2005).

A seizure occurs when an officer’s commands or actions prevent a person from leaving. State v. Ellwood, 52 Wn. App. 70, 73, 757 P.2d 547 (1988) (seizure occurred when officer told defendant to “wait right here”); State v. Stroud, 30 Wn. App. 392, 396, 634 P.2d 316 (1981), rev. denied, 96 Wn.2d 1025 (1982) (seizure occurred when police pulled behind defendant’s car and

switched on the flashing light because departure from the scene would not be a reasonable alternative).

This standard applies both under the Fourth Amendment and Article 1, section 7. State v. O'Neill, 148 Wn.2d 564, 574, 62 P.3d 489 (2003). The defendant has the burden of proving that a seizure occurred. Id. at 581. The question of whether the facts surrounding a police encounter amount to a seizure is a question of law this Court reviews *de novo*. State v. Rankin, 151 Wn.2d 689, 709, 92 P.3d 202 (2004).

In this case, the State properly conceded that the seizure occurred when the officers told Mr. Berry to sit on the stairs. RP 94. At this point, Mr. Berry was not free to leave, and the officers would have gone after him if he had tried to leave. RP 47-48.

b. Police must have reasonable articulable suspicion of criminal activity to support a seizure. An investigative detention based on a reasonable articulable suspicion of criminal activity is one of the “jealously and carefully drawn” exceptions to the warrant requirement, and is constitutionally authorized only if “the officer’s action was justified at its inception.” Terry, 392 U.S. at 20. An officer must be able to point to specific, articulable facts that criminal activity is afoot. State v. White, 97 Wn.2d 92, 105, 800

P.2d 1061 (1982). The level of articulable suspicion required to justify a Terry stop 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 (1986).

“Innocuous facts do not justify a stop.” State v. Martinez, 135 Wn. App. 174, 180, 143 P.3d 855 (2005); Armenta, 134 Wn.2d at 13.

Presence in a high crime area at night is not enough. The circumstances must suggest a substantial possibility that the particular person has committed a specific crime or is about to do so.

Martinez, 135 Wn. App. at 180, (citing State v. Garcia, 125 Wn.2d 239, 242, 883 P.2d 1369 (1994)). In Martinez, the court found there was not reasonable suspicion to stop the defendant based on the facts that he was in a neighborhood known for vehicle prowls, he appeared nervous, and he walked quickly away from the officer. 135 Wn. App. at 178-79. The Martinez court defined the question as “whether arguably innocuous facts plus the officer’s experience amount to an articulable suspicion or merely an inchoate hunch.” Id. at 180. The court found that the officer lacked particularized suspicion of Martinez because there were no reports about vehicle

prowls on that night or any suspect description linking him to vehicle prowling. Id. at 180-182.

“Startled reactions to seeing the police do not amount to reasonable suspicion.” Gatewood, 163 Wn.2d at 540 (citing State v. Henry, 80 Wn.App. 544, 552, 910 P.2d 1290 (1995)). In Gatewood, police stopped the defendant because (1) he had a “wide-eyed” expression upon seeing the police drive by a bus shelter where he was sitting, (2) he made a twisting motion to the left that the officers believed was for the purpose of sloughing drugs, and (3) he then left the bus shelter and crossed the street mid-block. Id. The Washington Supreme Court held that this was insufficient to justify a Terry stop. Id.

c. The officers lacked reasonable articulable suspicion of criminal activity to support the seizure. In this case, because the seizure occurred when the officers told Mr. Berry to sit on the stairs, this Court may only consider evidence known to the officer prior to the stop. Terry, 392 U.S. at 20. Therefore, it was error for the trial court to include the fact that Mr. Berry threw the baggie within its analysis of the validity of the stop.

The facts known to the officers prior to the stop are insufficient to justify the seizure. The officers approached Mr. Berry

[b]ecause of his suspicious behavior and his nervous behavior, and the history that [they] had there with that complex and with him, [. . .] believing that something could be going on with drugs again.

RP 26. The “suspicious behavior” and “nervous behavior” consisted of an allegedly wide-eyed, “surprised” look the officers observed on Mr. Berry’s face when he saw the officers. RP 24. As in Gatewood and Martinez, Mr. Berry’s presence in an area known for crime along with a “surprised” response to seeing the police does not justify the seizure. Mr. Berry’s inability to recall his friend’s apartment number did not establish reasonable suspicion because this is not evidence of criminal activity. Also, as in Martinez, the apartment manager’s complaints about drug activity in the area did not justify the stop because none of these complaints involved Mr. Berry and there were no complaints made that day. RP 45.

