

NO. 65099-8-1

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

REC'D

OCT 06 2010

King County Prosecutor  
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

SONTAVIA HARRIS,

Appellant.

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

The Honorable Michael Hayden, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it concluded police had probable cause to arrest appellant.

2. The trial court erred when it denied a motion to suppress all evidence obtained as a result of appellant's unlawful arrest.

3. The trial court erred when it failed to enter written findings of fact and conclusions of law under CrR 3.6.

Issues Pertaining to Assignments of Error

1. A Seattle Police officer claimed to see appellant possibly engaged in an exchange of an unidentified object for money. Did the trial court err when it concluded police had probable cause to arrest appellant for delivery of a controlled substance?

2. In light of appellant's unlawful arrest, should all evidence gathered incident to that arrest have been suppressed?

3. Where CrR 3.6 requires entry of written findings and conclusions following hearing on a motion to suppress, did the trial court err when it failed to enter written findings and conclusions?

B. STATEMENT OF THE CASE

a. Procedural Facts

The King County Prosecutor's Office charged Sontavia Harris with one count of possessing a controlled substance (cocaine) with intent to deliver, in violation of RCW 69.50.401(1), (2)(a). CP 1-5. Harris moved to suppress all evidence of the cocaine, arguing it was the product of an unlawful search and seizure. CP 7; 2RP<sup>1</sup> 48-55, 58-60. Following a CrR 3.6 hearing, the court denied the motion. 2RP 60-63. A jury found Harris guilty, the court imposed a standard range sentence, and Harris timely filed her Notice of Appeal. CP 42, 48, 54-64.

b. Substantive Facts

The State called one witness at the CrR 3.6 hearing: Seattle Police Officer Dave Blackmer. 2RP 4. Blackmer has extensive experience working with narcotics, having spent the past five years with the West Precinct Anticrime Team handling street level enforcement. 2RP 5. He has been involved in thousands of arrests. 2RP 5-6. At approximately 9:15 p.m. on the evening of

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<sup>1</sup> This brief refers to the verbatim report of proceedings as follows: 1RP – January 25, 2010; 2RP – January 26, 2010; 3RP – January 27, 2010; 4RP – January 28, 2010; 5RP – February 10, 2010.

August 3, 2009, officer Blackmer was stationed at a fixed and elevated location within the Smith Tower looking for narcotics activity on the streets below. 2RP 7, 31, 45. This is an area known for drug sales. 2RP 9.

Using binoculars, Blackmer spotted Sontavia Harris and her sister (Christina Harris) exiting the Merchant's Café. 2RP 7-8. The two women crossed Yesler Way and stopped at the "sinking ship garage." 2RP 8. Two gentlemen approached the women and, after a brief conversation, Harris motioned for the men to follow her. Everyone headed toward the garage entrance and out of Officer Blackmer's line of vision. 2RP 8, 10. The group reappeared in about 30 seconds and the two men walked away. 2RP 10-11. Blackmer did not see what happened in the garage, but was suspicious that it involved narcotics. 2RP 11.

According to Officer Blackmer, Harris and her sister lingered by the entrance to the parking garage. 2RP 12. Another pair of men approached and spoke briefly with Harris. She motioned for the men to follow her. The group headed east on Yesler, turned north on Second Avenue, and stopped at a pay phone near an upper entrance to the parking garage. 2RP 12-13, 20-21. Harris

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picked up the phone receiver, reached inside the waistband of her pants as if she were pulling them up,<sup>2</sup> made a hand movement consistent with placing an object on a ledge by the phone, and then hung up the phone. Blackmer did not see Harris put money in the phone or dial. Nor did he see what, if anything, she had in her hand. 2RP 13-14, 16, 34. Harris walked away from the phone. One of the men then approached the phone. He made a hand motion toward the ledge, looked at his hand, and then moved his hand towards his mouth. When the man tried to hand some cash to Harris, she waived him off and he gave it to her sister instead. 2RP 15-18. Blackmer testified that crack cocaine is not soluble and is often carried in the mouth. 2RP 18.

Harris' sister had been standing back and looking up and down Second Avenue. Blackmer believed she was acting as a lookout while Harris sold crack. 2RP 18-19. The two men walked away, heading south on Second Avenue, while Harris and her sister circled around the block, ending up back at the entrance to the parking garage on Yesler Way. 2RP 21-22. Another man

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<sup>2</sup> Blackmer conceded Harris may in fact have been simply pulling up her pants rather than reaching for an object near the waistband. 2RP 32.

contacted Harris and the two began walking east on Yesler. 2RP 22-23. The man had money in his hand. 2RP 26. Two other gentlemen (one with a baby carriage) joined them. As the group crossed Second Avenue and left Blackmer's line of sight, he called in an arrest team. 2RP 23-27. Harris and her sister were placed under arrest. 2RP 29.

