

NO. 65074-2-1

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

REC'D
SEP 14 2010
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

BOBANICA HAULCY,

Appellant.

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

The Honorable William L. Downing, Judge

BRIEF OF APPELLANT

2010 SEP 14 PM 4:21
COURT OF APPEALS
DIVISION ONE

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied appellant's motion to suppress under CrR 3.6.

2. The court erred in finding that police had probable cause to arrest appellant and that appellant was not arrested until handcuffed.¹

3. Defense counsel was ineffective in failing to challenge all evidence gathered as a result of appellant's arrest.

Issues Pertaining to Assignments of Error

1. Officers testified that they saw appellant associating with known drug users and exchanging unknown objects for money. They could not see the objects involved and the group dispersed before they could make contact. Did officers have probable cause to arrest appellant for possession of cocaine?

2. Officers claimed that appellant dropped cocaine on the ground after they confronted her. The trial court found that this occurred before appellant's arrest, which the court defined as the moment she was handcuffed. Where, in fact, officers had

¹ The court's findings and conclusions are attached to this brief as an appendix.

manifested their intent to arrest appellant and actually seized her before she discarded the cocaine, was appellant already arrested before the cocaine was discarded?

3. Defense counsel assumed that appellant had no standing to challenge the cocaine because it had been dropped on the ground and only moved to suppress money appellant was carrying when arrested. Where appellant was already unlawfully arrested when the cocaine was dropped, was defense counsel ineffective for failing to seek suppression of the cocaine?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County Prosecutor's Office charged Bobanica Haulcy with possession of a controlled substance (cocaine) with intent to deliver. CP 1-4. Defense counsel moved to suppress cash found on Haulcy at the time of her arrest, arguing the arrest had not been supported by probable cause, but did not move to suppress the cocaine she allegedly possessed, believing he was precluded from doing so because Haulcy had "abandoned" the cocaine and therefore lacked standing. CP 12-13; 2RP 4. The motion was denied. CP 43-45.

A jury found Haulcy guilty, and the court imposed a standard

range sentence of 12 months and a day. CP 32, 37. Haulcy timely filed her notice of appeal. CP 47.

2. Facts Pertaining to Motion to Suppress

The State called two witnesses at the CrR 3.6 hearing on the defense motion to suppress – Seattle Police Officers James Lee and Matthew Pasquan. 2RP 5, 32.

At about 10:00 p.m. on March 21, 2009, the officers were conducting “emphasis patrol” in an unmarked SUV, looking for narcotics activity in Pioneer Square, which is known for frequent drug activities. 2RP 6-7, 34-35. Both men were wearing tactical vests with the word police written in white letters on the front and back, a duty belt, and a badge. 2RP 7, 35.

As the officers travelled south on 2nd Avenue, they pulled over and spotted two black females – later identified as Bobanica Haulcy and her sister, Kelly Hendricks – standing in a doorway and surrounded by local drug users. The women were taking money in exchange for unidentified objects, and the officers believed they were witnessing narcotic sales. 2RP 8, 22, 30, 35-36. After approximately 10 seconds, someone in the group spotted the SUV and alerted the others. Most of the group headed north, but Haulcy and Hendricks started walking south. 2RP 9, 37, 44.

Officers decided to detain the two women. 2RP 25-26. Officer Pasquan, who was driving the SUV, drove south and pulled in front of the two women at the end of the block. 2RP 37, 45. Officer Lee, who was in the passenger seat, jumped out, identified himself as a police officer, and yelled at the women to stop. 2RP 38. The officers' testimony diverges at this point. According to Officer Lee, both women did an about face, running north on 2nd Avenue, and he ran after them. 2RP 9-10, 26-27. According to Officer Pasquan, however, Hendricks ran north, Officer Lee chased her, and Haulcy then began to chase the other two. 2RP 38, 47.

Officer Pasquan drove around the block in an attempt to meet the group at the north end of the block. 2RP 38. Meanwhile, Officer Lee ran behind Hendricks as she ran east across 2nd Avenue, pulled out a bindle from her clothing, tore it open, and dispersed what appeared to be crack cocaine onto the street. 2RP 10-12. Lee caught Hendricks and began to handcuff her. 2RP 12. As he was doing so, Haulcy approached. Lee repeatedly told her to step back. Haulcy would temporarily comply, but then come closer again. 2RP 12.

