

63738-0

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No. 63738-0-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ROY PORTER,

Appellant.

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

The Honorable Chris Washington

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. ARGUMENT.....1

 1. THIS COURT SHOULD SUPPRESS EVIDENCE
 OBTAINED AS A RESULT OF THE ARREST
 BECAUSE OFFICER DIAMOND LACKED
 INDIVIDUALIZED PROBABLE CAUSE TO
 ARREST MR. PORTER.....1

 a. The surveillance officer’s description of a black
 male wearing a white t-shirt and jeans, in a park
 populated with many African-American people,
 was not specific enough to sufficiently limit the
 pool of possible suspects.....1

 b. The alleged “confirmation” of arrest cannot be
 factored into the determination of probable
 cause because it occurred *after* the arrest took
 place.....3

 c. The inconsistencies between Officer Diamond’s
 and Officer Lee’s descriptions of the suspect’s
 movements as the arresting officers moved
 into the park indicate that the two officers were
 observing different people.....4

 2. THE TRIAL COURT ERRED WHEN IT DENIED
 MR. PORTER A SENTENCE BELOW THE
 STANDARD RANGE DUE TO THE
 EXTRAORDINARILY SMALL AMOUNT OF
 COCAINE FOUND IN HIS POSSESSION.....7

B. CONCLUSION.....8

TABLE OF AUTHORITIES

Cases

State v. Fricks, 91 Wn.2d 391, 588 P.2d 1328 (1979).....4

State v. Garcia-Martinez, 88 Wn. App. 322,
944 P.2d 1104 (1997).....7

State v. Mance, 82 Wn. App. 539, 918 P.2d 527 (1996)3

Statutes

RCW 9.94A.5307

A. ARGUMENT

1. THIS COURT SHOULD SUPPRESS EVIDENCE
OBTAINED AS A RESULT OF THE ARREST
BECAUSE OFFICER DIAMOND LACKED
INDIVIDUALIZED PROBABLE CAUSE TO
ARREST MR. PORTER

In his opening brief, Mr. Porter argued that Officer Diamond (the arresting officer) lacked individualized probable cause to arrest him based on Officer Lee's (the surveillance officer) order to arrest a black male wearing a white t-shirt and jeans in the center of a park populated with 40-60 people, most of whom were African-American. Br. of App. at 7-15.

a. The surveillance officer's description of a black male wearing a white t-shirt and jeans, in a park populated with many African-American people, was not specific enough to sufficiently limit the pool of possible suspects. The State responds by suggesting that the surveillance officer might have provided a more specific description, but the only details the arresting officer could recall was that the suspect was a black male wearing a white t-shirt and jeans. Br. of Resp. at 14. However, this lacks support in the record. Both officers had the opportunity to refresh their recollections with their police reports, and neither testified to any further details about the surveillance officer's description of the

suspect. Certainly, officers with such extensive experience in drug surveillance operations would consider further details of a suspect description important to document, especially where the scattering of dozens of people creates a high potential of arresting the wrong person. Indeed, both officers proved to be good at keeping records as they meticulously documented the movements of the various suspects through the park. Therefore, if additional details of the suspect description truly did exist, the officers would have been able to testify to them. The State may not rely on pure speculation to bolster the vague suspect description the arresting officer testified he received.

The State then imagines that because three other suspects were wearing jackets and Officer Diamond was wearing a sweatshirt on a fall evening, Mr. Porter must have been the only black male in the park wearing a white t-shirt and jeans. Br. of Resp. at 15. However, there was no testimony by the surveillance officer regarding the prevalence of black males wearing white t-shirts, and the arresting officer did not have the opportunity to observe the people in the park long enough to determine whether there were other people matching that description. Br. of App. at 11; RP 39, 43, 49. Within less than a minute, the arresting officer

drove into the park and immediately seized on Mr. Porter, the first black male wearing a white t-shirt and jeans. RP 39, 43, 49.

Therefore, this vague description was not sufficient information to establish individualized probable cause to arrest Mr. Porter.

b. The alleged “confirmation” of arrest cannot be factored into the determination of probable cause because it occurred *after* the arrest took place. In his opening brief, Mr. Porter argued that this Court cannot consider the surveillance officer’s “confirmation” of the arrest because the arresting officer received this information after the arrest. Br. of App. at 12-14. The State responds by arguing, “In a situation in which a surveillance officer is able to provide immediate and instant confirmation, there is no risk of circumventing the requirement that probable cause must be specific to the person arrested.” Br. of Resp. at 18.