Officer Blackmer testified that he believed Harris had committed drug traffic loitering. 2RP 29-30. He also believed he had witnessed a narcotics transaction at the pay phone. 2RP 30. A strip search revealed a small baggie of crack cocaine in Harris' bra and \$2.00 in cash. 2RP 41. Additional cash was found in Harris' sister's purse. 2RP 42.

Citing State v. Rodriguez-Torres, 77 Wn. App. 687, 893 P.2d 650 (1995), the State argued that Officer Blackmer had probable cause to arrest Harris for possession with intent to deliver cocaine. 2RP 56-57; Supp. CP \_\_\_\_ (sub no. 20, State's Response to Defendant's CrR 3.6 Motion to Suppress, at 3-4). Alternatively, the State argued there was probable cause to believe Harris had committed drug traffic loitering in violation of Seattle Municipal Code 12A.20.050. 2RP 57-58; Supp. CP \_\_\_\_ (sub no. 20, State's Response to Defendant's CrR 3.6 Motion to Suppress, at 4-5). The

defense argued Rodriguez-Torres was distinguishable. It also challenged probable cause for drug loitering and argued the ordinance was unconstitutional as applied to Harris' conduct. 2RP 48-55, 58-60.

The Honorable Michael Hayden found probable cause to arrest Harris for selling illegal drugs based on what Officer Blackmer observed at the pay phone. 2RP 61-63. He declined to find probable cause based on drug loitering and noted he too had a problem with the ordinance. RP 62, 64.

At trial, the State's evidence was similar to that from the CrR 3.6 hearing regarding Officer Blackmer's observations and the circumstances leading to Harris' arrest. See generally 3RP 11-62. Officers from the arrest team testified that by the time they arrested Harris and her sister, there was no one else near them. 3RP 66-68, 83-85. A search of the sister's purse revealed about \$493.00 in crumpled bills. 3RP 85-88. A female officer testified that she discovered a baggy of suspected cocaine in Harris' bra during a strip search. None was found in her pants. 3RP 96-98, 101. The defense stipulated that the substance in the baggy weighed 2.8 grams and contained cocaine. 3RP 6-11.

Harris testified in her own defense. She admitted being a user and explained that all of her interactions with various individuals on the night of her arrest – including the transaction at the pay phone – involved attempts to buy a pipe to smoke the cocaine, which she had purchased that evening for personal use. 3RP 121-129. Harris had paid a gentleman \$20.00 for his pipe by the Yesler entrance to the parking garage. Harris thought the pipe now belonged to her. But when she started to walk away, the man told her she needed to use it and give it back. 3RP 126, 134-135. This was unacceptable to Harris. Aware they might be under surveillance, Harris pretended to use the pay phone on Second Avenue, placed the pipe on the ledge for the man to retrieve, and told the man to return the \$20.00 to her sister, which he did. 3RP 126-127, 135-137.

Christina Harris also testified that her sister was simply trying to buy a pipe to smoke her crack cocaine and that she returned the pipe once she discovered the seller had no intention of parting with it. 3RP 107, 115-116. Her recollection, however, was that her sister purchased the pipe by the pay phone rather than down the street. 3RP 113-114. She also testified that the cash she was carrying when arrested was housing money she had received

through public assistance. 3RP 110. She testified the cash was in her pocket, not her purse, and it was in a neat stack. 3RP 118, 120.

The defense asked jurors to find Harris not guilty of possession with intent to deliver and guilty of the lesser offense of possession. 3RP 172-173.

C. ARGUMENT

THE TRIAL COURT ERRED WHEN IT DENIED THE MOTION TO SUPPRESS.

Under the Fourth Amendment to the United States Constitution and article 1, § 7 of the Washington Constitution,<sup>3</sup> 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

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<sup>3</sup> 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."

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).

Judge Hayden has failed to enter the requisite written findings and conclusions of law required under CrR 3.6. See CrR 3.6(b) (“If an evidentiary hearing is conducted, at its conclusion the court shall enter written findings of fact and conclusions of law.”). In his oral ruling, however, Judge Hayden found that Officer Blackmer had probable cause to believe that Harris had engaged in the illegal sale of a controlled substance. 2RP 61-63; RCW 69.50.401(a) (making it a crime to deliver a controlled substance).

As an initial matter, that Officer Blackmer was surveilling an area of Seattle 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 does not establish probable cause, either. See State v. Broadnax, 98 Wn.2d 289, 296, 654 P.2d 96 (1982), overruled on other grounds, Minnesota v. Dickerson, 508 U. S. 366 (1993); see also State v. Doughty, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_ (Slip op., at 4, filed 9/23/2010) (neither presence in a high crime area nor proximity to others suspected of criminal activity justifies a warrantless seizure).

