

NO. 67257-6-1

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

REC'D
FEB 03 2012
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

TOMMY D. HOLLINS,

Appellant.

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

The Honorable Marianne C. Spearman, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by denying Tommy D. Hollins' motion to suppress evidence discovered during a search incident to arrest.

2. The trial court erred by concluding, "Probable cause to arrest the defendant is based on Officer Fry's observations of the defendant on April 19, 2010, and Officer Fry's training and experience regarding narcotics investigations and surveillance." CP 23 (Conclusion of Law 4) (attached as Appendix A).

Issue Pertaining to Assignments of Error

A Seattle police officer arrested Hollins during a "see-pop" operation after being advised by a colleague stationed atop a building to arrest Hollins because she had probable cause to support an arrest for drug traffic loitering, a gross misdemeanor set forth in the Seattle Municipal Code.¹ The arresting officer saw nothing, and the observing officer did not participate in the arrest. Was the arrest therefore unlawful under RCW 10.31.100, which generally prohibits warrantless arrests for misdemeanors not committing in the presence of the arresting officer?²

¹ SMC 12A.20.050 (attached as Appendix B).

² This issue is pending before the Supreme Court in State v. Ortega, 159 Wn. App. 889, 895, 248 P.3d 1062, review granted, 171 Wn.2d 1031 (2011).

B. STATEMENT OF THE CASE

Seattle Police officer Sonya Fry was observing a street in the Pioneer Square neighborhood when she saw Tommy D. Hollins engage in a hand-to-hand exchange with an unknown man. Hollins appeared to hand an unknown item to the man, who then put something in his mouth. 1RP 19-24, 32, 34-35.³ This was significant to Fry, because crack cocaine has a numbing effect when placed in the mouth. Placing it in the mouth allows the buyer to test whether or not he is receiving actual cocaine. 1RP 30.

Hollins and the man parted ways, and about three minutes later Hollins contacted a second unknown man. 1RP 24-25. The two stepped into a doorway known by Fry to be used by crack users. A group of known users lingered around the doorway while Hollins and the unknown man were inside. 1RP 25-26. Hollins and the man stayed in the doorway long enough "to exchange an unknown item." 1RP 27. Fry saw "enough, uh, body movement . . . to know what their behavior was doing." 1RP 33. She did not see the mens' hands, but she "could see just the activity of an

³ Hollins cites to the verbatim report of proceedings as follows: 1RP – 3/2 – 3/3/2011; 2RP – 3/7/2011; 3RP – 3/8/2011; 4RP – 3/9/2011; 5RP – 5/12/2011.

exchange." 1RP 37. Based on her training and experience, Fry assumed the men exchanged narcotics. 1RP 33.

After Hollins departed the doorway, he walked for about three minutes before contacting an unknown woman standing next to a telephone booth. Hollins appeared to place an unknown item into the woman's hand before walking off. 1RP 28.

Because Fry had seen three suspected drug deliveries in a "high narcotics area," she radioed colleagues to arrest Hollins for drug traffic loitering. Fry observed fellow officers arrest Hollins. 1RP 28-29. A search of Hollins incident to arrest revealed three pieces of crack cocaine. 2RP 10, 16-18; 3RP 10-11, 14-15, 21.

Based on this evidence, the State charged Hollins with possessing cocaine with the intent to deliver, and alleged he was within 1,000 feet of a school bus route stop. CP 12.

Hollins moved to suppress the cocaine, arguing the arrest was supported by neither reasonable suspicion nor probable cause to believe Hollins was engaged in criminal activity. CP 7-11, 1RP 43-45. The trial court denied the motion. 1RP 48-49. In its written findings of fact and conclusions of law, the court concluded there was probable cause to arrest Hollins "for the crime of drug traffic loitering contrary to Seattle

Municipal Code 12A.20.050(B)." CP 23 (Conclusion of Law 3). The probable cause conclusion was based on Officer Fry's observations of Hollins and her "training and experience regarding narcotics investigations and surveillance." CP 23 (Conclusion of Law 4).

The case proceeded to a jury trial, during which Fry testified consistently with her testimony at the suppression hearing set forth above. 3RP 31-41. The transportation manager for Seattle Public Schools testified Hollins' exchanges occurred within 1,000 feet of a school bus route stop. 3RP 22, 26-28, 31-32. The arresting officer, Jonar Legaspi testified Hollins had suspected cocaine in his mouth. 3RP 10-11, 13-15. The presence of cocaine was confirmed after lab testing. 2RP 16-18.

