

67147-2

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NO. 67147-2-1

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

STATE OF WASHINGTON,

Respondent,

v.

JUAN LOZANO,

Appellant.

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

The Honorable George Bowden, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. LOZANO WAS UNLAWFULLY SEIZED AT THE POINT DEPUTY ATWOOD SAID, "LET'S GO AHEAD AND CHECK ON THAT WARRANT."

As an initial matter, the State has supplemented the facts from the CrR 3.5 hearing with the CD recording of the defense interview with Deputy Atwood. The CD was admitted at the pretrial hearing as exhibit 1. See Brief of Respondent, at 6. The State's reliance on the CD is misplaced.

The State maintains that the CD was admitted "without limitation." BOR, at 6. This is not correct. The context in which it was admitted shows that its purpose was simply to refresh Deputy Atwood's memory. When Atwood had difficulty recalling what he had said to the defense investigator, defense counsel suggested they could listen to the recording and Atwood agreed. RP¹ 16-17. Afterward, defense counsel asked, "O.K. Does that refresh your recollection?" RP 18. Atwood responded affirmatively. RP 18 ("Beautiful. Good job."); see also RP 22 (recording used again to refresh recollection).

¹ "RP" refers to the verbatim report of proceedings for April 21, 2011.

Moreover, there is a second problem with the State's reliance on the CD. The court only heard a portion of the recording. RP 17 ("what I'm going to do is just play portions from the equipment that I brought."). There is nothing in the record indicating that counsel played all of the portions relied upon in the State's brief. Compare RP 17-18, 22 (played portions appear to focus on initial contact between Atwood and Lozano and Atwood's request that they check on the warrant) with BOR, at 6-7 (recording covers entirety of stop, past contacts with Lozano, and warrant procedures).

With or without the CD, however, the evidence reveals an unlawful seizure. As discussed in the opening brief, Deputy Atwood spotted Lozano, pulled up next to him, and got out of his patrol car to engage him. He recognized Lozano based on prior contacts and asked him about the warrant that previously had been checked and found unconfirmed. And when Lozano could not say for certain what had happened with the warrant, Atwood said, "Let's go ahead and check on that warrant," conveying an expectation that Lozano was not simply free to terminate the encounter and walk away. See Brief of Appellant, at 4-10. No reasonable person in this situation would have believed otherwise.

The State attempts to distinguish State v. Barnes, 96 Wn. App. 217, 978 P.2d 1131 (1999), by relying on Atwood's testimony at the CrR 3.6 hearing that Lozano appeared to be a "confident male" during their discussion of the warrant. BOR, at 15 (citing RP 8, 11). The State also cites to Atwood's opinion, contained in exhibit 1, that Lozano encouraged their conversation, confident the warrant would not be confirmed.² BOR, at 15.

As noted above, exhibit 1 was admitted for a limited, non-substantive purpose and it is not clear Judge Bowden even heard this portion of the recording. In any event, Lozano's confidence the warrant would not be confirmed does not shed light on whether a reasonable person would have felt free to leave. A defendant who believes he will not be arrested on a warrant is no less restrained by an officer's show of authority than a defendant who fears he will. Both defendants understand they are not free to leave during the investigation.

In Barnes, for example, the defendant quite confidently and correctly told the investigating officer that his prior warrant had

² Judge Bowden struck a similar opinion as "speculative" when offered by Deputy Atwood on the stand. See RP 11 (striking Atwood's opinion that Lozano did not break off contact because "he was curious" about the status of the warrant).

been cleared. Barnes, 96 Wn. App. at 219. Despite this well-founded confidence, Barnes was seized when an investigating officer inquired about the warrant and asked if he would mind waiting while the officer checked. Barnes, 96 Wn. App. at 219, 223. Similarly, Lozano was seized regardless of his confidence level.

2. JUDGE BOWDEN PROPERLY RULED THERE WAS NO BASIS FOR A TERRY³ STOP.

Judge Bowden concluded, "There were no underlying facts to justify a *Terry* stop of Defendant, who did not appear to be engaged in any criminal activity." CP 26 (conclusion of law 1). The State now takes issue with this conclusion and urges this Court to find that Deputy Atwood had reasonable suspicion to detain Lozano based on his knowledge that Lozano previously had an outstanding warrant. BOR, at 19-22.