Officer Pasquan pulled up in the SUV, got out, and focused on Haulcy, who was standing 10 to 15 feet from Officer Lee and

appeared to be animated and yelling. 2RP 39, 49. As soon as Haulcy saw Pasquan approaching, she began to back up. 2RP 39. Pasquan said "Seattle Police, Stop," and Haulcy complied. 2RP 40. According to Pasquan, Haulcy then "sloughed" crack cocaine, opening her right hand and letting it fall to the ground. 2RP 40. Pasquan placed Haulcy in cuffs and recovered the cocaine from the ground. 2RP 41. In a search incident to arrest, Pasquan found that Haulcy was carrying about \$79.00. 2RP 47.

As noted above, defense counsel only moved to suppress the money found on Haulcy and not the drugs. CP 12-13; 2RP 4. Counsel argued that officers did not have probable cause to arrest Haulcy for a drug offense and, therefore, the money had to be suppressed. 2RP 50-54.

In its written findings on denial of the defense motion, which incorporate its oral findings, the trial court concluded that Haulcy was not arrested until she was cuffed. By that time, officers had probable cause for the arrest based on the suspected transactions in the doorway and Haulcy dropping rocks on the ground when confronted by Officer Pasquan. CP 44-45; 2RP 58-59. The court believed it unnecessary to determine whether Haulcy ran from the officers when initially contacted or, as Officer Pasquan recalled, she ran

northbound attempting to follow Officer Lee as he chased Ms. Hendricks. See 2RP 57 (“at the very least,” Hendricks ran). The written findings simply indicate that both women ran northbound. CP 44.

At trial, Officers Lee and Pasquan testified consistently with their testimony at the pretrial hearing. 3RP 10-112. The State also called a forensic scientist from the crime lab to confirm the rocks attributed to Haulcy contained cocaine. 3RP 91-92, 125-127, 132.

Kelly Hendricks testified and admitted that on the night in question, she had crack cocaine, which she attempted to discard while being pursued by Officer Lee. 3RP 146-151. But she denied interacting with the group of drug users and denied that Haulcy made any suspicious exchanges with anyone or dropped cocaine on the ground. She also testified that she was the only one who initially ran when confronted by officers. 3RP 144-145, 153-154, 157-160. Haulcy also testified and denied that she ever possessed cocaine that evening or was in the area to sell. 3RP 178-179, 181. She chased after and confronted Officer Lee because she was scared for her sister, whom she did not know was in possession of cocaine. 3RP 174-180.

Haulcy now appeals.

C. ARGUMENT

POLICE DID NOT HAVE PROBABLE CAUSE AT THE TIME OF HAULCY'S ARREST.

Under the Fourth Amendment to the United States Constitution and article 1, § 7 of the Washington Constitution,² warrantless arrests must be supported by probable cause. State v. Bonds, 98 Wn.2d 1, 8-9, 653 P.2d 1024 (1982), cert. denied, 464 U.S. 831 (1983). Probable cause exists only "when facts and circumstances within the arresting officer's knowledge are sufficient to cause a person of reasonable caution to believe that a crime has been committed." State v. Huff, 64 Wn. App. 641, 646-47, 826 P.2d 698, review denied, 119 Wn.2d 1007 (1992). Whether the facts satisfy the probable cause requirement is a question of law this Court reviews de novo. Ornelas v. United States, 517 U.S. 690, 116 S. Ct. 1657, 1663, 134 L. Ed. 2d 911 (1996); State v. Armenta, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997); State v. Dearbone, 125 Wn.2d 173, 178, 883 P.2d 303 (1994).

² The Fourth Amendment provides, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated"

Article 1, § 7 provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

As an initial matter, the trial court was incorrect when it concluded Haulcy was not arrested until she was handcuffed. Arrest does not require physical restraint. Rather, "An arrest takes place when a duly authorized officer of the law manifests an intent to take a person into custody and actually seizes or detains such person. The existence of an arrest depends in each case upon an objective evaluation of all the surrounding circumstances." State v. Patton, 167 Wn.2d 379, 387, 219 P.3d 651 (2009) (quoting 12 ROYCE A. FERGUSON, JR., WASHINGTON PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 3104, at 741 (3d ed. 2004) (footnote omitted). And the officer need not orally communicate the intent to arrest. City of Seattle v. Sage, 11 Wn. App. 481, 485, 523 P.2d 942 (citing State v. Sullivan, 65 Wn.2d 47, 51, 395 P.2d 745 (1964)), review denied, 84 Wn.2d 1013 (1974).