Hollins testified he went to the area to buy cocaine. 3RP 71. He knew a lot of people in the neighborhood because he was once homeless there. It was also his area to "get high." 3RP 61-63. Beginning his search, Hollins bumped fists with a man he knew and asked him where he could find "three for thirty," as in \$30 worth of crack cocaine. 3RP 63-65. The man told Hollins "somebody was down there with him[.]" who had cocaine. 3RP 67.

Hollins did not recall meeting anyone in a doorway. He had a very brief contact with someone who did not have cocaine. 3RP 65-66.

Hollins continued walking until he met a woman with cocaine to sell. She dropped the rocks onto the ground and Hollins picked them up and gave her \$30. 3RP 67-70. Just then a van pulled up and an officer jumped out and arrested him. Hollins then relinquished the three rocks and was taken to the police station. 3RP 70-71.

Hollins argued to the jury he was guilty only of possession of cocaine rather than possession with intent to deliver. 3RP 96-107. Jurors did not agree; they found him guilty as charged. CP 75. The jury also found Hollins committed the crime within 1,000 feet of a school bus route stop. CP 76.

The trial court imposed a standard range sentence of 60 months imprisonment, followed by 12 months community custody. CP 78-86.

C. ARGUMENT

1. THE SEARCH INCIDENT TO HOLLINS' WARRANTLESS ARREST WAS INVALID BECAUSE THE SUSPECTED MISDEMEANOR ON WHICH IT WAS BASED IS NOT ONE OF THOSE OFFENSES THE LEGISLATURE HAS SPECIFICALLY EXCEPTED FROM THE WARRANT REQUIREMENT.

Officer Legaspi found cocaine during a search incident to Hollins' arrest for drug traffic loitering. Drug traffic loitering is a gross misdemeanor. SMC 12A.20.050(E). Because Legaspi did not see Hollins

commit the misdemeanor offense, his detention, search, and seizure of cocaine were unlawful. The cocaine should thus be suppressed.

a. General legal principles for searches incident to arrest

The Fourth Amendment protects against unreasonable searches and seizures. State v. Einfeldt, 163 Wn.2d 628, 634, 185 P.3d 580 (2008). Warrantless searches and seizures are per se unreasonable. Minnesota v. Dickerson, 508 U.S. 366, 372, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993).

Article I, section 7 of the Washington Constitution, in contrast, requires a warrant before any search, reasonable or not. Einfeldt, 163 Wn.2d at 635. Absent a valid warrant, a search is made without authority of law unless it is established the search fell within one of the narrowly drawn exceptions to the warrant requirement. State v. Afana, 169 Wn.2d 169, 177, 233 P.3d 879 (2010). The State always carries the "heavy burden" of proving a warrantless search is justified. State v. Jones, 146 Wn.2d 328, 335, 45 P.3d 1062 (2002).

A search incident to a valid arrest is one such exception. State v. Moore, 161 Wn.2d 880, 885, 169 P.3d 469 (2007). A warrantless arrest, however, must be supported by probable cause for the exception to apply. Moore, 161 Wn.2d at 885. Probable cause to arrest exists only where the facts and circumstances within the arresting officer's knowledge and of

which the officer has reasonably trustworthy information are sufficient to warrant a person of reasonable caution in a belief that an offense has been committed and that the arrestee committed the arrest. State v. Gaddy, 152 Wn.2d 64, 70, 93 P.3d 872 (2004); State v. Graham, 130 Wn.2d 711, 724, 927 P.2d 227 (1996).

b. Hollins' drug loitering did not occur in the arresting officer's presence.

The authority to arrest for a suspected violation of a misdemeanor requires more than probable cause. Instead, "[a] police officer may arrest a person without a warrant for committing a misdemeanor or gross misdemeanor only when the offense is committed in the presence of the officer, except [as otherwise provided]." RCW 10.31.100.⁴

The "in the presence" requirement stems from longstanding common law principles. State v. Walker, 157 Wn.2d 307, 315-16, 138 P.3d 113 (2006). Only the Legislature may limit the scope of this rule. Walker, 157 Wn.2d at 318-19. See Staats v. Brown, 139 Wn.2d 757, 768,

⁴ The statute "has been amended at least 20 times since then and has been expanded to include 24 exceptions." State v. Ortega, 159 Wn. App. 889, 895, 248 P.3d 1062, review granted, 171 Wn.2d 1031 (2011). The exceptions include misdemeanors involving physical harm or threats of harm to persons or property, the unlawful taking of property, the use or possession of cannabis, underage drinking, violation of a domestic violence protection order, certain traffic offenses, indecent exposure, or harassment. Drug traffic loitering is not on the list of exceptions.

