

67147-2

67147-2

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 N. Bowden, Judge

---

---

OPENING BRIEF OF APPELLANT

---

---

DAVID B. KOCH  
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 E Madison Street  
Seattle, WA 98122  
(206) 623-2373

FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2011 JUL 20 PM 4:25

**TABLE OF CONTENTS**

	Page
A. <u>ASSIGNMENTS OF ERROR</u> .....	1
<u>Issues Pertaining to Assignments of Error</u> .....	2
B. <u>STATEMENT OF THE CASE</u> .....	3
1. <u>Procedural Facts</u> .....	3
2. <u>Facts Surrounding Seizure and Search</u> .....	4
C. <u>ARGUMENT</u> .....	6
THE COURT WAS REQUIRED TO SUPPRESS ALL EVIDENCE STEMMING FROM AN UNLAWFUL SEIZURE. ....	6
D. <u>CONCLUSION</u> .....	13

## TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>State v. Armenta</u> 134 Wn.2d 1, 948 P.2d 1280 (1997).....	7, 8
<u>State v. Barnes</u> 96 Wn. App. 217, 978 P.2d 1131 (1999).....	8, 9, 10
<u>State v. Byers</u> 88 Wn.2d 1, 559 P.2d 1334 (1977).....	12
<u>State v. Ellwood</u> 52 Wn. App. 70, 757 P.2d 547 (1988).....	8, 10, 12
<u>State v. Hansen,</u> 9 Wn. App. 575, 994 P.2d 855 <u>review denied</u> , 141 Wn.2d 1022 (2000) .....	8
<u>State v. Hendrickson</u> 129 Wn.2d 61, 917 P.2d 563 (1996).....	6
<u>State v. Mote</u> 129 Wn. App. 276, 120 P.3d 596 (2005).....	2, 10, 11
<u>State v. O'Neill</u> 148 Wn.2d 564, 62 P.3d 489 (2003).....	7
<u>State v. Thorn</u> 129 Wn.2d 347, 917 P.2d 108 (1996).....	7
<u>State v. Williams</u> 102 Wn.2d 733, 689 P.2d 1065 (1984).....	12
<u>State v. Young</u> 135 Wn.2d 498, 957 P.2d 681 (1998).....	7

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>FEDERAL CASES</u>	
<u>Arkansas v. Sanders</u> 442 U.S. 753, 99 S. Ct. 2586, 61 L. Ed. 2d 235 (1979).....	7
<u>Miranda v. Arizona</u> 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).....	5
<u>Terry v. Ohio</u> 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).....	6
<u>Wong Sun v. United States</u> 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441, (1963).....	12
<u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
CrR 3.6.....	4
U.S. Amend. IV .....	6, 12
Wash. Const. art. ....	6

A. ASSIGNMENTS OF ERROR

1. The trial court erred when it refused to suppress unlawfully seized evidence.<sup>1</sup>

2. The trial court erred when it entered that portion of conclusion of law 3 that states, “there was no particular show of force by the officer” to the extent it is a finding there was no particular show of authority by the officer.

3. The trial court erred when it entered that portion of conclusion of law 5 that states the defendant “was not unlawfully seized, in fact, prior to being placed under arrest.”

4. The trial court erred when it entered conclusion of law 6, which states, “Defendant was lawfully placed under arrest for the outstanding warrant” to the extent it implies the arrest was not tainted by the prior unlawful seizure.

5. The trial court erred when it entered that portion of conclusion of law 7 that states “[t]he search incident to arrest was properly conducted” to the extent it implies the search was not tainted by the prior unlawful seizure.

---

<sup>1</sup> The court’s written findings and conclusions are attached to this brief as an appendix.

6. The trial court erred when it entered conclusion of law 8, which states “[t]he controlled substance(s) seized from Defendant are admissible for use at trial.”

7. The trial court erred when it entered conclusion of law 10, which states “[t]he circumstances of this confrontation are virtually indistinguishable from those found in *State v. Mote*, 129 Wn. App. 276 (2005), except that there, the defendant was sitting in a motor vehicle and the officer approached shining a spotlight, whereas here, Defendant was a pedestrian and no spotlight was employed.”

