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DEC 04 2009

King County Superior Court

NO. 63934-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

M. H.,

Appellant.

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

The Honorable Leroy McCullough, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court's finding of fact that Officer McDaniel did not expressly order the 15-year-old appellant to get into the patrol car is not supported by substantial evidence. Supp. CP \_\_ (sub. no. 55, CrR 3.6 Findings of Fact and Conclusions of Law, filed 9/4/2009), at 2, FOF 16 (attached as appendix).

2. The trial court's finding of fact that the appellant "voluntarily entered" Officer McDaniel patrol car is not supported by substantial evidence. Supp. CP \_\_ at 2, FOF 17.

3. The trial court erred by concluding Officer McDaniel did not "seize" the appellant when McDaniel approached the appellant at a bus stop, ordered the appellant to walk to him, ordered him to stand near his police car, told him he was driving him home, and directed him to get into the police car.

4. The trial court erred by denying the appellant's motion to suppress evidence because Officer McDaniel lacked a reasonable, articulable suspicion of criminal activity when he detained the appellant for investigation.

5. The trial erred by concluding that, even if Officer McDaniel seized the appellant, the seizure fell within the "community caretaking" exception to the warrant requirement.

Issues Pertaining to Assignments of Errors

1. Are the trial court's findings of fact 16 and 17 supported by substantial evidence?

2. Was the appellant seized for purposes of the Fourth Amendment and article I, section 7 when Officer McDaniel, who knew him well, approached him at a bus stop, told him to come to him, and after the appellant obeyed, told him to stand next to the officer's parked patrol car, and after the appellant obeyed, told him to get into the car, and after the appellant obeyed, drove him home?

3. If the appellant was seized, did Officer McDaniel lack a reasonable, articulable suspicion to support an investigative detention?

4. If the appellant was seized, was the seizure justified under the community caretaking exception to the warrant requirement?

B. STATEMENT OF THE CASE

Police officer Kevin McDaniel was on patrol at about 4:30 p.m. when he saw 15-year-old M.H. at a bus stop smoking what appeared to be a tobacco or marijuana cigarette. RP 55, 75-81. McDaniel had met M.H.

and M.H.'s mother about two years earlier through his role as a community police officer and speaker in an neighborhood after-school program. RP 11-13, 33, 44-47, 114-16. McDaniel also had given M.H. a ride home once or twice. RP 60-61, 73. He had spoken with and counseled M.H. individually and in a group setting many times and developed "good rapport" with the youth. RP 44-47. The officer said M.H. had "never once" disrespected him and had always done what he asked him to do. RP 46, 89-90.

At some point in their relationship, M.H.'s mother asked McDaniel to bring M.H. home if he saw the youth associating with the "wrong crew" or doing anything wrong. RP 13-17, 33-34, 50. She called the police more often after M.H. received a deferred disposition about five weeks earlier for having stolen property in an incident when his son was "hanging around with the wrong crew." RP 16-17.

One condition of the deferred disposition was that M.H. not associate with Mark Skinner. RP 17-20. McDaniel was aware of this no-contact provision of M.H.'s disposition. RP 50-53.

When McDaniel saw M.H. at the bus stop, he also observed a group that included Mark Skinner. McDaniel parked his car, approached the bus stop, and ordered M.H. to come to him. RP 50-53, 55-58, 78-81.

McDaniel testified he "didn't feel as though something was right." RP 58. He did not feel M.H. "was safe in the environment he was in." RP 58. The officer explained, "[Y]ou learn in this job to trust your gut feeling. If you feel as though something is possibly wrong or going wrong, you have to trust that feeling." RP 93.

M.H. tossed what he was smoking and came toward McDaniel. RP 55, 82. M.H. testified he did not believe he had a choice but to comply with the officer's command. RP 105. McDaniel then told M.H. to wait by the police car, and he did. RP 55-56, 82-83. McDaniel, meanwhile, approached the bus stop and smelled the odor of burnt marijuana. RP 56, 84. The bus stop was known to McDaniel for narcotics activity. RP 84. He told the other people at the bus stop, including Skinner, to leave if they were not waiting for the bus. RP 56, 84.

McDaniel returned to where M.H. stood; he told the youth to get in the car because he was taking him home. RP 56-58, 85-86, 94. M.H. did as he was told and McDaniel drove to M.H.'s residence. RP 21-22, 58-59, 85, 86, 107-08. On the short ride to M.H.'s apartment, McDaniel smelled no odor of burnt marijuana. RP 86-87.

When they arrived, McDaniel knocked on the door and requested entry when M.H.'s mother answered the knock. RP 21-26, 34-35, 59-63,

87-91, 108-110. McDaniel and M.H. entered the apartment building foyer and M.H.'s mother turned and began walking up the stairs to her apartment. RP 25-26, 62-63, 91-92, 109-11. At about that time, M.H. dropped a gun. McDaniel recovered the weapon, handcuffed M.H., and arrested him. As this happened, M.H. asked McDaniel not to arrest him and said he carried the gun for his own protection. RP 60, 63-66, 110-11.