991 P.2d 615 (2000) (given existence of specified exceptions, doctrine of expressio unius est exclusio alterius dictates that enumerated exceptions to warrant requirement are exclusive, "rendering the statutory subject of this citation [not within exceptions] nonarrestable if committed outside the officer's presence."); State ex rel. McDonald v. Whatcom County Dist. Court, 92 Wn.2d 35, 38, 593 P.2d 546 (1979) ("It is for the legislature to extend the authority of law enforcement officers to arrest for misdemeanors not committed in their presence.").

Hollins was arrested for drug traffic loitering, a gross misdemeanor. SMC 12A.20.050(E). Because the offense falls within none of the exceptions set forth in RCW 10.31.100, it had to have been committed "in the presence of" Legaspi.

That did not happen here. Legaspi was riding a bicycle as a member of the "arrest team" during a "see-pop" operation. 3RP 7. Legaspi testified "the whole thing with being arrest team officers, you're not seeing any of the transactions." 3RP 8. Instead, he was guided to Hollins by Fry, who was the "observing officer" in the operation. 3RP 8-9. Having seen no criminal activity, Legaspi had no legal authority to arrest Hollins.

This Court addressed the same situation in Ortega. An officer surveilling a Belltown street from the second floor of a business observed what he suspected were three narcotics transactions involving Ortega and a companion, Cuevas. The officer could not, however, confirm that the items exchanged were controlled substances. The observer officer radioed two colleagues, informing them probable cause existed to arrest Ortega and Cuevas for drug traffic loitering. Responding immediately, the officers arrested and searched Ortega, finding small rocks of cocaine and \$780 in cash. The observer officer maintained visual contact with the suspects up to the time of the arrest. He then left his observation post, met with his colleagues at the arrest scene, and confirmed the detained suspects were the individuals he had observed. Ortega, 159 Wn. App. at 893.

The issue was whether the arrest was unlawful under RCW 10.31.100 because the suspected crime did not occur in the presence of the arresting officer. Ortega, 159 Wn. App. at 895-96. This Court first rejected the state's argument the "fellow officer rule" should be extended to apply to arrests for misdemeanors. 159 Wn. App. at 898.

Second, this Court nevertheless found the arrest lawful because the observer officer maintained continuous contact with his arresting colleagues and with the process of arrest:

The observing officer viewed the conduct, directed the arrest, kept the suspects and officers in view, *and proceeded immediately to the location of the arrest* to confirm that the arresting officers had stopped the correct suspects. McLaughlin's continuous contact rendered him a participant in the arrest. Although McLaughlin was not the officer who actually put his hands on Ortega, McLaughlin was an arresting officer in the sense that he directed the arrest and maintained continuous visual and radio contact with the arrest team.

Ortega, 159 Wn. App. at 898 (emphasis added).

Unlike the officer in Ortega, Fry did not "participate" in Hollins' arrest in the Ortega sense because she did not leave her observation post and meet Legaspi and Hollins at the scene of arrest. The record indicates Fry had nothing to do with the arrest other than to direct the otherwise unknowing Legaspi to arrest Hollins. Expanding the definition of "in the presence of" beyond the facts of Ortega would effectively usurp the Legislature's exclusive authority to limit the warrant requirement for misdemeanor arrests.

This Court should thus find the arrest unlawful here. An unlawful arrest may not serve as the basis for a search incident to arrest. State v. Allen, 138 Wn. App. 463, 472, 157 P.3d 893 (2007). Legaspi's search of Hollins was therefore invalid. The fruits of that search – the cocaine and marijuana – must be suppressed. State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999); Allen, 138 Wn. App. at 472. Without the cocaine

evidence, the state has no case. This Court should therefore reverse Hollins' conviction and remand for dismissal.