#### Issues Pertaining to Assignments of Error

1. An individual is seized if, under the circumstances, a reasonable person would not feel free to leave or otherwise terminate the encounter with police. In this case, a uniformed police officer with whom appellant had prior contacts pulled up next to appellant as he walked on a sidewalk, got out of his car, and asked appellant whether he had ever “cleared up” an outstanding warrant. When appellant was unable to assure the officer that he had, the officer requested appellant’s identification and said, “Let’s go ahead and check on that warrant.” Would a reasonable person

have felt free to simply walk away from the officer under these circumstances?

2. Once the officer confirmed the warrant, he placed appellant under arrest. A subsequent search revealed appellant had cocaine in his possession. Given that the seizure was unauthorized at the outset, should the evidence of cocaine have been suppressed?

3. Several of the trial court's conclusions of law are not supported by the evidence or the applicable legal standard. Are these conclusions erroneous?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Snohomish County Prosecutor's Office charged Juan Lozano with one count of possession of a controlled substance: cocaine. CP 52-53. Lozano moved to suppress evidence of the cocaine, arguing it was the product of an unlawful seizure. CP 43-48. The motion was denied. CP 24-28.

Lozano waived his right to trial by jury and agreed to a trial on stipulated documentary evidence before the Honorable George Bowden. CP 29-41. Judge Bowden found Lozano guilty and

imposed a standard range sentence of six months and a day in jail.

CP 16, 32. Lozano timely filed his Notice of Appeal. CP 1-12.

2. Facts Surrounding Seizure and Search

The trial court's written findings and conclusions following the CrR 3.6 hearing accurately summarize the evidence at that hearing and the court's ruling. Shortly before 3:00 a.m. on February 2, 2011, Snohomish County Sheriff's Deputy James Atwood spotted Juan Lozano walking on a sidewalk in front of the Roadhouse Grill in Everett. The restaurant was closed at the time. Lozano had just left a nearby Walmart store, which was open, and was heading for a video store, which was about one block away and also open for business. CP 24-25.

Deputy Atwood decided to make a "subject stop," entered the restaurant parking lot, and stopped his fully marked vehicle by Lozano. He asked something to the effect of, "Hey, what's up?" Initially, Lozano did not hear Atwood because he was listening to music through headphones. But Atwood called out to Lozano again. Lozano then stopped and removed the headphones. CP 25.

Deputy Atwood exited his car to speak with Lozano. CP 26. Within about 30 seconds, Atwood recognized Lozano from

contacts in December and January and recalled there had been a warrant for his arrest out of Skagit County. Lozano had not been arrested at that time only because officers had been unable to verify the warrant from the issuing agency. Atwood asked Lozano whether he had ever cleared up that warrant and Lozano gave an equivocal response, indicating he would have to ask his lawyer. CP 25.

Deputy Atwood asked Lozano for identification and said, "Let's go ahead and check on that warrant." CP 25. Lozano pulled out his identification and handed it to Atwood. It is Atwood's common practice to copy information from a suspect's identification and then return the identification to the individual before contacting dispatch about warrants. CP 26. Atwood provided Lozano's information to dispatch and engaged Lozano in conversation while the two waited. Eight to ten minutes later, the warrant was confirmed as valid and still outstanding. CP 26. Lozano was arrested and read his Miranda<sup>2</sup> rights. In a search incident to arrest, Deputy Atwood found a small amount of cocaine on Lozano. CP 26.

---

<sup>2</sup> Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Judge Bowden concluded, "There were no underlying facts justifying a *Terry*<sup>3</sup> stop of Defendant, who did not appear to be engaged in any criminal activity." CP 26. But Judge Bowden also concluded that Lozano was never seized prior to his arrest on the warrant. Therefore, because there was no unlawful seizure, the arrest was valid and its fruits admissible at trial. CP 27.

Lozano now appeals to this Court.

C. ARGUMENT

THE COURT WAS REQUIRED TO SUPPRESS ALL EVIDENCE STEMMING FROM AN UNLAWFUL SEIZURE.

Under the Fourth Amendment to the United States Constitution and article 1, § 7 of the Washington Constitution,<sup>4</sup> a warrantless search and seizure is per se unreasonable unless the State demonstrates that it falls within one of the jealously and carefully drawn exceptions to the warrant requirement. State v. Hendrickson, 129 Wn.2d 61, 70, 917 P.2d 563 (1996)(quoting

---

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

<sup>4</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."