During a Terry stop, an "officer may briefly detain and question a person reasonably suspected of criminal activity." State v. Watkins, 76 Wn. App. 726, 729, 887 P.2d 492 (1995) (quoting State v. Rice, 59 Wn. App. 23, 26, 795 P.2d 739 (1990)). To justify

³ Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

an intrusion under Terry, an officer must be able to point to "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant th[e] intrusion." State v. Williams, 102 Wn.2d 733, 739, 689 P.2d 1065 (1984) (quoting Terry, 392 U.S. at 21). Specific and articulable facts means the circumstances must show "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).

In support of its argument that a Terry stop was justified here, the State cites three cases – one from Washington – in which the suspects offered statements to police affirmatively indicating they would find a valid warrant if they checked. BOR, at 21.

In State v. Bailey, 154 Wn. App. 295, 298, 224 P.3d 852, review denied, 169 Wn.2d 1004 (2010), the defendant, without prompting from the officer, indicated he "likely had an outstanding warrant." Division Three found that Bailey had not been seized. Bailey, 154 Wn. App. at 300-302. In dicta, the court also indicated Bailey's statement that he likely had a warrant provided reasonable suspicion for a seizure. Bailey, 154 Wn. App. at 301.

Even if the relevant discussion in Bailey were not dicta, that case is easily distinguished from Lozano's case. Every indication –

indeed, the only indication – in Bailey was that, more likely than not, the defendant had an outstanding warrant that would result in his arrest. Bailey himself provided that information, making it particularly trustworthy.

In Lozano's case, however, Deputy Atwood had information from two months earlier, in December. At that time, a check revealed that Lozano had a warrant out of Mt. Vernon, but he could not be arrested because Mt. Vernon refused to confirm the warrant's existence, a typical failure for Mt. Vernon and other northern jurisdictions. RP 22-23, 25-26. Atwood conceded he had no new information on the warrant's status since the December check. RP 23, 26-27. When Atwood asked whether Lozano cleared up the unconfirmed warrant, Lozano simply responded that he would have to talk to his attorney about it. RP 21; CP 25 (finding of fact 11).

Lozano's equivocal response falls well short of Bailey's unsolicited comment that he likely had an outstanding warrant. While Atwood could still believe Lozano's warrant remained in the system, there was nothing to suggest another warrant check on Lozano would result in anything different than the check in

December – at most, an unconfirmed warrant.⁴ This is a far cry from the “substantial possibility” of criminal activity required under Terry. Bailey does not hold otherwise.

The two foreign cases cited by the State also are distinguishable. In Klauke v. Daly, 595 F.3d, 20, 22-23, 25-26 (1st Cir. 2010), the court found a warrant check within the scope of a Terry stop where the defendant – already lawfully stopped for suspicion of underage possession of alcohol – initially refused an investigating officer’s request for identification and challenged the officer’s authority to make such a request. In People v. Archuleta, 980 P.2d 509, 511, 516 (Colo. 1999), the officer had reasonable suspicion to detain the defendant because the defendant fled from the officer, knocked over an innocent bystander in his attempt to get away and, when found, admitted that he ran because he had outstanding warrants for his arrest. Neither case bears any resemblance to Lozano’s case.

⁴ Although Lozano has argued this Court should not consider exhibit 1 as substantive evidence, if this Court chooses to do so, the CD reveals that even Officer Atwood did not believe a warrant check would result in Lozano’s arrest. He indicated he was surprised when the warrant ended up confirmed during the February check. Exhibit 1, at 15:40.

Judge Bowden properly found no reasonable suspicion of criminal activity prior to confirmation of the warrant.

B. CONCLUSION

For the reasons discussed in Lozano's opening brief and above, this Court should find that Lozano was unlawfully seized and that the evidence against him should have been suppressed.

DATED this 3rd day of January, 2012.

Respectfully submitted,

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