

NO. 66376-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

RASHID HASSAN,

Appellant.

REC'D
OCT 04 2011
King County Prosecutor
Appellate Unit

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COURT OF APPEALS
STATE OF WASHINGTON
ED. 15 DIV. 1

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

The Honorable Michael Heavey, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY¹

HASSAN'S ARREST WAS UNLAWFUL BECAUSE THE ARRESTING OFFICER HAD NO PROBABLE CAUSE TO BELIEVE ANY PART OF A CRIME OCCURRED IN HIS PRESENCE OR VIEW.

The state asserts Hassan's suspected drug traffic loitering occurred in observer officer Hazard's "presence" because Hazard personally observed the loitering. Brief of Respondent (BOR) at 10-12. It cites Garske v. United States in support, which observed "an offense is committed within the presence of an officer when his senses afford him knowledge that such is the fact." 1 F.2d 620, 623 (8th Cir. 1924).

Garske is, however, inapposite. There the prohibition agent arrested a man for illegal transportation of alcohol after the man entered a business suspected of illegally transporting alcohol, after the agent saw the outlines of two pint whisky bottles on the man's person, and after the man tried to flee. Garske, 1 F.2d at 626. The court found the agent had probable cause to arrest, rather than mere suspicion, despite not seeing actual whisky in the bottles before the arrest, because they "were plainly whisky bottles and could be observed through the thin paper." Id.

¹ Hassan rests on the Brief of Appellant at 19-22 with respect to the argument there was no probable cause to arrest for a felony offense. He also relies on the same brief at 23-29 for the argument the trial court's erroneous introduction of testimony that Hassan also possessed marijuana deprived him of a fair trial.

In other words, the agent who arrested the man personally observed the misdemeanor of transporting alcohol being committed in his presence. Not surprisingly, the court found the arrest and resulting warrantless seizure of the liquor incident to the arrest lawful. Id. Because the officers who arrested Hassan did not see a crime committed in their presence, Garske is of no help to the state.

The same is true of the officers in City of Snohomish v. Swoboda, 1 Wn. App. 292, 461 P.2d 546 (1969). There officers positioned themselves 150 feet from the home of a family suspected of committing the misdemeanor of keeping explosives. An agent cooperating with the officers was admitted into the home, where officers saw through a window the transfer of an unknown object from a boy in the house to the agent. The agent then left, approached the officers, and produced firecrackers he had purchased inside the house. 1 Wn. App. at 293.

The officers then went to the house, met a boy on the front porch, and asked him if he sold the firecrackers. He replied that he had not. The boy entered the house and the officers followed him inside. They confronted a second boy, who admitted he made the sale. Officers arrested the boy. On review, this Court found the arrest of the boy was lawful because the officers' observation through the window of a transaction coupled with their prior knowledge and the boy's admission

furnished probable cause to believe the misdemeanor illegal sale of firecrackers was being committed in their presence.

Again, however, the arresting officer was the one who observed the suspected misdemeanor being committed. Had the officer arrested the boy after seeing nothing – as happened in Hassan's case – Swoboda would be apt. But because the arresting officer was also the observing officer, the case does not benefit the state.

Finally, City of Tacoma v. Harris, 73 Wn.2d 123, 436 P.2d 770 (1968), suffers from the same flaw. Officers heard a loud disturbance emanating from a home that had been the subject of earlier neighbors' complaints about an unruly and uninvited man in a nearby house. Upon arrival, officers observed the man in the doorway of the house and knew he was inside. The court held it was proper for the officers to investigate and halt the disturbance. When they approached and heard the man say he had a gun and would shoot any officer who came inside, three officers rushed inside, grabbed the man, and arrested him. The court held this combination of events furnished probable to believe the man was committing the misdemeanor crime of breach of the peace in the officers' presence.

As in Swoboda and Garske, however, the arresting officer personally heard the disturbance. He did not – unlike Officer Blackmer

here -- rely solely on a fellow officer for all the information justifying an arrest for a misdemeanor. Harris does not apply here.

Although counsel found no other applicable Washington cases, a case with similar facts arising in Michigan supports Hassan's claim his arrest was unlawful here. The case, United States v. Marls,² involved the officers' use of an undercover technique akin to the time-honored "buy-bust" narcotics operations used by the Seattle Police Department in areas around the King County Courthouse, Pike Place Market, and Belltown. Undercover Officer Jones, while acting as a decoy in a prostitution sting operation, was offered money in exchange for sex by the accused. As per operational protocol, Jones sent a secret signal to an observer officer, who saw Jones speaking with the accused but did not hear what was said. The observer in turn radioed the two-officer arrest team, which positioned itself in an alley and saw nothing. The arrest team descended upon the accused, handcuffed him and placed him in their patrol car. Marls, 227 F. Supp. at 710. Officers then discovered a firearm in the accused's van, which resulted in an arrest for the felony of carrying a concealed weapon, and a federal prosecution. Id.

Soliciting prostitution was a misdemeanor punishable by not more than 90 days in jail. Id. at 711. As in Washington, Michigan had a statute

² 227 F.Supp.2d 708 (E. D. Mich. 2002).

permitting warrantless arrests for misdemeanors only if committed in the arresting officer's presence. Although exceptions to the rule authorized officers to rely on the "police team" theory (fellow officer rule) for other types of misdemeanors, the theory did not apply to soliciting. As a result, in a straightforward application of statutory law, the judge held the arrest team officers were not permitted to rely on the signals from the undercover and observer officers to arrest the accused for a misdemeanor, because the offense was not committed in their presence. Id. at 711. This should be the result in Hassan's case as well.

The state also renews the argument rejected by this Court in State v. Ortega:³ that the "fellow officer" rule should be extended to arrests for misdemeanors. "The 'police-team' rule is a fiction to satisfy the presence requirement." Penn v. Commonwealth, 13 Va. App. 399, 405, 412 S.E.2d 189, 192 (Va. App. 1991)(quoting Comment, The Presence Requirement and the "Police-Team" Rule in Arrest for Misdemeanors, 26 Wash. & Lee L.Rev. 119, 124 (1969)), aff'd., 244 Va. 218, 420 S.E.2d 713 (1992).

This is an argument for the legislature and not the courts. Ortega, 159 Wn. App. at 898; see State ex rel. McDonald v. Whatcom County Dist. Court, 92 Wn.2d 35, 38, 593 P.2d 546 (1979) ("It is for the

³ 159 Wn. App. 889, 248 P.3d 1062, review granted, 171 Wn.2d 1031 (2011).

legislature to extend the authority of law enforcement officers to arrest for misdemeanors not committed in their presence."); Penn, 13 Va. App. at 405 ("Absent a legislative authorization, we are unwilling to adopt a legal fiction that is inconsistent with the plain meaning of Code § 19.2-81.").

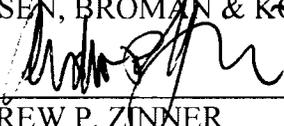
B. CONCLUSION

For the reasons cited herein and in his Brief of Appellant, this Court should reverse Hassan's conviction and remand for a new trial.

DATED this 4 day of October, 2011.

Respectfully submitted,

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DIVISION ONE

STATE OF WASHINGTON,)	
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Respondent,)	
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v.)	COA NO. 66376-1-III
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RASHID HASSAN,)	
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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 4TH DAY OF OCTOBER, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] RASHID HASSAN
DOC NO. 725705
MONROE CORRECTIONS CENTER
P.O. BOX 777
MONROE, WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 4TH DAY OF OCTOBER, 2011.

x *Patrick Mayovsky*