Haulcy was seized prior to dropping the crack cocaine from her hand. A person is seized "when, by means of physical force or a show of authority, his or her freedom of movement is restrained and a reasonable person would not have believed he or she is (1) free to leave, given all the circumstances, or (2) free to otherwise decline an officer's request and terminate the encounter." State v. O'Neill, 148 Wn.2d 564, 574, 62 P.3d 489 (2003) (internal

quotations and citations omitted). Statements such as “halt,” “stop, I want to talk to you,” “wait right here,” and the like qualify as seizures. See State v. Whitaker, 58 Wn. App. 851, 854, 795 P.2d 182 (1990), review denied, 116 Wn.2d 1028 (1991); State v. Friederick, 34 Wn. App. 537, 541, 663 P.2d 122 (1983). Haulcy and Hendricks were seized as soon as the officers blocked their path on 2nd Avenue with the SUV and Officer Lee ordered the women to stop. See CP 44 (court finds that Officer Lee yelled “Police Stop”). Officer Pasquan’s similar command to Haulcy, after he drove around the block and confronted her, also qualifies as a seizure.

Moreover, officers had already manifested their intent to arrest both women prior to Haulcy dropping the cocaine. Immediately after officers blocked the women’s path and Lee had told them to stop, Haulcy watched as Lee chased down her sister, physically took her to the ground, and began to place handcuffs on her.³ 2RP 12. Officer Pasquan “gunned the car,” circled around the block, stopped near Haulcy, and immediately approached her. She began to back away but Pasquan prevented her from doing so

³ Although the trial court did not find that Haulcy ran away from Officer Lee, even if she had, it would not impact the point of arrest. See Patton, 167 Wn.2d at 388 (one does not avoid seizure or arrest by failing to yield to a show of authority).

by ordering her to stop. 2RP 39-40, 46. Under an objective evaluation of the circumstances, Haulcy was under arrest at that point and, therefore, prior to dropping the cocaine.

Because Haulcy dropped the cocaine *post-arrest*, defense counsel was mistaken in his belief that she had “abandoned” the cocaine and therefore lacked standing to challenge its admission. A defendant has automatic standing when (1) possession is an essential element of the offense and (2) the defendant was in possession of the contraband at the time of the contested seizure. State v. Evans, 159 Wn.2d 402, 407, 150 P.3d 105 (2007) (citing State v. Simpson, 95 Wn.2d 170, 181, 622 P.2d 1199 (1980)).

As for abandonment, generally, police may retrieve voluntarily abandoned property without violating an individual's constitutional rights. State v. Nettles, 70 Wn. App. 706, 708, 855 P.2d 699 (1993), review denied, 123 Wn.2d 1010 (1994); State v. Whitaker, 58 Wn. App. 851, 853, 795 P.2d 182 (1990), review denied, 116 Wn.2d 1028 (1991). But property is not voluntarily abandoned where a defendant demonstrates (1) unlawful police conduct and (2) a causal nexus between that conduct and the abandonment. Nettles, 70 Wn. App. at 708; Whitaker, 58 Wn.

App. at 853; see also Evans, 159 Wn.2d at 408 (“Involuntary abandonment occurs when property was abandoned as a result of illegal police behavior.”). Here, Officer Pasquan illegally arrested Haulcy without probable cause. This led directly to Haulcy’s decision to drop what was in her hand. Therefore, the necessary nexus is established.

Because Haulcy did not voluntarily abandon the cocaine and had standing to challenge its seizure as the product of her unlawful arrest, defense counsel was ineffective for failing to move for its suppression. Failure to move for suppression of evidence is ineffective where there is no conceivable legitimate tactic for doing so and it resulted in prejudice. See State v. Reichenbach, 153 Wn.2d 126, 130-131, 137, 101 P.3d 80 (2004) (counsel ineffective for failure to challenge seizure of methamphetamine in possession case). There was no legitimate tactic for counsel’s failure to challenge the most important evidence against Haulcy, just a misunderstanding of the law. Moreover, Haulcy suffered prejudice because a proper challenge would have resulted in suppression of the evidence.