- c. The Ortega Court's analysis contravened the rules of statutory construction and should not be relied on in Hollins' case.

Assuming this Court finds Ortega applies to Hollins' case, it should reexamine and reject its improper expansion of RCW 10.31.100.

Questions of statutory construction are reviewed de novo. State v. Bright, 129 Wn.2d 257, 265, 916 P.2d 922 (1996). Several well-established rules govern a court's construction of a statute. First, when statutory language is unambiguous, the statute's meaning must be derived from its plain wording. Post v. City of Tacoma, 167 Wn.2d 300, 310, 217 P.3d 1179 (2009). Second, statutes in derogation of the common law are strictly construed. State v. Grant, 89 Wn.2d 678, 683, 575 P.2d 210 (1978).

Because RCW 10.31.100 is in derogation of the common law, it must be strictly construed. McDonald, 92 Wn.2d at 37. "Strict construction of a penal statute means that the punitive sanctions must be confined to such matters as are clearly and manifestly within the statutory terms and purposes." State v. Rinkes, 49 Wn.2d 664, 667, 306 P.2d 205 (1957). See State v. Hornaday, 105 Wn.2d 120, 127, 713 P.2d 71 (1986)

("fundamental fairness requires that a penal statute be literally and strictly construed in favor of the accused although a possible but strained interpretation in favor of the State might be found.").⁵

This Court's opinion in Ortega runs afoul of these principles. Instead of reading the plain, unambiguous, language of RCW 10.31.100 narrowly, this Court stretched its scope beyond its intended meaning. By finding the arrest did not violate the warrant requirement, the Court necessarily found the observer officer "arrested" Ortega even though he clearly did not detain him, handcuff him, search him incident to arrest, or otherwise restrain his freedom. In fact, the Court held the observer "was an arresting officer in the sense that he directed the arrest and maintained continuous visual and radio contact with the arrest team." Ortega, 159 Wn. App. at 898.

⁵ In other words, the plain language of an unambiguous statute must be strictly construed. See Miller v. Treat, 57 Wn.2d 524, 531-32, 358 P.2d 143 (1960):

The host-guest statute is in derogation of the common law and, therefore, must be strictly construed. The statute is clear and unambiguous. It specifically states the evidence must be independent of, or in addition to that of the parties to the action. Griffith was not a party to the action in the instant case. He was a former party. Under the statute, therefore, his testimony constituted evidence in addition to that of the parties to the action. To hold otherwise would require reading into the statute language which is not there.

While it is true the observing officer supervised and observed the actual arrest of Ortega, he was not an arresting officer in the sense of a strict and narrow view of the term "arrest." Rather, a person is under arrest "when, by a show of authority, his freedom of movement is restrained." State v. Holeman, 103 Wn.2d 426, 428, 693 P.2d 89 (1985). Ortega had long since been restrained -- and searched incident thereto -- by the time the observer officer arrived at the arrest scene.

Second, the Court must have found Ortega was in the "presence" of the observer officer, because the arrest team officers saw Ortega do nothing at all. The Legislature has not defined what it meant by "presence" in this context. In such circumstances, a court may ascertain the plain meaning of unambiguous terms by looking to a common dictionary definition. Lindeman v. Kelso School Dist. No. 458, 162 Wn.2d 196, 202, 172 P.3d 329 (2007).

The dictionary provides several definitions of "presence," including the following: "the fact or condition of being present[;]" ["the state of being in one place and not elsewhere[;]" ["the condition of being within sight or call, at hand, or in a place being thought of[;]" the fact of being in company, attendance, or association[."]. Webster's Third New International Dictionary 1793 (1993). If necessary, it is also proper to

consult a thesaurus when interpreting statutes. State v. Kintz, 169 Wn.2d 537, 547-48, 238 P.3d 470 (2010). For "presence," the thesaurus entries are: "being, nearness, praeensia, proximity, sojournment, visitation." William C. Burton, Legal Thesaurus, 420 (3d ed. 1999).

In Ortega, the suspected drug traffic loitering occurred at street level. The observer officer, meanwhile, was on the second floor of a nearby business. Although the Ortega Court did not mention whether the officer needed a visual aid to see from his distance away, it did note the officer "packed up his surveillance gear" before meeting his colleagues below. Ortega, 159 Wn. App. at 893.