The state charged M.H. with second-degree unlawful possession of a firearm. CP 3. M.H. moved to suppress the gun, contending McDaniel unlawfully seized him by ordering him away from the bus stop and into the patrol car, then driving him home, without articulating a reasonable suspicion that M.H. was involved in criminal activity. CP 9-14; RP 136-40. He also contended the warrantless seizure was not justified by the community caretaking exception to the warrant requirement because it was late in the afternoon, he was 15 years old, and he was not involved in criminal activity. CP 14-16; RP 140-43, 148-49.

The trial court denied the motion to suppress. Supp. CP \_\_\_, CrR 3.6 Findings of Fact and Conclusions of Law; RP 149-54. The court concluded that McDaniel did not seize M.H., that a reasonable person with the type of relationship M.H. had with McDaniel would have felt free to leave, and that M.H. voluntarily entered McDaniel's patrol car. Supp. CP

\_\_\_, at 3, Conclusion of Law 1; RP 149-53. The court also found that even if McDaniel seized M.H., the seizure was justified by the community caretaking exception to the warrant requirement because (1) the Family Reconciliation Act mandated the action based on M.H.'s mother's request to bring her son home if he was with the wrong people in an unsafe place; and (2) McDaniel had a reasonable basis to be concerned for M.H.'s safety. Supp. CP \_\_\_, at 3-4, Conclusions of Law 2-6; RP 153-54.

M.H. waived his right to a fact-finding hearing and stipulated to the admissibility of evidence for the judge's consideration. RP 154-59. The trial court found M.H. guilty. CP 18-19, RP 159. The court imposed a standard range disposition. CP 22-28; RP 168-72.

C. ARGUMENT

1. THE TRIAL COURT ENTERED FINDINGS OF FACT THAT WERE NOT SUFFICIENTLY SUPPORTED BY THE EVIDENCE.

Findings of fact entered on a motion to suppress evidence must be supported by substantial evidence. State v. Moore, 129 Wn. App. 870, 877, 120 P.3d 635 (2005), review denied, 157 Wn.2d 1007 (2006). "Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding." State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313

(1994). Factual findings that are not supported by substantial evidence are not binding on appeal. Hill, 123 Wn.2d at 647.

Portions of two of the trial court's findings of fact lack substantial evidentiary support. Finding of Fact 16 states, "Officer McDaniel did not handcuff the respondent, nor did McDaniel expressly order the respondent to get into the patrol car." Supp. CP \_\_ (CrR 3.6 Findings of Fact and Conclusions of Law) at 2. M.H. agrees the evidence shows McDaniel did not handcuff him. He disagrees the evidence establishes McDaniel did not order him into the car.

McDaniel testified he said, "Come on, I'm going to take you home. He [M.H.] stood by the passenger side door. I said: Go ahead and get in, it's open. He opened the front door himself, got into the front seat of the car and we drove to his home." RP 56. During cross examination, McDaniel responded, "Yes, sir" to the question "But he was being driven home?" RP 85. Defense counsel also asked McDaniel whether he changed M.H.'s decision of where he was going to go because he was going home. The officer answered, "It would be fair to say because he was in violation of his court order. He was not getting on the bus at that point." RP 85-86. On redirect, the prosecutor asked, "Now going back to the point that you told [M.H.] to get in your car and he did, he wasn't

handcuffed, right?" RP 94 (emphasis added). McDaniel responded, "No, he was not." RP 94.

This testimony indicates McDaniel told M.H. he was going home and to get into the patrol car. The trial court's finding to the contrary is unsupported by the evidence and therefore not binding on appeal.

The trial court also found M.H. "voluntarily entered McDaniel's patrol care [sic] without being handcuffed . . . ." Supp. CP \_\_ at 2, Finding of Fact 17. M.H. agrees he was not handcuffed but, for the reasons already set forth, disagrees with the finding he voluntarily entered the patrol car. It is true McDaniel did not force him into the car, and it is true M.H. cooperated with McDaniel, but it is not correct that M.H. voluntarily entered. The idea to enter the patrol car originated in McDaniel's mind and was conveyed to M.H. by the officer. M.H. had never disrespected McDaniel before and he did not disrespect McDaniel at that point. He did not "voluntarily" enter the car. The trial court's finding to the contrary is unsupported by the evidence and is not binding on appeal.

2. THE TRIAL COURT VIOLATED M.H.'s  
CONSTITUTIONAL RIGHTS TO PRIVACY AND TO  
BE FREE FROM UNREASONABLE SEIZURES.

McDaniel "seized" M.H. when he ordered the youth away from the bus stop, ordered him to stand next to the patrol car, told him to enter the patrol car, and drove him home. Because of the particular position of authority McDaniel enjoyed over M.H. based on their past relationship, as well as McDaniel's stern demands, M.H. had no reason to believe he was free to walk away. Because McDaniel lacked legal justification to detain M.H., the seizure violated article I, section 7 of the Washington Constitution and the Fourth Amendment.<sup>1</sup> All evidence obtained as a result of the seizure must be suppressed.