However, the simple fact that “confirmation” of arrest can only occur *after* arrest means that the use of such a “confirmation” in the determination of probable cause does circumvent the requirement that probable cause be established based on information known to the arresting officer *prior* to the arrest. State v. Mance, 82 Wn. App. 539, 542-43, 918 P.2d 527 (1996)

(emphasis in original) (quoting State v. Fricks, 91 Wn.2d 391, 398, 588 P.2d 1328 (1979)). Otherwise, in a drug surveillance operation such as in this case, the arresting officers could arrest all the people matching a vague suspect description, wait for confirmation, and then release those who were not confirmed to be the suspect. Such an approach violates each arrestee's rights to be arrested only based on individualized probable cause. It also is not justified by the need for expediency, as the officers could use other methods to obtain confirmation before the arrest.

Therefore, this Court must not factor in the surveillance officer's alleged "confirmation" of arrest in its determination of whether the arresting officer had individualized probable cause to arrest Mr. Porter.

c. The inconsistencies between Officer Diamond's and Officer Lee's descriptions of the suspect's movements as the arresting officers moved into the park indicate that the two officers were observing different people. In his opening brief, Mr. Porter argued that the discrepancies between the surveillance officer's and the arresting officer's testimony regarding the suspects' behavior as the arresting officers moved into the park show that the officers were observing two separate people. Br. of App. at 11-12.

The arresting officer testified that as he approached Mr. Porter, Mr. Porter walked northbound from the center of the park to the bocce ball courts on the north end of the park, where he stood behind two people. RP 41. The surveillance officer, on the other hand, testified that the man he was observing was located by the benches on the east side of the park, and that when the officers entered the park, the man walked 20 feet in a southbound direction. RP 26-27. The surveillance officer testified that the man did not hide behind two people, and was stopped near the totem poles at the center of the park. RP 27-28.

The State responds by admitting that there was “some variation between the testimonies”, but the testimonies were consistent as to the general area of the arrest. Br. of Resp. at 12-13. The State’s argument fails to refute Mr. Porter’s argument that Officer Diamond and Officer Lee were observing two separate people as the police moved into the park, that the surveillance officer lost track of the suspect in the confusion (as 40-60 people scattered in different directions), and the surveillance officer incorrectly confirmed the arrest of Mr. Porter because he matched the vague description of a black male in a white t-shirt and jeans. At the time of the arrest, it is undisputed that both officers observed

Officer Diamond arrest Mr. Porter. Therefore, the similarity in testimonies regarding the location of the arrest is of little importance. Rather, it is vital to focus on the officers' observations during the minute before the arrest. The State ignores two important inconsistencies: (1) whereas Officer Lee's suspect walked southbound, Officer Diamond observed Mr. Porter walked northbound, and (2) whereas Officer Diamond observed Mr. Porter stand by two people, Officer Lee did not observe his suspect do the same. Because the officers' testimonies describe two people walking in opposite directions and behaving differently, it is highly likely that Mr. Porter was not the same man observed by Officer Lee.

In conclusion, because the arrest of Mr. Porter was based on little more than a vague description that could have matched a number of people in the park that evening, the arresting officer lacked individualized probable cause to arrest Mr. Porter. Therefore, the trial court erred in failing to suppress the evidence obtained as a result of arrest, and this court should reverse Mr. Porter's conviction for possession of cocaine.

2. THE TRIAL COURT ERRED WHEN IT DENIED MR. PORTER A SENTENCE BELOW THE STANDARD RANGE DUE TO THE EXTRAORDINARILY SMALL AMOUNT OF COCAINE FOUND IN HIS POSSESSION

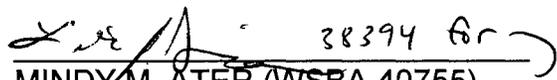
In his opening brief, Mr. Porter argued that the trial court erred when it denied his request for a sentence below the standard range due to the extraordinarily small amount of cocaine found in his possession, which was estimated to be between .001 to .01 grams. Br. of App. at 15-18. This Court may review this standard range sentence because the trial court erroneously based its denial of a sentence below the standard range on acts for which Mr. Porter was not convicted. State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997); RP 381. The State responds by arguing that the trial court properly considered evidence that Mr. Porter may have been involved in dealing drugs, and that this was not an impermissible basis for denying the requested sentence below the standard range. Br. of Resp. at 20-21. However, a trial court may not rely on facts outside those proved at trial when considering a sentence within or below the standard range. RCW 9.94A.530(2). Therefore, this Court may review Mr. Porter's sentence, and should hold that the trial court erred when it denied Mr. Porter a sentence below the standard range.

B. CONCLUSION

For the above reasons, Mr. Porter respectfully requests this Court reverse his conviction for possession of cocaine, or remand his case for re-sentencing.

DATED this 20th day of January 2010.

Respectfully submitted,


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