Arkansas v. Sanders, 442 U.S. 753, 759, 99 S. Ct. 2586, 61 L. Ed. 2d 235 (1979)).

Whether a person has been seized is a mixed question of law and fact. State v. Thorn, 129 Wn.2d 347, 351, 917 P.2d 108 (1996), overruled on other grounds, State v. O'Neill, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). “The resolution by a trial court of differing accounts of the circumstances surrounding the encounter are factual findings entitled to great deference,’ but ‘the ultimate determination of whether facts constitute a seizure is one of law and is reviewed de novo.” State v. Armenta, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997) (quoting Thorn, 129 Wn.2d at 351).

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." O'Neill, 148 Wn.2d at 574 (internal quotations and citations omitted).

Generally, where an officer merely approaches an individual in public, requests to speak with him, and requests identification, no seizure has occurred. O'Neill, 148 Wn.2d at 577-580 (citing State v. Young, 135 Wn.2d 498, 511, 957 P.2d 681 (1998);

Armenta, 134 Wn.2d at 11); see also State v. Hansen, 99 Wn. App. 575, 579, 994 P.2d 855 (holding license for no more than 30 seconds to simply record name and birth date is not a seizure), review denied, 141 Wn.2d 1022 (2000).

Here, however, Deputy Atwood did not merely request Lozano's identification. He made it clear he knew Lozano previously had an outstanding warrant for his arrest and – after Lozano could not assure him the warrant no longer existed – asked Lozano to provide identifying information and said, “Let’s go ahead and check on that warrant.” CP 25 (finding of fact 12). By using the verb and object “let’s,” meaning “let us,” Deputy Atwood conveyed the message that Lozano was no longer free to simply walk away. Rather, the two would wait together until the warrant status could be confirmed. Asking or telling a suspect to wait during a warrant check qualifies as a seizure. See State v. Ellwood, 52 Wn. App. 70, 72-73, 757 P.2d 547 (1988); State v. Barnes, 96 Wn. App. 217, 223, 978 P.2d 1131 (1999).

In Ellwood, a detective spotted the defendant and a companion, late at night, in an area of Everett with a history of criminal activity. Even though he did not have reasonable suspicion to stop the men, the detective decided to conduct a “field

interview.” Ellwood, 52 Wn. App. at 71. He asked them for their names and dates of birth, which both men provided verbally. The detective then said “[w]ait right here” while he went to his car and conducted a warrant check. After determining that Ellwood had an outstanding warrant, the detective arrested him and discovered cocaine in a search incident to arrest. Id. at 72. This Court concluded that while asking Ellwood to identify himself did not constitute a seizure, Ellwood was seized as soon as the detective told him to wait while he checked for warrants. Id. at 73-74.

In Barnes, an officer spotted the defendant walking in the neighborhood in which the defendant lived. The officer had contacted the defendant before and, believing he had an outstanding warrant, decided to make a “field contact.” Barnes told the officer the warrant had been cleared. In response, the officer asked if Barnes “would be willing to stick around while I check on it.” The officer specifically recalled using the words “would you mind.” In response, Barnes did not walk away. Barnes, 96 Wn. App. at 219. Barnes became fidgety, however, and the officer indicated he was going to conduct a pat down search. Barnes resisted and was arrested for obstructing. A search incident to arrest revealed crack cocaine and a pipe. Id. at 220.

The Barnes Court found an unlawful seizure requiring suppression of the cocaine:

Here, contact was established when Officer Moran told Mr. Barnes he thought there was a warrant outstanding on him. Officer Moran then requested that Barnes wait while he checked the warrant out. A reasonable person would not have felt free to walk away at this point, regardless of whether the exact words were, “please wait right here,” or “why don’t you wait right here,” or “would you mind waiting right here,” instead of plain “wait right here.” The ensuing interaction was a detention, not a social encounter.

Id. at 223. Supporting this conclusion was the fact Barnes and this particular officer had prior contacts related to violations of the law, further removing the interaction from the realm of “social encounter.” Id. at 223-224.

Ellwood and Barnes control the outcome in Lozano’s case. A reasonable person would not have felt free to just walk away once Deputy Atwood – who previously had contact with Lozano, knew there had been a warrant, and specifically asked about that warrant – said “let’s go ahead and check on that warrant” after Lozano failed to assure him the warrant had been cleared.