Under a reasonable interpretation, this Court's conclusion that Ortega's activity occurred "in the presence of" the observer officer does not comport with the required strict and narrow construction of RCW 10.31.100. Ortega was plainly not "near" the officer in common parlance.

This is even more evident when considering the hypothetical presented by the Ortega Court to illustrate its reasoning:

If Officer A was driving a squad car with Officer B and Officer A witnessed a suspect commit a misdemeanor while Officer B did not, we would not construe the in the presence rule to require that Officer A could arrest the suspect but Officer B would need a warrant. Such a view of an arrest by a witnessing officer would be artificially narrow. The same is true here.

Ortega, 159 Wn. App. at 899. This clearly shows the Court did not equate "in the presence of" with "within sight of," as suggested by its ultimate conclusion, because Officer B saw nothing. Rather – because the fellow officer rule would not apply to authorize Officer B's arrest – "in the presence of" must mean "near" the observing officer and the offense (assuming Officer A, while driving, would not be able to see the commission of a suspected misdemeanor that did not occur nearby in the normal sense of the word).

In Ortega, the observing officer made himself "near" the incident, but only long after the arrest. This Court in Ortega therefore failed to restrict its holding as required when considering statutes in derogation of the common law. For these reasons, this Court should not apply Ortega in Hollins' case.

Moreover, given that "presence" apparently means physical distance in this context, Hollins' case is distinguishable from Ortega. Fry observed the incidents from the top of an undisclosed building with the assistance of binoculars. CP 21; 1RP 19-21, 34. Nothing in the record indicates Fry met with Legaspi and Hollins during the arrest. Therefore, to the extent this Court found such behavior noteworthy enough to include in

Ortega, that behavior did not occur here. For this reason as well, Hollins asks this Court not to apply Ortega to his appeal.

Finally, "the rule of statutory construction that trumps every other rule" cannot be overlooked: a court should not interpret statutory language in a manner that results in absurd or strained consequences. Davis v. State ex rel. Department of Licensing, 137 Wn.2d 957, 971, 977 P.2d 554 (1999). Hollins respectfully submits an absurdity would result if this Court finds the warrantless arrest permissible under RCW 10.31.100 here.

In summary, Officer Fry did not "arrest" Hollins for suspicion of a misdemeanor committed in her "presence." The arresting officer, Legaspi, saw nothing. This Court should find the arrest unlawful.

d. Hollins may make this argument for the first time on appeal.

Hollins' trial counsel challenged the grounds for the arrest, but not because it constituted a warrantless arrest for a suspected crime outside the presence of the arresting officer. Although counsel did not specifically rely on RCW 10.31.030, he did assert there was insufficient probable cause to support the arrest. Probable cause, the objective standard for determining the reasonableness of an arrest, "is limited by RCW 10.31.100." Ortega, 159 Wn. App. at 894. The warrantless arrest argument was therefore implicitly implicated.

In any event, RAP 2.5(a)(3) permits an appellant to raise a manifest constitutional error for the first time on appeal. Erroneous suppression rulings have been found to constitute such error. See, e.g., State v. Littlefair, 129 Wn. App. 330, 339, 119 P.3d 359 (2005) (A trial court's failure to suppress evidence seized as the result of an unlawful search affects a constitutional right and may thus be raised for the first time on appeal.).

In addition, Hollins asks this Court to answer a purely legal question. And because he moved to suppress the evidence, the trial court held a hearing and all pertinent facts are of record. Cf. State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) ("If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest."); see State v. Contreras, 92 Wn. App. 307, 313, 966 P.2d 915 (1998) (rejecting narrow reading of McFarland, court holds that "when an adequate record exists, the appellate court may carry out its long-standing duty to assure constitutionally adequate trials by engaging in review of manifest constitutional errors raised for the first time on appeal."); see also State v. Snapp, 153 Wn. App. 485, 494-95, 219 P.3d 971 (2009) ("In contrast, Snapp challenged the scope of the vehicle search incident to arrest below.

While he did not, and could not, have raised his challenge under Gant,⁶ which was not yet decided, he sufficiently challenged the scope of the search incident to his arrest. Thus, Snapp preserved this issue for appeal."), review granted, 169 Wn.2d 1026 (2010).

This Court should therefore reject any assertion that RAP 2.5(a) precludes this Court from reviewing the merits of the above arguments.