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<sup>1</sup> Article I, section 7 provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

The Fourth Amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

1. *McDaniel Seized M.H. When He Ordered Him to Walk Away From the Bus Stop and Stand Next to the Car.*

Whether a person has been seized for purposes of article I section 7 and the Fourth Amendment is a mixed factual and legal question. State v. Cormier, 100 Wn. App. 457, 460, 997 P.2d 950, review denied, 142 Wn.2d 1003 (2000). Unchallenged factual findings are verities on appeal, while the trial court's legal conclusions are reviewed de novo. Cormier, 100 Wn. App. at 460.

With respect to whether a person has been seized, article I, section 7 indisputably provides greater protection for the seized person than the Fourth Amendment. State v. Rankin, 151 Wn.2d 689, 694, 92 P.3d 202 (2004). A separate state constitutional analysis, set forth in State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986), is therefore not necessary. Rankin, 151 Wn.2d at 694.

A person is seized under article I, section 7 when, examining all the circumstances, the person's freedom to move is restrained and the person would not think he could walk away or decline an officer's request because of a display of authority. Rankin, 151 Wn.2d at 695. Determining whether a person is seized is done objectively by looking at the particular facts and the police officer's actions. State v. O'Neill, 148

Wn.2d 564, 574, 62 P.3d 489, 495 (2003), State v. Young, 135 Wn.2d 498, 501, 957 P.2d 681 (1998). Critical to the determination is the interaction between the person and the officer. State v. O'Neill, 148 Wn.2d 564, 575, 62 P.3d 489 (2003). More specifically, "[w]hether there was any show of authority on the officer's part, and the extent of any such showing, are crucial factual questions in assessing whether a seizure occurred." O'Neill, 148 Wn.2d at 577.

Directing an individual to stop, or issuing some "positive command," constitutes a seizure. Michigan v. Chesternut, 486 U.S. 567, 574-575, 108 S. Ct. 1975, 100 L. Ed. 2d 565 (1988); Young, 135 Wn.2d at 513-14 (shining of spotlight on pedestrian was not seizure "until some positive command from [officer] issued"); State v. Martinez, 135 Wn. App. 174, 179, 143 P.3d 855 (2006) (officer seized man walking in private apartment complex when he ordered him to sit on nearby utility box and wait); State v. Coyne, 99 Wn. App. 566, 574, 995 P.2d 78 (2000) (officer unlawfully seized defendant by ordering him and companion to sit on hood without articulable reasonable suspicion); State v. Gleason, 70 Wn. App. 13, 17, 851 P.2d 731, 733-34 (1993) (seizure occurred when officer asked if he could talk for a minute, asked Gleason why he was there, and demanded identification); State v. Ellwood, 52 Wn. App. 70, 73, 757 P.2d

547 (1988) (seizure occurred when officer told Ellwood and companion to “[w]ait right here”). An investigative detention is also a seizure. State v. Armenta, 134 Wn.2d 1, 10, 948 P.2d 1280 (1997).

The use of language or tone of voice indicating compliance with the officer's request might be compelled suggests a seizure has occurred. United States v. Mendenhall, 446 U.S. 544, 554-55, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980); State v. Dorey, 145 Wn. App. 423, 428, 186 P.3d 363 (2008). See State v. Mote, 129 Wn. App. 276, 292, 120 P.3d 596 (2005) (no seizure where officer requested but did not demand identification; “[t]hus his use of language and tone of voice did not change this encounter from a social contact into a seizure.”); State v. Cerrillo, 122 Wn. App. 341, 350, 93 P.3d 960 (2004) (officer did not seize driver of parked car when he knocked on window and asked driver for identification and why he was in parking lot; officer did not show force or indicate by tone of his voice compliance was mandatory); State v. Nettles, 70 Wn. App. 706, 711, 855 P.2d 699 (1993) (officer's contact did not amount to seizure because officer merely requested to speak with pedestrian and companion, did not stop companion when he continued to walk away, spoke in normal tone of voice, and did not direct pedestrian to place himself in particular place or position), review denied, 123 Wn.2d 1010 (1994).