Judge Bowden did not mention or distinguish Ellwood. Nor did he mention or distinguish Barnes. Instead, he found Lozano’s situation “virtually indistinguishable” from State v. Mote, 129 Wn.

App. 276, 120 P.3d 596 (2005). CP 28 (conclusion 10). In Mote, however, an officer simply pulled his patrol car behind a parked but occupied vehicle and requested identifying information from both occupants. Mote provided the information verbally, which the officer wrote down. A warrant check revealed Mote had a warrant. He was arrested, and the officer found a small baggie of methamphetamine in his possession. Mote, 129 Wn. App. at 279-281.

Mote argued he was seized as soon as the officer asked him for identification. Id. at 279, 281. This Court rejected the notion that because Mote was in a parked car when the officer made contact, he enjoyed a right to privacy any greater than a pedestrian on the street. Id. at 286-291. Citing the well-established principle that a request for identifying information, without more, is not a seizure, this Court found that Mote was not seized prior to his arrest. This was true even if – as Mote alleged – the officer had his spotlight on the car in which Mote was sitting. Id. at 282, 291-292.

Critically, the officer in Mote did not know and did not ask the suspect about a prior warrant. Nor did he, while asking for identification, say “let’s go ahead and check on that warrant.” While a reasonable person in Mote’s situation would not feel he or

she was being detained, a reasonable person in Lozano's situation would. Judge Bowden's contrary conclusions, subject to de novo review, do not withstand scrutiny. See CP 27-28 (conclusions 3, 5-8, and 10).

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, 83 S. Ct. 407, 9 L. Ed. 2d 441, (1963)), overruled in part on other grounds, State v. Williams, 102 Wn.2d 733, 741 n.5, 689 P.2d 1065 (1984). The cocaine obtained during the search incident to Lozano's arrest was fruit of the illegal seizure. See Ellwood, 52 Wn. App. at 74-75 ("coerced continued presence at scene" requires suppression of controlled substance evidence found incident to arrest on outstanding warrant). The trial court erred when it refused to suppress the evidence in this case.

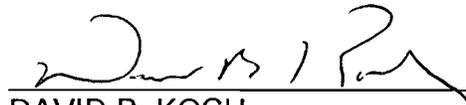
D. CONCLUSION

Lozano was unlawfully seized. All evidence obtained during the subsequent arrest and search must be suppressed. His conviction should be reversed and the charge dismissed with prejudice.

DATED this 20<sup>th</sup> day of July, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

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

DAVID B. KOCH  
WSBA No. 23789  
Office ID No. 91051

Attorneys for Appellant

## **APPENDIX**

FILED

2011 MAY 11 AM 11:05

ED. YAKRASKI  
COUNTY CLERK  
SNOHOMISH CO. WASH



CL14372207

SUPERIOR COURT OF WASHINGTON  
FOR SNOHOMISH COUNTY

The State of Washington,

Plaintiff,

v.

Juan Luis Lozano,

Defendant.

No. 11-1-00221-1

CRIMINAL RULE 3.6 CERTIFICATE

On April 21, 2011, a hearing was held on Defendant's Motion to Suppress Evidence.

The Court considered the testimony of the witnesses at the hearing and the arguments and memoranda of counsel. Being fully advised in the premises, the Court now enters the following:

FINDINGS OF FACT

1. On February 2, 2011, shortly before 3:00 a.m., Snohomish County Sheriff's Deputy Atwood was on patrol and observed Defendant Juan Lozano walking on a sidewalk in front of the Roadhouse Grill in Everett.

2. The Roadhouse Grill is a restaurant, but it was not open for business at that hour.

3. It was dark, and no one else was in the vicinity.

1           4.       Defendant testified that he had been at a nearby Walmart, which was open, and  
2 was proceeding to a video store, about a block away, which was also open for business, which  
3 testimony the court accepts as true.

4           5.       Consistent with his duties of responding to 911 calls and proactive patrolling,  
5 which includes investigating any activity deemed suspicious by the officer, Dep. Atwood chose  
6 to make a "subject stop" to ask Defendant who he was and what he was doing.

