

REC'D

JUN 27 2012

King County Prosecutor  
Appellate Unit

NO. 68094-3-1

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

STATE OF WASHINGTON,

Respondent,

v.

JOHN LOMACK,

Appellant.

2012 JUN 27 PM 4:13  
COURT OF APPEALS  
STATE OF WASHINGTON  
M

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

The Honorable Palmer Robinson, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it refused to suppress unlawfully seized evidence.

2. The trial court erred when it entered conclusions of law 1, 3, and 6 in its written CrR 3.6 findings and conclusions and when it made consistent oral findings.<sup>1</sup>

Issues Pertaining to Assignments of Error

1. By statute, Community Corrections Officers (CCOs) are authorized to seize, search, and arrest – or order police officers to seize, search, and arrest – an offender on community custody where there is reasonable cause to believe the offender has violated a condition of his sentence. Here, however, a police officer unlawfully seized appellant for a suspected violation before obtaining proper authorization from a CCO and based on stale information. Did the trial court err when it denied appellant's motion to suppress the fruits of this unlawful seizure?

2. Are several of the trial court's conclusions contrary to the record and applicable law?

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

B. STATEMENT OF THE CASE

The King County Prosecutor's Office charged John Lomack with one count of possession of a controlled substance: cocaine. CP 1-4. Lomack moved to suppress evidence of the cocaine, arguing it was the product of an unlawful seizure. CP 40-44.

At the hearing on the defense motion, the State called one witness: Seattle Police Officer Juan Tovar. 2RP<sup>2</sup> 6. Tovar testified that on the afternoon of November 10, 2010, while on bicycle patrol, he spotted Lomack walking near 2<sup>nd</sup> and Yesler, near the King County Courthouse. 2RP 8. Tovar knew Lomack from prior arrests. During one of those arrests, a Department of Corrections Officer informed Tovar that Lomack's probation was being supervised outside of Seattle, Lomack was not permitted to be in downtown Seattle, and if Tovar ever saw Lomack downtown, he should stop him and contact DOC. 2RP 6-7.

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<sup>2</sup> This brief refers to the verbatim report of proceedings as follows: 1RP – July 28, 2011; 2RP – August 30, 2011; 3RP – August 31, 2011; 4RP – December 1, 2011.

When asked how long prior to November 10, 2010 this conversation with the DOC representative had taken place, Tovar testified, "I know it wasn't more than a year." 2RP 7. He could not, however, be more specific. 2RP 7-8, 10. Tovar also testified that he believed the prohibition was still in place when he saw Lomack in November 2010. 2RP 8.

Officer Tovar approached Lomack, stopped him, and told him he was not supposed to be in Seattle. Lomack responded that he was just passing through. Tovar then contacted DOC and was told to place Lomack under arrest, which he did. 2RP 8, 12. In a search incident to arrest, Tovar found crack cocaine and a crack pipe in Lomack's pockets. 2RP 9.

Lomack argued that Officer Tovar had no legal authority to seize him prior to contacting DOC to inquire about his status. Moreover, the information Tovar had been told as long as one year earlier – that Lomack was not permitted to be in Seattle – was too stale to rely on when making the stop, particularly since DOC can temporarily lift a ban on travel to a particular location for reasons such as a medical appointment or court appearance. CP 41-44; 2RP 12-17, 20-25.

The court denied the defense motion to suppress, finding the stop justified based on the information Tovar had received in the past and DOC's directive that Tovar stop Lomack if he ever saw him in Seattle. 2RP 26-27. Subsequently, the court entered consistent written findings and conclusions. CP 35-36.

At trial, Officer Tovar again recounted the circumstances of Lomack's arrest and discovery of the cocaine. 2RP 79-89. In addition, Community Corrections Specialist Brooks Raymond testified that he was the individual who received Officer's Tovar's call following Lomack's detention in downtown Seattle. 2RP 90-91. He confirmed for Tovar that Lomack still did not have permission to be in Seattle and directed Tovar to place Lomack under arrest. 2RP 92-93. Finally, a forensic scientist testified that the substance found on Lomack contained cocaine. 2RP 95-102.

A jury convicted Lomack, the court imposed a standard range 24-month sentence, and Lomack timely filed his Notice of Appeal. CP 7, 28, 38.

C. ARGUMENT

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

Under the Fourth Amendment to the United States Constitution and article 1, § 7 of the Washington Constitution,<sup>3</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 Arkansas v. Sanders, 442 U.S. 753, 759, 99 S. Ct. 2586, 61 L. Ed. 2d 235 (1979)). The State bears the burden of showing that a search or seizure falls within one of these narrow exceptions. State v. Williams, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984).

As an initial matter, Lomack was seized when Officer Tovar stopped him on the streets of Seattle. A person is seized under article 1, section 7 "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

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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 . . . ."

leave, given all the circumstances, or (2) free to otherwise decline an officer's request and terminate the encounter." State v. O'Neill, 148 Wn.2d 564, 574, 62 P.3d 489 (2003) (internal quotations and citations omitted). The trial court properly found Lomack had been seized. See CP 36 (conclusion 4: "when Officer Tovar stopped the defendant, questioned him, and called DOC, defendant had been seized and was not free to leave.").