In contrast is the "police-citizen" encounter, which courts have held is not a seizure. State v. Thomas, 91 Wn. App. 195, 200, 955 P.2d 420, review denied, 136 Wn.2d 1030 (1998). For example, an officer who merely engages an individual in conversation in a public place and asks for identification has not "raise[d] the encounter to an investigative detention." Armenta, 134 Wn.2d at 11. An officer's request to chat, as opposed to a demand or an order, is an insufficient showing of authority to constitute a seizure. See State v. Kinzy, 141 Wn.2d 373, 380, 5 P.3d 668 (2000) (juvenile not seized when officers merely approached and asked, "Could you come here" and "Young lady, could you please stop and come here."), cert denied, 531 U.S. 1104 (2001); State v. Harrington, 144 Wn. App. 558, 561, 183 P.3d 352 (2008) ("The officer asked if Harrington would talk with him. There was simply no show of authority that would support a finding that Mr. Harrington was seized.") (emphasis in original), review granted, 164 Wn.2d 1034 (2008); State v. Barnes, 96 Wn. App. 217, 222, 978 P.2d 1131 (1999) ("If a person does freely consent to stop and talk, the officer's merely asking questions or requesting identification does not necessarily elevate a consensual encounter into a seizure. Neither does directing the person to remove his hands from his pockets, by itself, convert the encounter into a seizure."); State v. Aranguren, 42 Wn. App.

452, 455-56, 711 P.2d 1096 (1985) (encounter was not coercive because "officer used permissive language when he asked, "can I talk to you guys for a minute"). This rule is based on the notion that "the person approached need not answer any question put to him and may go on his way." State v. Belanger, 36 Wn. App. 818, 820-21, 677 P.2d 781 (1984).

In M.H.'s case, McDaniel's conduct is consistent with that found in seizure cases and strongly inconsistent with that involved in only police-citizen encounters. It is undisputed McDaniel approached M.H. and "ordered [M.H.] to walk to him and [M.H.] did so." Supp. CP \_\_\_, Findings and Conclusions, at 2, FOF 12. McDaniel then "ordered [M.H.] to wait by the patrol car and [M.H.] did so." Id., FOF 14. When McDaniel met M.H. at the car after speaking with the youths at the bus stop, he told M.H. he was taking him home. RP 56.

McDaniel did not request that M.H. do these things; instead, he demanded compliance. From the outset, McDaniel's encounter with M.H. was not permissive. This fact was not lost on M.H.; he moved away from the bus stop only because of the command. RP 82. Further, McDaniel acknowledged he used a stern, authoritative voice. RP 81. In addition, McDaniel directed M.H. to move into not one, but two different positions. Finally, McDaniel knew M.H. was respectful and never before had

disobeyed a command. Under these circumstances, a reasonable individual in M.H.'s shoes would not have thought he or she was free to disregard McDaniel and walk away. McDaniel seized M.H. when he ordered him away from the bus stop, next to the patrol car, and into the car.

2. *McDaniel's Seizure Was Not a Lawful Investigative Detention.*

Under either article I, section 7 or the Fourth Amendment, a police officer may seize an individual for investigative purposes only if he or she can articulate a reasonable suspicion the person stopped was engaged in criminal activity. Armenta, 134 Wn.2d at 10. The level of articulable suspicion required to support an investigative detention 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). Moreover, the substantial possibility must be that a particular person has committed or was about to commit a specific crime. Martinez, 135 Wn. App. at 180. An investigative stop must be justified at its inception and reasonably related in scope to the facts that justified the interference with freedom caused by the stop. State v. Tijerina, 61 Wn. App. 626, 629, 811 P.2d 241, review denied, 118 Wn.2d 1007 (1991).

McDaniel testified he detained M.H. because he was in violation of his court order by being at the bus stop with Skinner. RP 85-86. He decided to take M.H. home because he had a "gut feeling" the youth was not safe. RP 58, 93. He also wanted to make sure M.H. actually went inside his home and also wanted to explain to M.H.'s mother why he brought M.H. home. RP 88-89.

These reasons do not constitute an articulable reasonable suspicion of criminal activity. First, McDaniel had no authority to detain M.H. for violation of the no-contact portion of his deferred disposition. McDaniel did not have a court order to detain M.H. A law enforcement officer may take a juvenile into custody without a court order "if grounds exist for the arrest of an adult in identical circumstances." RCW 13.40.040(1)(b). There are no provisions for taking an adult into custody without a court order or warrant for violating a sentencing condition in comparable circumstances.

Under the Sentencing Reform Act, a community corrections officer (CCO) may arrest or cause the arrest of an offender without a warrant if the offender violates a condition or requirement of sentence. RCW 9.94A.631(1). A police officer has no authority to arrest a sentence violator without a warrant. In contrast, a police officer or a CCO may

arrest any offender who violates a condition of community custody if a warrant issues. RCW 9.94A.716(1). But only a CCO may arrest or cause the arrest of an offender if he or she has reasonable cause to believe an offender has violated a condition of community custody. RCW 9.94A.716(2).

RCW 10.31.100 governs warrantless arrests. It authorizes a police officer with probable cause to believe a person has committed or is committing a felony to arrest the person without a warrant. An officer may generally arrest a person without a warrant for committing a misdemeanor or gross misdemeanor only when the offense is committed in the presence of the officer, subject to certain exceptions.