Counsel was correct on one point: there was no probable cause. As an initial matter, the fact an area is known for illicit drug

activity is insufficient to establish probable cause. “It is beyond dispute that many members of our society, live, work, and spend their time in high crime areas, a description that can be applied to parts of many of our cities.” State v. Larson, 93 Wn.2d 638, 645, 611 P.2d 771 (1980). Moreover, associating with individuals suspected of criminal activity (here, known drug users) does not establish probable cause, either. See State v. Broadnax, 98 Wn.2d 289, 296, 654 P.2d 96 (1982) (“Merely associating with a person suspected of criminal activity does not strip away the protections of the fourth amendment to the United States Constitution.”), overruled on other grounds, Minnesota v. Dickerson, 508 U.S. 366 (1993).

This Court has held that multiple exchanges of objects between a suspect and passersby, under suspicious circumstances, can establish probable cause for arrest. See State v. Fore, 56 Wn. App. 339, 343-345, 783 P.2d 626 (1989), review denied, 114 Wn.2d 1011 (1990). In Fore, an experienced officer watched as the defendant repeatedly exchanged with motorists in a park a substance packaged in small plastic baggies for cash. The officer also noted the suspect had a larger bag, inside of which he could see several smaller bags containing “green vegetable

matter.” Fore, 56 Wn. App. at 340-342. Whereas the officer in Fore had a clear view of several transactions involving baggies of a green marijuana-like substance for cash, Officers Lee and Pasquan were only able to observe Haulcy and Hendricks for a very brief time (about 10 seconds) and could not see what they allegedly exchanged for money. This falls short of the officer’s observations in Fore.

Haulcy’s case bears greater similarity to State v. Poirier, 34 Wn. App. 839, 664 P.2d 7 (1983). Officers in that case observed Poirier standing in a restaurant parking lot. A second man arrived at the location in his car, parked, and approached Poirier. Officers continued to watch as the two men exchanged items that appeared to be white envelopes or packages. Both men were arrested. A search revealed a package of suspected cocaine and a package of money on the men. Id. at 841-842. This Court found that while the circumstances may have warranted officers approaching and speaking with the two men, and police may have special skills in recognizing street sales, the evidence fell short of probable cause to arrest the men. Id. at 842-843.

While there are some distinctions between Poirier and Haulcy’s case – there was no evidence the parking lot in Poirier

was known for narcotics traffic or that any person involved was a known drug user – these distinctions are insufficient to justify a different outcome. Both cases involve officers making premature arrests predicated on what they perceived to be the sale of narcotics without sufficient confirmation. Based on the information available to Officers Lee and Pasquan, a person of reasonable caution would not have believed that Haulcy possessed cocaine at the time of her arrest. In finding otherwise, the trial court erroneously considered Haulcy's act of dropping cocaine on the ground, which it mistakenly believed preceded her arrest. See CP 44-45; 2RP 58-59.

Any evidence or statements derived directly or indirectly from an illegal seizure must be suppressed unless sufficiently attenuated from the initial illegality to be purged of the original taint. Wong Sun v. United States, 371 U.S. 471, 484-88, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963); State v. Warner, 125 Wn.2d 876, 888, 889 P.2d 479 (1995); State v. Chapin, 75 Wn. App. 460, 463, 879 P.2d 300 (1994), review denied, 125 Wn.2d 1024 (1995). The courts apply a "but-for analysis." State v. Aranguren, 42 Wn. App. 452, 457, 711 P.2d 1096 (1985). But for the unlawful seizure, there would not have been evidence that Haulcy possessed a controlled substance or

suspected proceeds from sales. All subsequent evidence had to be suppressed.

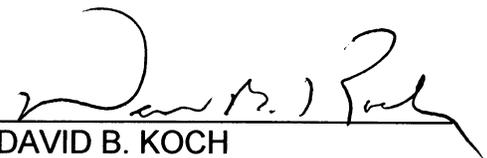
D. CONCLUSION

Defense counsel was correct that Haulcy was arrested without probable cause, but ineffective for failing to recognize she had standing to challenge the cocaine. The trial court erred when it found probable cause and that Haulcy was not arrested until placed in handcuffs. Haulcy's conviction should be reversed and the case dismissed.

DATED this 14th day of September, 2010.