The remaining question is whether Officer Tovar had any legal authority justifying this warrantless seizure.

One of the narrow exceptions to the warrant requirement is the "Terry investigatory stop," discussed in detail in Terry v. Ohio, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968). "To justify a seizure on less than probable cause, *Terry* requires a reasonable, articulable suspicion, based on specific, objective facts, that the person seized has committed or is about to commit a *crime*." State v. Duncan, 146 Wn.2d 166, 172, 43 P.3d 513 (2002) (emphasis in original) (citing Terry, 392 U.S. at 21)

Officer Tovar's warrantless seizure of Lomack cannot be sustained under this exception because it is generally limited to

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Article 1, § 7 provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

suspected crimes. It has never been extended to suspected probation violations. See Duncan, 146 Wn.2d at 173 (“Essentially the only circumstance where, absent a reasonable articulable suspicion of criminal activity, Terry has been applied is to stops incident to traffic violations.”). Short of violations involving criminal activity, probation violations such as this one are not crimes. Rather, they are violations of sentencing conditions imposed in connection with a prior offense and punishable by additional sanctions. See RCW 9.94A.703(3)(a) (authorizing DOC to order offenders to remain outside of specified geographical boundaries); RCW 9.94A.633 (authorizing certain limited sanctions for violations).

This does not mean Officer Tovar was without lawful options upon seeing Lomack in Seattle. It is well recognized that individuals on probation enjoy a lesser expectation of privacy. State v. Reichert, 158 Wn. App. 374, 386, 242 P.3d 44 (2010), review denied, 171 Wn.2d 1006 (2011). And the Washington Legislature has specifically provided CCOs with the authority to seize, search, and/or arrest probationers (or cause these actions) without a warrant under certain circumstances.

RCW 9.94A.631 provides:

If an offender violates any condition or requirement of a sentence, a community corrections officer may arrest or cause the arrest of the offender without warrant, pending a determination by the court or by the department. If there is reasonable cause to believe that an offender has violated a condition or requirement of the sentence, a community corrections officer may require an offender to submit to a search and seizure of the offender's person, residence, automobile, or other personal property.

RCW 9.94A.631(1).

In addition, RCW 9.94A.716 provides:

A community corrections officer, if he or she has reasonable cause to believe an offender has violated a condition of community custody, may suspend the person's community custody status and arrest or cause the arrest and detention in total confinement of the offender, pending the determination of the secretary as to whether the violation has occurred. . . .

RCW 9.94A.716(2); see also RCW 9.94A.716(4) ("A violation of a condition of community custody shall be deemed a violation of the sentence for purposes of RCW 9.94A.631. The authority granted to community corrections officers under this section shall be in addition to that set forth in RCW 9.94A.631.").

Under these statutory provisions, a CCO can order the warrantless seizure, search, and arrest of a probationer for "reasonable cause," which is analogous to the "reasonable suspicion" standard under Terry. Warrantless intrusions must be

based on specific and articulable facts, and rational inferences, supporting the belief an individual has violated the terms of his probation. State v. Parris, 163 Wn. App. 110, 118-119, 259 P.3d 331 (2011), review denied, 173 Wn.2d 1008 (2012).

Upon seeing Lomack in downtown Seattle, and without first seizing Lomack, Officer Tovar could have contacted DOC, confirmed that Tovar was not permitted to be in Seattle, and – at *DOC's direction* – seized Lomack without a warrant and/or placed him under arrest. This would have complied with RCW 9.94A.631 and RCW 9.94A.716. But under the plain language of these statutes, there was no authority for Officer Tovar to unilaterally seize Lomack without first contacting a community corrections officer and being directed to do so. The order of events was wrong.

In response, the State may seek to rely on Officer Tovar's testimony at the CrR 3.6 hearing that he was told by DOC – up to a year earlier – that if he ever saw Lomack in Seattle, he should detain him and then contact DOC because Lomack was prohibited from being in the city. 2RP 6-8.

Below, defense counsel argued this information was stale. Undersigned counsel was unable to find a case discussing

staleness in the context of suspected probation violations. Based on the language of RCW 9.94A.631 and RCW 9.94A.716, however, it is not necessary to determine whether Officer Tovar's information was stale.

Again, the order of events is critical. By their very language, these statutes contemplate a specific sequence: violation *and then* a community corrections officer taking appropriate action, which may include ordering the defendant's seizure. RCW 9.94A.631(1) authorizes the CCO to act "if an offender violates any condition or requirement" and "if there is reasonable cause to believe that an offender has violated a condition." Similarly, RCW 9.94A.716(2) authorizes the CCO to act "if he or she has reasonable cause to believe an offender has violated a condition of community custody." There is no authority for a CCO to order an offender's seizure prior to and contingent upon some hypothetical future violation.