One exception that requires brief mention is RCW 10.31.100(1), which authorizes a police officer to arrest a person if the officer has "probable cause to believe that a person has committed or is committing a misdemeanor or gross misdemeanor, involving . . . the use or possession of cannabis." McDaniel testified he saw M.H. smoking something, but could not tell if it was a tobacco product or marijuana. He also said he smelled the odor of burnt marijuana in the bus stop where M.H. has been smoking.

But McDaniel did not recover what M.H. had been smoking after he tossed it. RP 57. Nor did McDaniel smell the odor of marijuana on M.H.'s person. Furthermore, McDaniel said when he walked up to the bus stop, he saw four or five of M.H.'s friends. RP 56. Under these circumstances, McDaniel did not have probable cause to believe M.H., rather than someone else at the bus stop, smoked marijuana. "In order for the police to make a lawful arrest under RCW 10.31.100, there must be a finding of individualized probable cause." State v. Grande, 164 Wn.2d 135, 140, 187 P.3d 248 (2008); see also Martinez, 135 Wn. App. at 182 (to justify investigative detention, "there must be some suspicion of a particular crime or a particular person, and some connection between the two."). McDaniel had no such suspicion of marijuana use here; RCW 10.31.100(1) therefore did not justify the detention.

The same is true for tobacco consumption. Any minor who possesses cigarettes or tobacco products commits a class 3 civil infraction. RCW 70.155.080. Therefore, even if McDaniel had probable cause to believe M.H. was smoking tobacco, he had no authority to arrest M.H. and would have had to release him after writing the infraction. See State v. Duncan, 146 Wn.2d 166, 175, 43 P.3d 513 (2002) (declining to

extend investigative detention exception to warrant requirement to non traffic civil infractions).

Because McDaniel had no authority to arrest or detain M.H. for either violating a court order or smoking, his seizure of M.H. was not constitutionally justified.

3. *McDaniel's Detention did Not Fit Within the Narrow Exception for Community Caretaking.*

Under the community caretaking exception, a warrantless search may be permissible when necessary to render aid or perform routine health and safety checks. State v. Thompson, 151 Wash.2d 793, 802, 92 P.3d 228 (2004). In determining whether an officer's encounter with a person is reasonable as part of a routine check on safety, courts weigh the individual's interest in liberty from police intrusion against society's interest in having police officers perform a community caretaking role. State v. Acrey, 148 Wn.2d 738, 750, 64 P.3d 594 (2003); see U.S. v. Brignoni-Ponce, 422 U.S. 873, 878, 95 S. Ct. 2574, 45 L. Ed. 2d 607 (1975) (reasonableness of seizures subject to Fourth Amendment constraints "depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.").

This balance should generally be struck on the side of privacy "because '[t]he policy of the Fourth Amendment is to minimize governmental confrontations with the individual.'" Kinzy, 141 Wn.2d at 392 (quoting United States v. Dunbar, 470 F.Supp. 704, 708 (D.Conn.), affd., 610 F.2d 807 (2d Cir.1979)). The community caretaking exception should therefore be "cautiously applied" because of the "real risk of abuse in allowing even well-intentioned stops to assist." State v. DeArman, 54 Wn. App. 621, 626, 774 P.2d 1247 (1989).

The Supreme Court has twice applied these legal principles to stops of children on the streets for the ostensible purpose of fostering their health and safety. In Kinzy, two police officers seized a 16-year-old girl because (1) she appeared to be between 11 and 13 years old; (2) she was in a high narcotics area; (3) it was after 10 p.m.; and (4) she was in the company of a person known by the officers to be involved in narcotics. Kinzy, 141 Wn.2d at 391. One of the officers testified he wanted to find out the girl's age and ask her why she was in the area, who she was with, whether they were family members, and whether she knew them. Kinzy, 141 Wn.2d at 390-91.

After cautiously applying the community caretaking exception because of its potential for abuse, the court held the girl's interest in

freedom of expression, association and movement outweighed the public's interest in maintaining child safety. Kinzy, 141 Wn.2d at 391-92.

The result was different in Acrey. Officers responded to a 911 call reporting juveniles fighting in a commercial area at about 12:40 a.m. on a week night. One officer arrived and observed five boys who fit the description given by the 911 caller. He stopped the youths and asked if they had been fighting. They responded they had only been playing around and were walking to a convenience store. Acrey, 148 Wn.2d at 742. The officers concluded no one had been fighting, no one was injured, and no criminal activity was afoot. But because of the late hour and location, officers asked for the boys' names and home telephone numbers and directed them to sit on the sidewalk while the officers called their homes. Acrey, 148 Wn.2d at 743. The petitioner's mother requested officers to drive her son home, and one of the officers did. Acrey, 148 Wn.2d at 743.