- e. Fry lacked probable cause to suspect Hollins was committing a felony.

Officer Fry did not see Hollins or anyone he contacted display drugs or exchange cash. Hollins nevertheless anticipates the state may assert there was probable cause to arrest Hollins for selling drugs or possessing drugs with intent to deliver.

In discussing whether the "fellow officer" rule applied to misdemeanor arrests, the Ortega Court cited, inter alia, State v. White⁷ for the proposition the rule applies to arrests for the felony of possessing drugs with intent to deliver. In White, Seattle police were employing the same type of surveillance for drug activity as in Hollins' case. 76 Wn. App. at

⁶ Arizona v. Gant, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009).

⁷ Ortega, 159 Wn. App. at 896 (citing White, 76 Wn. App. 801, 805, 888 P.2d 169 (1995), aff'd. on other grounds, 129 Wn.2d 105 (1996)).

803-04. The police in White did not see actual drugs exchanged when watching the interactions of three people. 76 Wn. App. at 803.

But unlike in Hollins' case, the police saw one participant (the "buyer") count and deliver money to another participant (the "seller"). The police saw the "seller" drop a small object to the ground, which the buyer immediately picked up and looked at and momentarily put into his mouth before handing money to the "seller." 76 Wn. App. at 803. Furthermore, an individual who appeared to act as a "look out" accompanied the "seller." 76 Wn. App. at 804. This Court held these observations gave the surveilling officer probable cause to believe he had witnessed a drug transaction. And under the fellow officer rule, the arrest team officer who actually made the arrest thus also had probable cause. 76 Wn. App. at 805.

In both Hollins' case and in White, the officer could not tell whether the exchanged item was a narcotic. But the additional indicia in White -- exchanging money for a small object and employing a "lookout" - - are not present in Hollins' case. White is therefore distinguishable and not helpful to the state's anticipated argument.

Neither is State v. Fore, 56 Wn. App. 339, 343-44, 783 P.2d 626 (1989), review denied, 114 Wn.2d 1011 (1990). There an officer observed

three transactions in which the defendant and his companion exchanged small plastic bags containing brownish or greenish matter with passing motorists for what appeared to be folded currency. The defendant then retrieved a larger plastic bag from underneath the dashboard of a nearby vehicle and removed smaller plastic packets containing green matter. This Court held these observations were sufficient to establish probable cause to believe the officer witnessed drug transactions:

[A]bsolute certainty by an experienced officer as to the identity of a substance is unnecessary to establish probable cause. . . . Here, the suspicious circumstances surrounding the exchanges, not the officer's ability to identify the substance, constituted the primary basis for the probable cause determination.

Fore, 56 Wn. App. at 345. See also State v. Rodriguez-Torres, 77 Wn. App. 687, 694, 893 P.2d 650 (1995) (officer had probable cause to arrest defendant based on following observations: Rodriguez-Torres' companion gave him money; Rodriguez-Torres showed companion object that he kept cupped in his hand; transaction occurred in area well-known for narcotics sales; someone yelled "police" when the officer approached, prompting Rodriguez-Torres and companion to quickly leave scene.).

Again, the only commonality between Hollins' case and these cases is the officers' inability to identify the items exchanged. Importantly, Fry saw no money change hands. Nor did she see Hollins appear to retrieve

more packaged-for-sale suspected drugs from a larger stockpile. Again, these differences highlight the lack of probable cause to support a felony arrest of Hollins.

Additionally, Fry had no prior knowledge of Hollins. Nor did Hollins appear to exchange anything with the "known crack users" Fry observed lingering around the doorway.

For these reasons, Fry did not have probable cause to believe she witnessed Hollins commit a felony drug offense. This Court should therefore reject any anticipated state's claim to the contrary.

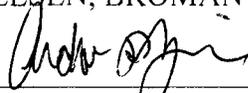
D. CONCLUSION

For the foregoing reasons, Hollins respectfully requests this Court to reverse his conviction and remand for dismissal with prejudice.