Respectfully submitted,

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APPENDIX

FILED
KING COUNTY, WASHINGTON

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

BOBANICA HAULCY,

Defendant,

No. 09-1-01930-1 SEA

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON CrR 3.6
MOTION TO SUPPRESS PHYSICAL,
ORAL OR IDENTIFICATION
EVIDENCE

A hearing on the admissibility of physical, oral, or identification evidence was held on January 19, 2010 before the Honorable Judge William Downing. After considering the evidence submitted by the parties and hearing argument, to wit: the testimony of the State's witnesses who included Seattle Police Department Officer Matthew Pasquan and Officer James Lee; the court makes the following findings of fact and conclusions of law as required by CrR 3.6:

- THE UNDISPUTED FACTS: The facts in this case are undisputed. On March 21, 2009 at approximately 10:00pm, Seattle Police Department Officers James Lee and Matthew Pasquan were on narcotics emphasis patrol in the Pioneer Square area. They were in an unmarked sport utility vehicle on Sedond Avenue when they observed two females, later

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 1

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1 identified as the defendant Bobanica Haulcy and her sister, Kelly Haulcy aka Haully,
2 engaged in a huddle with a group they recognized as known drug users. Playing their
3 parts in what looked to be a prototypical street narcotics transaction, the females appeared
4 to be the suppliers and the others appeared to be the purchasers. Officer Lee saw each of
5 the females place a small object into the outstretched hand of someone who then handed
6 cash to her. When the officers' vehicle was recognized, the buyers scattered. Officer
7 Pasquan drove ahead of the two females as they walked southbound on Second Avenue.
8 He stopped the vehicle as he reached James Street. Officer Lee got out and yelled,
9 "Police Stop". The women ran northbound, with one crossing the street in an eastbound
10 direction, and Off. Lee gave pursuit as Off. Pasquan drove around the block.

11 Kelly Haulcy ran to the east side of the street, as she ran discarding objects which
12 appeared to be suspected rocks of cocaine. Officer Lee effectuated the arrest of Kelly
13 Haulcy. During the arrest, the defendant was standing in the vicinity and was asked to
14 stand back. Officer Pasquan arrived on the scene and saw the defendant's right hand drop
15 towards the street as she surreptitiously dropped something to the ground. The officer
16 recognized what had been dropped as small white rocks consistent with crack cocaine in
17 appearance, and she was placed under arrest. In a search incident to her arrest, \$79 in
18 cash was recovered.

19 3. FINDINGS:

20 The Court advised the defendant of her rights at the hearing and, after consultation with
21 counsel, she elected not to testify. The Court finds the testimony of Officers James Lee
22 and Matthew Pasquan credible and the facts to be as stated above.

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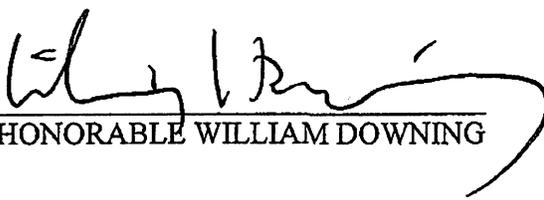
4. CONCLUSIONS OF LAW AS TO THE ADMISSIBILITY OF THE EVIDENCE SOUGHT TO BE SUPPRESSED:

a. PHYSICAL EVIDENCE

The defendant moved to suppress evidence based on a lack of probable cause to arrest the defendant, when first observed, for Drug Loitering. The Court concludes that the defendant was not arrested until she was handcuffed by Officer Pasquan. Officer Pasquan had probable cause to effectuate the arrest of the defendant at that time for the crime of possession of cocaine.

In addition to the above written findings and conclusions, the court incorporates by reference its oral findings and conclusions.

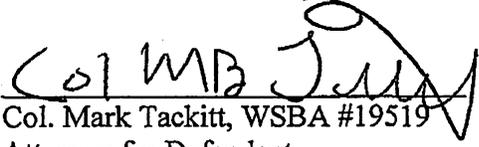
Signed this 12th day of March, 2010.


HONORABLE WILLIAM DOWNING

Presented by:



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Deputy Prosecuting Attorney


Col. Mark Tackitt, WSBA #19519
Attorney for Defendant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 65074-2-1
)	
BOBANICA HAULCY,)	
)	
Appellant.)	

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 14TH DAY OF SEPTEMBER, 2010, 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] BOBANICA HAULCY
1414 SW CAMBRIDGE STREET
SEATTLE, WA 98106

SIGNED IN SEATTLE WASHINGTON, THIS 14TH DAY OF SEPTEMBER, 2010.

x *Patrick Mayovsky*

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