The petitioner conceded the officers' initial detention was permissible, but only until they concluded there was no criminal activity. At that point, the petitioner argued, he should have been free to leave. Acrey, 148 Wn.2d at 748-49. The Court disagreed, holding the community caretaking exception justified the continued detention. Acrey, 148 Wn.2d at 753-54. The Court relied on the petitioner's young age (12

as opposed to the 16-year-old girl in Kinzy), the even later hour than in Kinzy, the absence of any adults with the boys, the isolated nature of the commercial area where no businesses were open and no residences were nearby, and the fact the initial investigative detention was permissible. Acrey, 148 Wn.2d at 753-754.

The Court also agreed with the Court of Appeals that the existence of the 911 call "raised at least some degree of concern for Acrey's well-being, regardless of whether there was any criminal activity." Acrey, 148 Wn.2d at 752. See State v. Moore, 129 Wn. App. 870, 884-886, 120 P.3d 635 (2005) (officer stopped car because registered owner Morris was listed as "missing/endangered," officer had no way of confirming Morris did not need assistance, and officer was "entitled to attempt to fully dispel the concerns about Morris before ceasing the noncriminal investigation into Morris' whereabouts and safety.").

The facts of M.H.'s case are much more like Kinzy than Acrey or Moore and warrant the same result. M.H. was 15 years old and at a bus stop in his own neighborhood at about 5 p.m. when he was seized. McDaniel did not see any criminal activity, M.H. was not truant, and M.H. did not ask for help. Although M.H. was court-ordered to refrain from contacting Skinner, there is no evidence Skinner was dangerous or

involved with narcotics. No one had reported that M.H. was missing or endangered, and no one called 911 about any conduct at the bus stop. Finally, McDaniel did not testify he reasonably suspected M.H. was not safe; rather, he maintained only that he had a "gut feeling" the youth was not in a safe place.

Therefore, unlike in Acrey, McDaniel at no point articulated a reasonable suspicion that would have justified an investigative detention. Further, his belief M.H. was unsafe was based solely on a professional "hunch." Using the same rationale as the Washington Supreme Court, a plurality of the California Supreme Court held that because reasonableness is the touchstone of the community caretaking exception, "hunches" carry no weight in the balancing process. People v. Ray, 21 Cal.4th 464, 476-477, 981 P.2d 928, 88 Cal.Rptr.2d 1, 11 (1999), cert. denied, 528 U.S. 1187 (2000). An appellate court later applied the same standard, concluding, "Just as officers cannot rely on their own hunches or unparticularized suspicions [to support a community caretaking claim], they cannot rely on those of lay witnesses." People v. Morton, 114 Cal.App.4th 1039, 1048, 8 Cal.Rptr.3d 388, 395 (Cal.App. 2003).

Although appellate counsel has found no Washington case applying this "no hunch" rule specifically to the community caretaking

exception, courts have applied it to the investigative detention exception. State v. Thompson, 93 Wn.2d 838, 842, 613 P.2d 525 (1980); State v. Doughty, 148 Wn. App. 585, 589, 201 P.3d 342, 344-45 (2009) (citing State v. Santacruz, 132 Wn. App. 615, 619, 133 P.3d 484 (2006)), review granted, 166 Wn.2d 1019 (2009); State v. O'Cain, 108 Wn. App. 542, 549, 31 P.3d 733 (2001); State v. Pressley, 64 Wn. App. 591, 597-98, 825 P.2d 749 (1992). Because both the investigative detention and community caretaking exceptions require a balancing to determine their reasonableness, this Court should hold an officer may not reasonably rely on the community caretaking exception where he merely has a hunch the object of the search may be in danger. McDaniel's "gut feeling" should not support the community caretaking rationale here.

The only substantive difference between M.H.'s case and Kinzy was M.H.'s mother's standing request to McDaniel and other neighborhood officers to bring her son home if he was up to no good or in the company of the wrong crowd. The trial court concluded this request triggered application of the Family Reconciliation Act, chapter 13.32A RCW, and provided additional support for use of the community caretaking exception. Supp. CP \_\_\_, conclusion of law 3.

RCW 13.32A.050 provides in pertinent part:

(1) A law enforcement officer shall take a child into custody:

(a) If a law enforcement agency has been contacted by the parent of the child that the child is absent from parental custody without consent; or

(b) If a law enforcement officer reasonably believes, considering the child's age, the location, and the time of day, that a child is in circumstances which constitute a danger to the child's safety or that a child is violating a local curfew ordinance[.]

An officer who takes a child into custody under RCW 13.32A.050(1)(a) or (b) must inform the child of the reason for the custody and transport the child home. RCW 13.32A.060(1)(a). The same provision requires an officer who releases a child into the custody of a parent to explain the reason for taking the child into custody.

The Kinzy Court, without elaboration, held the record did not support detention of the 16-year-old girl under the Family Reconciliation Act, "which clearly is designed to promote the public interest in the safety of children." Kinzy, 141 Wn.2d at 389. In dicta, the Acrey Court observed "the officers' conduct may have been permissible" under the Act. Acrey, 148 Wn.2d at 751 n.44.