DATED this 7 day of February, 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



ANDREW P. ZINNER

WSBA No. 18631

Office ID No. 91051

Attorneys for Appellant

APPENDIX A

FILED
KING COUNTY, WASHINGTON

MAR 07 2011

SUPERIOR COURT
TOMMY HUTCHINSON
DEPUTY

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)	
)	
)	Plaintiff,
)	No. 10-1-04346-9 SEA
vs.)	
)	WRITTEN FINDINGS OF FACT AND
TOMMY HOLLINS,)	CONCLUSIONS OF LAW ON
)	DEFENSE'S CrR 3.6 MOTION TO
)	SUPPRESS PHYSICAL EVIDENCE
)	
)	
)	

A hearing on the admissibility of physical, oral, or identification evidence was held on March 3, 2011, before the Honorable Judge Mariane Spearman. After considering the evidence submitted by the parties and hearing argument, to wit: (a) briefing submitted by the parties; (b) testimony from Seattle Police Officer Sonya Fry; and (c) oral argument of the parties, the court makes the following findings of fact and conclusions of law as required by CrR 3.6:

1. THE UNDISPUTED FACTS:

- a. That Officer Sonya Fry is a commissioned law enforcement officer employed by the Seattle Police Department.
- b. That Officer Fry has extensive training and experience in narcotics investigations and surveillance of narcotics transactions.
- c. That on April 19, 2010, Officer Fry was conducting surveillance of the Pioneer Square area of Seattle from an elevated position.
- d. That Officer Fry was using binoculars to aid her in observing the Pioneer Square area.

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 1

ORIGINAL

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
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- 1 e. That according to Officer Fry's training and experience, she knows Pioneer
2 Square to be a high crime, high drug use area.
- 3 f. That Officer Fry observed the defendant first at approximately 2:44 pm.
- 4 g. That Officer Fry observed the defendant make contact with an unknown black
5 male.
- 6 h. That Officer Fry observed the defendant put something small into the unknown
7 man's outstretched hand.
- 8 i. That the unknown man then took the small object and placed it in his mouth.
- 9 j. That based on training and experience, Officer Fry knows that crack cocaine is
10 often transported in a person's mouth.
- 11 k. That the defendant and the unknown male then walked away in different
12 directions.
- 13 l. That approximately 3 minutes later, Officer Fry observed the defendant make
14 contact with another unknown black male.
- 15 m. That the defendant and the unknown black male moved into a doorway for a brief
16 period of time, partially obstructing her view.
- 17 n. That Officer Fry knows the doorway to be used for narcotics transactions based
18 on her experience and reports of people who work in the immediate area.
- 19 o. That at the same time several known crack cocaine users approached and
20 surrounded the defendant and the unknown male.
- 21 p. That after a short period of time, the defendant broke off contact with the
22 unknown male and walked towards Occidental Park.
- 23 q. That about 3 minutes later, the defendant contacted an unknown female at a
24 telephone booth at the northeast corner of Occidental Park.
- r. That the defendant placed an unknown, small object in the female's hand.
- s. That the defendant and the female walked away in different directions.
- t. That based on her three observations over the period of 6 minutes, Officer Fry
radioed an arrest team to arrest the defendant.
- u. That Officer Fry maintained visual contact with the defendant until the arresting
officers arrived.

APPENDIX B



City of Seattle Legislative Information Service

Seattle Municipal Code

Information retrieved June 13, 2011 1:12 PM

Title 12A - CRIMINAL CODE
Subtitle I Criminal Code
Chapter 12A.20 - Controlled Substances

SMC 12A.20.050 Drug-traffic loitering.¹

A. As used in this section:

1. "Conviction" means an adjudication of guilt pursuant to Titles 10 or 13 RCW, or the equivalent provisions of any federal statute, state statute or ordinance of any political subdivision of this state, and includes a verdict of guilty, a finding of guilty and an acceptance of a plea of guilty.

2. "Drug paraphernalia" means drug paraphernalia as the term is defined in the Uniform Controlled Substance Act, RCW 69.50.102, excluding, however, items obtained from or exchanged at any needle exchange program sponsored by the Seattle-King County Health Department, and hypodermic syringes or needles in the possession of a confirmed diabetic or a person directed by his or her physician to use such items.

3. "Illegal drug activity" means unlawful conduct contrary to any provision of RCW Chapter 69.41, 69.50 or 69.52, or the equivalent federal statute, state statute, or ordinance of any political subdivision of this state.

4. "Known drug trafficker" means a person who has, within the knowledge of the arresting officer, been convicted within the last two years in any court of any felony illegal drug activity.