The officers’ belief that Mr. Berry would flee – based on their observation that Mr. Berry was glancing around and not paying close attention to what they were saying – does not justify the stop. It is true that flight from the police is a circumstance that courts may consider when evaluating whether an investigatory stop is justified. State v. Swaite, 33 Wn. App. 477, 481, 656 P.2d 520 (1982) (suspect fled upon seeing officers by jumping into nearby bushes);

State v. Sweet, 44 Wn. App. 226, 230, 721 P.2d 560 (1986) (when defendant saw police, he fled from a hiding place by jumping over a fence into some bushes). However, Mr. Berry did not flee from the police. Rather, he continued to walk toward the officers after he saw them, was cooperative and compliant with their commands, and did not attempt to leave at any time. RP 39, 67-68, 146, 152. The officers' observations amount to mere nervousness, which is not sufficient for a Terry stop. Gatewood, 163 Wn.2d at 540 (citing Henry, 80 Wn. App. at 552).

This seizure – based on little more than presence in a high crime area and a surprised reaction to seeing the police – cannot be not justified by the officers' prior contacts with Mr. Berry or their belief that he was under supervision with DOC. A court's evaluation of a Terry stop must consider "specific and articulable facts that give rise to a reasonable suspicion that there is criminal activity afoot." White, 97 Wn.2d at 105. Thus, reasonable suspicion may be based on facts indicating that a crime is occurring at the time, not on an officer's hunch that someone who has done it before will do it again. Just as officers may not infer criminal activity from a person's location in a high crime area, without more, they may not infer current criminal activity from a person's past

criminal activity. Mr. Berry did nothing to indicate that he was involved with drug-related activity. Rather, the officers were out looking for criminal activity and Mr. Berry was simply one of their usual targets. Without any facts supporting a conclusion that Mr. Berry was involved in current criminal activity, the seizure violated Mr. Berry's rights to be free of unreasonable government intrusions.

Officer Settle's incorrect belief that Mr. Berry had been trespassed from the apartment complex also did not justify the seizure. Washington Courts do not recognize the good faith exception to the exclusionary rule. State v. Littlefair, 129 Wn. App. 330, 344, 119 P.3d 359 (2005) (citing White, 97 Wn.2d at 107-08). Further, Officer Settle's mere belief, which was based on a computer search he performed during a prior contact (possibly months before this stop) and did not verify before this stop, would not lead a reasonable person to conclude there was a substantial possibility Mr. Berry was trespassing.

Finally, as in Martinez, the officers' experience does not transform these innocuous facts into reasonable suspicion of criminal activity. Martinez, 135 Wn. App. at 182 (without evidence linking particular defendant with particular crime, general suspicion that defendant was up to no good did not justify the stop). It is true

that “circumstances which appear innocuous to the average person may appear incriminating to a police officer in light of past experience.” State v. Samsel, 39 Wn. App. 564, 570-71, 694 P.2d 670 (1985). However, the talisman of “officer experience” should not be misused to permit officers to stop citizens based on evidence so innocuous as a man walking through an apartment complex in an area known for narcotics activity. Approving this stop would allow detentions based on an inarticulable hunch, which Terry forbids, and would threaten citizens’ constitutional right to be free of unreasonable searches and seizures. Therefore, this Court should hold that the seizure was unconstitutional.

d. All evidence resulting from the illegal seizure must be suppressed as fruit of the poisonous tree. Where there has been a violation of Article I, section 7 or the Fourth Amendment, courts must suppress evidence obtained as a result of the illegal search or seizure as fruit of the poisonous tree. State v. Day, 161 Wn.2d 889, 895, 168 P.3d 1265 (2007); State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999); Wong Sun v. United States, 371 U.S. 484, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

Because the illegal stop violated Mr. Berry’s rights under the Fourth Amendment and Article I, section 7, evidence obtained as a

result of the stop must be suppressed as fruit of the poisonous tree. Therefore, this Court should reverse Mr. Berry's conviction for possession of cocaine.

F. CONCLUSION

For the above reasons, Mr. Berry respectfully requests this Court reverse his conviction for possession of cocaine.

DATED this 20th day of July 2009.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Mindy M. Ater", written over a horizontal line.

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 62874-7-I
v.)	
)	
CEDRIC BERRY,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 20TH DAY OF JULY, 2009, 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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