In M.H.'s case, McDaniel's conduct was not justifiable under RCW 13.32.050. M.H. was not "absent from parental custody without consent."

Instead, M.H.'s mother testified her son had permission to be outside the home and to go to a neighborhood community center. RP 29-30.

Therefore, the seizure could have been authorized by the Act only if McDaniel reasonably believed, "considering the child's age, the location, and the time of day, that a child is in circumstances which constitute a danger to the child's safety[.]" RCW 13.32A.050(1)(b). McDaniel's own testimony belies such a belief; the officer candidly testified only that he had a "gut feeling" M.H. might not be safe. In any event, M.H.'s age of 15, the location of the stop only minutes from M.H.'s residence, and the unremarkable time of about 5 p.m. all militate against a seizure under the Family Reconciliation Act.

For these reasons, Officer McDaniel's seizure of M.H. was not authorized by his community caretaking function. The seizure was therefore unlawful.

#### *4. The Gun Must be Suppressed.*

"[E]vidence obtained as a result of an unlawful seizure is inadmissible." State v. Reichenbach, 153 Wn.2d 126, 135, 101 P.3d 80 (2004). Absent McDaniel's unlawful seizure, M.H. would not have dropped the gun and McDaniel would not have found it. Because it was the product of an illegal seizure, the gun must be suppressed. Without the

gun, the state cannot sustain the conviction of unlawful possession of a firearm. M.H.'s conviction should be reversed and the cause remanded for dismissal with prejudice.

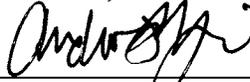
D. CONCLUSION

McDaniel seized M.H. without an articulable, reasonable suspicion of criminal activity. Further, the community caretaking exception did not justify the search. Because McDaniel's seizure was unlawful, the gun must be suppressed and the cause remanded for dismissal with prejudice.

DATED this 4 day of December, 2009.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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ANDREW P. ZINNER

WSBA No. 18631

Office ID No. 91051

Attorneys for Appellant

## APPENDIX

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**ORIGINAL**

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY  
JUVENILE DIVISION

STATE OF WASHINGTON,	)	
	)	
	)	Plaintiff,
	)	No 08-8-04406-0
	)	
vs	)	
	)	CrR 3 6 FINDINGS OF FACT AND
MARTIN ANTHONY HARRIS	)	CONCLUSIONS OF LAW
DOB 6/21/1993	)	
	)	
	)	Respondent
	)	
	)	

THE ABOVE-ENTITLED CAUSE having come on for fact-finding between June 11, 2009, and June 29, 2009, before Judge McCullough, in the above-entitled court, the State of Washington having been represented by Deputy Prosecuting Attorney Leah R Altaras, the respondent appearing in person and having been represented by his attorney, George Eppler, the court having heard sworn testimony and arguments of counsel, now makes and enters the following findings of fact and conclusions of law

FINDINGS OF FACT

- 1 On November 20, 2008, near 5 p m , Seattle P D Officer McDaniel observed the respondent standing at a bus stop in the High Point Neighborhood of West Seattle The bus stop was in a high crime area known for narcotics trafficking
- 2 The respondent and McDaniel had a cordial relationship of longstanding Officer McDaniel served as a counselor to the respondent in the past and the respondent's mother, Maria Ruiz, knew Officer McDaniel as well
- 3 The respondent's mother had directed Officer McDaniel to bring the respondent home if the respondent was not at school when he should have been, hanging out with the wrong crowd, or doing things that he should not be doing, or in an unsafe place

Norm Maleng,  
Prosecuting Attorney  
Regional Justice Center  
401 Fourth Avenue North  
Kent Washington 98032 4429

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- 1 4 Officer McDaniel had given the respondent a ride to the respondent's home before on at least  
2 one other occasion under different circumstances
- 3 5 The respondent was 15 years old on November 20, 2008
- 4 6 In the dim light of the afternoon, Officer McDaniel observed the respondent smoking what  
5 appeared to be a marijuana joint or a tobacco product
- 6 7 Present at the bus stop with the respondent were several other individuals, one of whom was  
7 known to Officer McDaniel as a juvenile male named Mark Skinner
- 8 8 The respondent has been previously prohibited by court order from having contact with Skinner  
9 and Officer McDaniel was aware of such prohibition
- 10 9 Officer McDaniel was concerned for the respondent's safety
- 11 10 Officer McDaniel parked his marked patrol vehicle in the Walgreen's parking lot located near  
12 the intersection of 35<sup>th</sup> Avenue S W and S W Morgan Street, across from the bus stop where  
13 the respondent was standing
- 14 11 Officer McDaniel exited his vehicle and walked towards the bus stop As Officer McDaniel  
15 approached, the respondent flicked the item that he was smoking onto the ground
- 16 12 Officer McDaniel ordered the respondent to walk to him, and the respondent did so The  
17 respondent did not try to walk away or leave the premises at any time
- 18 13 Officer McDaniel did not order the respondent to put his hands on the car and did not subject the  
19 respondent to a pat down search
- 20 14 Officer McDaniel ordered the respondent to wait by the patrol car and the respondent did so
- 21 15 Officer McDaniel smelled what he recognized based upon his training and experience to be  
22 marijuana when he walked back to the bus stop where the respondent had been
- 16 Officer McDaniel did not handcuff the respondent, nor did McDaniel expressly order the  
respondent to get into the patrol car
- 17 The respondent responded politely to the officer, voluntarily entered McDaniel's patrol care  
without being handcuffed, sat in the front passenger seat of the car next to Officer McDaniel,  
and Officer McDaniel drove the respondent home The officer did not smell the odor of burning  
marijuana on the respondent's person