Both the State and Judge Hayden believed Harris' case was similar to State v. Rodriguez-Torres. Supp. CP \_\_\_ (sub no. 20, State's Response to Defendant's CrR 3.6 Motion to Suppress, at 3-4); 2RP 48-49, 56, 60. But there are key distinctions. In Rodriguez-Torres, an officer saw a man hand the defendant money and then pick a small item out of the defendant's cupped hand. As the officer approached, someone yelled "police." The second man took his money back from the defendant and dropped the object on the ground. The defendant picked up the object and placed it in his pocket. He attempted to "hurry away from the scene," looking over his shoulder and watching the officer as he did so. The officer stopped the defendant and pulled cocaine from his pocket. Rodriguez-Torres, 77 Wn. App. at 689-90. Under these circumstances, this Court upheld the search of the defendant's

pocket because the officer had quite clearly seen a drug transaction. Id. at 693-94.

In contrast, Officer Blackmer could not even say that Harris had an object in her hand while by the pay phone – only that she and the gentleman made gestures consistent with an object. 2RP 15-18. Moreover, unlike Rodriguez-Torres, at no time did Harris flee the scene when police arrived. See State v. Baxter, 68 Wn.2d 416, 421-422, 413 P.2d 638 (1966) (flight is an element of probable cause). Therefore, officers did not have the same confirmation of suspicion found in Rodriguez-Torres that a drug sale had taken place.

This Court has held that multiple exchanges of unidentified 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 for cash, as previously discussed, Officer Blackmer could not even confirm that Harris left anything for the gentleman by the pay phone. This falls well short of the officer's observations in Fore. And while Blackmer also saw Harris and her sister interact with two other groups of men, he could not say that Harris exchanged anything with these individuals, either. He did not see any transactions with these men. 2RP 43-45.

Harris' 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 distinctions between Poirier and Harris' case – there was no evidence the parking lot in Poirier was known for narcotics traffic and no furtive behavior – 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 Officer Blackmer, a person of reasonable caution would not have believed that Harris was guilty of selling a controlled substance.

Officer Blackmer did have an available option, however, short of arrest. There was arguably sufficient information to support a Terry<sup>4</sup> stop, under which an officer may briefly detain and question a person reasonably suspected of criminal activity. State v. Alcantara, 79 Wn. App. 362, 365, 901 P.2d 1087 (1995); State v. Watkins, 76 Wn. App. 726, 729, 887 P.2d 492 (1995). Terry also permits officers to frisk suspects, but only if they have reasonable grounds to believe a suspect is currently armed and dangerous. State v. Hudson, 124 Wn.2d 107, 112, 874 P.2d 160 (1994); Rodriguez-Torres, 77 Wn. App. at 690. There is no evidence

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<sup>4</sup> Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

officers viewed Harris as dangerous. Any other search (other than for weapons) would have been limited to circumstances where the “plain view” doctrine or probable cause justified it. Alcantara, 79 Wn. App. at 366; Rodriguez-Torres, 77 Wn. App. at 652.

But here, Officer Blackmer dispensed with an investigative stop and simply decided to have Harris arrested. And incident to that unlawful arrest, police discovered the cocaine that ultimately led to Harris’ conviction. Under the Fourth Amendment, all fruits of an illegal seizure must be suppressed. State v. Byers, 88 Wn.2d 1, 7-8, 559 P.2d 1334 (1977)(citing Wong Sun v. United States, 371 U.S. 471, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963)), overruled in part on other grounds, State v. Williams, 102 Wn.2d 733, 741 n.5, 689 P.2d 1065 (1984). The court erred when it refused to suppress the evidence in this case.

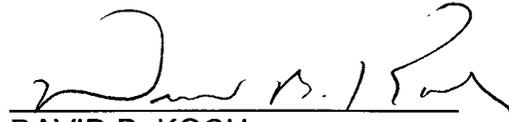
D. CONCLUSION

There was not probable cause to arrest Harris. The fruits of that arrest must be suppressed. Her conviction should be reversed and dismissed.

DATED this 6<sup>th</sup> day of October, 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to read "David B. Koch", written over a horizontal line.

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DIVISION ONE**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
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v.	)	COA NO. 65099-8-1
	)	
SONTAVIA HARIS,	)	
	)	
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 6<sup>TH</sup> DAY OF OCTOBER, 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] SONTAVIA HARIS  
DOC NO. 881732  
WASHINGTON CORRECTIONS CENTER FOR WOMEN  
9601 BUJACICH ROAD NW  
GIG HARBOR, WA 98332

**SIGNED** IN SEATTLE WASHINGTON, THIS 6<sup>TH</sup> DAY OF OCTOBER, 2010.

x *Patrick Mayovsky*

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