5. "Public place" is an area generally visible to public view and includes, but is not limited to, streets, sidewalks, bridges, alleys, plazas, parks, driveways, parking lots, transit stations, shelters and tunnels, automobiles visible to public view (whether moving or not), and buildings, including those which serve food or drink, or provide entertainment, and the doorways and entrances to buildings or dwellings and the grounds enclosing them.

B. A person is guilty of drug-traffic loitering if he or she remains in a public place and intentionally solicits, induces, entices, or procures another to engage in unlawful conduct contrary to Chapter 69.50, Chapter 69.41, or Chapter 69.52, Revised Code of Washington.

C. The following circumstances do not by themselves constitute the crime of drug-traffic loitering. Among the circumstances which may be considered in determining whether the actor intends such prohibited conduct are that he or she:

1. Is seen by the officer to be in possession of drug paraphernalia; or

2. Is a known drug trafficker (provided, however, that being a known drug trafficker, by itself, does not constitute the crime of drug-traffic loitering); or
3. Repeatedly beckons to, stops or attempts to stop passersby, or engages passersby in conversation; or
4. Repeatedly stops or attempts to stop motor vehicle operators by hailing, waving of arms or any other bodily gesture; or
5. Circles an area in a motor vehicle and repeatedly beckons to, contacts, or attempts to stop pedestrians; or
6. Is the subject of any court order, which directs the person to stay out of any specified area as a condition of release from custody, a condition of probation or parole or other supervision or any court order, in a criminal or civil case involving illegal drug activity; or
7. Has been evicted as the result of his or her illegal drug activity and ordered to stay out of a specified area affected by drug-related activity.

D. No person may be arrested for drug-traffic loitering unless probable cause exists to believe that he or she has remained in a public place and has intentionally solicited, induced, enticed or procured another to engage in unlawful conduct contrary to Chapter 69.50, Chapter 69.41, or Chapter 69.52 Revised Code of Washington.

E. A person convicted of drug-traffic loitering shall be guilty of a gross misdemeanor and punished in accordance with SMC Chapter 12A.02.

F. During each of the two (2) years following enactment of the ordinance codified in this section², the Mayor of Seattle and the Chief of Police, jointly, shall conduct at least one (1) public hearing a year to ascertain the effectiveness of said ordinance in reducing drug trafficking and its attendant criminal behavior and to assure that this section is being enforced without regard to race, color, ancestry, national origin, sex, sexual orientation or disability. Within one (1) month after each hearing the Mayor and the Chief of Police shall issue a report to the City Council summarizing the testimony at the hearing. In their report, the Mayor and Chief of Police shall also inform the Council of any changes they deem advisable.

{Ord. 116307 Sections 1, 2, 1992}

1. Editor's Note: Section 1 of Ord. 116242, passed by the City Council on June 29, 1992, concerning prosecutions under Ord. 115171, reads as follows: The expiration or repeal of Ordinance 115171 shall not affect the validity of any prosecution under that ordinance for unlawful conduct committed prior to the date of the expiration or repeal of that ordinance, and such prosecution may proceed as though Ordinance 115171 had remained in effect. Ordinance 115171 expired August 5, 1992.

2. Editor's Note: Ordinance 116307 was passed by the Council on August 17, 1992 and signed by the Mayor on August 21, 1992.

Search for ordinances passed since the last SMC update (ordinances effective through February 18th, 2011, Ordinance 123538 except 123495) that refer to and that may amend Section 12A.20.050. *(Note: this feature is provided as an aid to users, but is not guaranteed to provide comprehensive information about related recent ordinances.)*

See also Recent Legislation and Council Bills and Ordinances.

For research assistance, contact the Seattle City Clerk's Office at (206) 684-8344, or by e-mail, clerk@seattle.gov.

For interpretation or explanation of a particular SMC section, please contact the relevant City department.



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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
vs.)	COA NO. 67257-6-1
)	
TOMMY HOLLINS,)	
)	
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 3RD DAY OF FEBRUARY, 2012, 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] TOMMY HOLLINS
DOC NO. 715662
AIRWAY HEIGHTS CORRECTIONS CENTER
P.O. BOX 2049
AIRWAY HEIGHTS, WA 99001

SIGNED IN SEATTLE WASHINGTON, THIS 3RD DAY OF FEBRUARY, 2012.

x Patrick Mayovsky

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STATE OF WASHINGTON
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