7           6.       He pulled his marked patrol vehicle to a stop in front of Defendant, in the  
8 opposite lane of travel in the parking area for the restaurant, rolled down his window, and asked  
9 him, "Hey, what's up?" or words to that effect.

10          7.       Defendant, who was wearing headphones (or earbuds), did not appear to hear the  
11 officer and continued walking, taking only a couple of steps before the officer called out to him.

12          8.       Defendant then stopped and took the headphones off, and Dep. Atwood asked  
13 what he was doing.

14          9.       The officer did not recognize Defendant immediately, but within about 30  
15 seconds he recalled him from earlier police contacts in December and January and remembered  
16 that there was then a warrant out for his arrest.

17          10.      Defendant had not been taken into custody on the warrant at that time because  
18 police had been unable to obtain confirmation of the validity of the warrant from the issuing  
19 jurisdiction, which was in Skagit County.

20          11.      Dep. Atwood asked Defendant if he had cleared up that outstanding warrant, and  
21 Defendant gave an equivocal response, stating that he would need to talk with his lawyer about  
22 it.

23          12.      Dep. Atwood then asked Defendant if he could see his identification and said,  
24 "Let's go ahead and check on that warrant."  
25

1           13.     Defendant handed the officer his identification, and Dep. Atwood ran a check  
2 through dispatch.

3           14.     During this contact, the officer had stepped out of his car and engaged Defendant  
4 in an ongoing conversation while the check was run.

5           15.     At no time did the officer activate his overhead emergency lights or siren, display  
6 his weapon, or tell Defendant he was not free to go, and Defendant was cooperative with him at  
7 all times.

8           16.     It was the officer's practice to write down the identifying information and  
9 promptly return any identification to the subject stopped; neither the officer nor Defendant  
10 testified to any different procedure on this occasion.

11          17.     Within eight to ten minutes, the officer received information from dispatch that  
12 confirmation had been received that the warrant was still valid and outstanding.

13          18.     Defendant was then placed under arrest, handcuffed, and advised of his *Miranda*  
14 warnings, which he both acknowledged and agreed to waive.

15          19.     During a search of his person incident to that arrest, a small amount of suspected  
16 cocaine was retrieved by the officer, which field tested positive for cocaine through a NIK test.

17          20.     Because Defendant was unable or unwilling to relate any details of his discussion  
18 with the officer about the outstanding warrant, in response to the Court's questions, and given his  
19 equivocal response to the officer at the scene, his testimony was less credible than that of Dep.  
20 Atwood.

21                 From the foregoing Findings of Fact, the Court now enters the following:

22                                 CONCLUSIONS OF LAW

23           1.     There were no underlying facts to justify a *Terry* stop of Defendant, who did not  
24 appear to be engaged in any criminal activity.

25

1           2.       The officer did have a reasonable basis to believe a warrant for Defendant's  
2 arrest was still outstanding, once he had recognized him after effecting the stop, based upon the  
3 earlier police contact with Defendant in December, and particularly after Defendant's equivocal  
4 response to the officer's inquiry about whether he had taken care of that warrant.

5           3.       While it may be euphemistic to refer to a police inquiry by a uniformed officer at  
6 3:00 a.m. as a "social stop," given that all police contacts are inherently intimidating to some  
7 degree, there was no particular show of force by the officer, and Defendant was, in fact, free to  
8 go at all times until the officer received word from dispatch that the outstanding warrant had  
9 been confirmed.

10          4.       Defendant's perception that the officer was "commanding" him to produce his  
11 identification, or that he was not free to go, were subjective beliefs and unsupported by any  
12 objective conduct on the part of the officer.

13          5.       The officer did not retain Defendant's identification, and he was not unlawfully  
14 seized, in fact, prior to being placed under arrest.

15          6.       Defendant was lawfully placed under arrest for the outstanding warrant.

16          7.       The search incident to arrest was properly conducted, resulting in the recovery of  
17 contraband that was subsequently tested and believed to contain cocaine, a controlled substance,  
18 which possession is the basis for the felony charge lodged by the prosecutor in this cause of  
19 action.

20          8.       The controlled substance(s) seized from Defendant are admissible for use at trial.

21          9.       While Defendant was properly advised of his *Miranda* rights, and knowingly  
22 waived them and agreed to talk with the deputy, the State has not indicated that it intends to  
23 introduce any incriminating statements at trial.

24

25