- 1 18 On arrival at the respondent's apartment home, Officer McDaniel went to the front door and
- 2 knocked on the door, intending to tell the respondent's mother what had transpired Officer
- 3 McDaniel entered the home after being invited to do so by the respondent's mother, and in the
- 4 interests of protecting the respondent's privacy regarding the Officer's communication with the
- 5 respondent and his mother
- 6 19 Once inside the apartment, the respondent's mother walked upstairs The respondent was
- 7 standing in front of Officer McDaniel at the bottom of the stairs
- 8 20 The respondent walked upstairs at the order of Officer McDaniel, and a 9 mm handgun fell
- 9 from the respondent's pants
- 10 21 The respondent testified that he obeyed Officer McDaniel and did not think about walking away
- 11 when the officer spoke to him
- 12 22 The respondent also testified that Officer McDaniel patted him down for weapons prior to his
- 13 entry into Officer McDaniel's vehicle and that the respondent attempted to go up the stairs in
- 14 front of both his mother and Office McDaniel on entry into his home and was ordered to return
- 15 by Officer McDaniel The court did not find the respondent's testimony credible as to those
- 16 particular points

And having made those Findings of Fact, the court also now enters the following

CONCLUSIONS OF LAW

I

- 1 Officer McDaniel did not seize the respondent A reasonable person who had a relationship
- 2 with Officer McDaniel like the respondent did would have felt free to leave the scene The
- 3 respondent voluntarily entered Officer McDaniel's car
- 4 Even if Officer McDaniel did seize the respondent, it was justified by the community
- 5 caretaking exception to the warrant requirement
- 6 The Family Reconciliation Act, RCW 13 32A 050, mandates a police officer to transport a
- 7 child (under 18 years old) home if so requested by a parent who indicates that the child is
- 8 outside of parental custody, or when the officer believes that the child's safety is in danger
- 9 The respondent was under 18 years old at the time of the incident
- 10 The respondent's mother authorized Officer McDaniel to bring the respondent home if he
- 11 was in an unsafe place with the wrong people

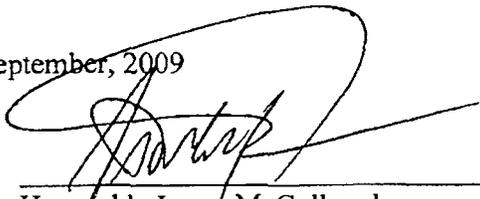
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6 When Officer McDaniel contacted the respondent, the respondent was in the presence of an individual in violation of an outstanding court order, smoking something that appeared to be marijuana or a tobacco product, and the officer had a reasonable basis upon which to associate his concerns with the respondent's safety to intervention

II

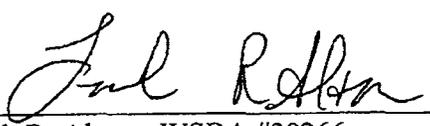
Judgment should be entered in accordance with Conclusion of Law I In addition to these written findings and conclusions, the court hereby incorporates its oral findings and conclusions as reflected in the record

SIGNED this 4<sup>th</sup> day of September, 2009

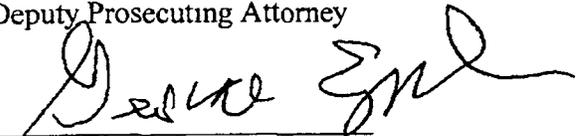


Honorable Leroy McCullough

Presented by



Leah R. Altaras WSBA #39266  
Deputy Prosecuting Attorney



George Eppler WSBA #15264  
Attorney for Respondent

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 63934-0-1
	)	
M.H.,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 4<sup>TH</sup> DAY OF DECEMBER 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] M.H.  
22435 SE 240<sup>TH</sup>  
MAPLE VALLEY, WA 98038

**SIGNED** IN SEATTLE WASHINGTON, THIS 4<sup>TH</sup> DAY OF DECEMBER 2009.

x Patrick Mayovsky

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STATE OF WASHINGTON  
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