The timing requirements of statutes authorizing arrest are strictly construed and any ambiguity is resolved in the defendant's favor. See Staats v. Brown, 139 Wn.2d 757, 767-769, 991 P.2d 615 (2000) (statutes authorizing warrantless arrests by fisheries patrol officers did not authorize arrest where timing requirements not met; offense had to be committed in officer's presence or be a

continuing offense); State ex rel. McDonald v. Whatcom County Dist. Court, 92 Wn.2d 35, 36-38, 593 P.2d 546 (1979) (statute authorizing arrest at the scene of a motor vehicle accident did not authorize arrest once defendant taken to hospital). Exceptions to the warrant requirement are construed similarly. See O'Neill, 148 Wn.2d at 585-586 (even where there is probable cause to arrest, state constitution requires an actual custodial arrest *before* a search incident to arrest; otherwise, there is no lawful authority to search and any fruits must be suppressed).

To the extent, however, this Court deems it necessary to address notions of staleness, they also support Lomack here. “The test for ‘staleness’ is one of common sense; if the facts indicate information is recent and contemporaneous, then it is not ‘stale.’” State v. Perea, 85 Wn. App. 339, 343, 932 P.2d 1258 (1997) (quoting State v. Anderson, 41 Wn. App. 85, 95, 702 P.2d 481 (1985), rev'd on other grounds, 107 Wn.2d 745, 733 P.2d 517 (1987)). Courts look at the totality of the circumstances, including the nature and scope of the suspected activity.<sup>4</sup> State v. Maddox, 152 Wn.2d 499, 506, 98 P.3d 1199 (2004).

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<sup>4</sup> The trial court’s conclusion 1 – that staleness turns on the reasonableness of the officer’s subjective intent – is incorrect.

In Perea, for example, the court concluded that 7-day-old knowledge the defendant had a suspended license was not too stale to warrant a seizure and arrest for suspected driving with a suspended license because it was unlikely his license had been reinstated during that brief period. Perea, 85 Wn. App. at 342-343. In State v. Myers, 117 Wn. App. 93, 97, 69 P.3d 367 (2003), review denied, 150 Wn.2d 1027 (2004), however, the court concluded that an officer's approximately one-year-old information was too stale to justify a seizure for that same offense.

In this case, Officer Tovar's information was as much as one year old. Given this significant period, Lomack's restrictions may have changed.<sup>5</sup> Moreover, there is no indication Tovar knew when Lomack's community custody ended. For all he knew, Lomack may have been near or at the end of his term when arrested a year

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<sup>5</sup> The State did not submit the judgment in the prior case that resulted in Lomack's community custody, which would have revealed whether the sentencing court expressly ordered him to stay out of Seattle or merely placed such geographical restrictions in DOC's discretion. If the latter, which would not require modification of the Judgment and Sentence, the possibility of a change was more likely. Below, the deputy prosecutor described the ban as one of the "conditions of conduct imposed by the Department of Corrections on Mr. Lomack." 2RP 18. She also said, "CCOs can impose specific conditions which in fact was done here." 2RP 18. Thus, it appears the ban was subject to DOC's discretion.

earlier. Lomack could not reasonably just assume that Lomack was still banned from Seattle and choose to seize him without first confirming the ban with DOC. The trial court's contrary conclusion (conclusion 3) is incorrect.

Any evidence or statements derived directly or indirectly from this illegal seizure must be suppressed unless sufficiently attenuated from the initial illegality to be purged of the original taint. Wong Sun v. United States, 371 U.S. 471, 484-88, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963); State v. Warner, 125 Wn.2d 876, 888, 889 P.2d 479 (1995); State v. Chapin, 75 Wn. App. 460, 463, 879 P.2d 300 (1994), review denied, 125 Wn.2d 1024 (1995). The courts apply a "but-for analysis." State v. Aranguren, 42 Wn. App. 452, 457, 711 P.2d 1096 (1985). But for the unlawful seizure, there would have been no discovery of the cocaine in Lomack's pocket, no criminal charge, and no conviction.

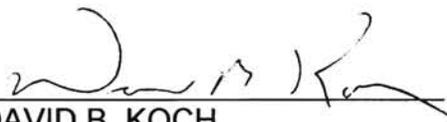
D. CONCLUSION

Lomack was unlawfully seized. All evidence obtained during the subsequent search must be suppressed and his conviction vacated.

DATED this 27<sup>th</sup> day of June, 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

  
\_\_\_\_\_  
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Attorneys for Appellant

## **APPENDIX**

**FILED**  
KING COUNTY WASHINGTON  
DEC 13 2011  
SUPERIOR COURT CLERK  
BY Melissa Ehlers  
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR KING COUNTY

STATE OF WASHINGTON  
Plaintiff

v

JOHN RAY LOMACK,  
Defendant

No. 11-1-02748-8 SEA

WRITTEN FINDINGS OF FACT AND  
CONCLUSIONS OF LAW ON CrR 3.6  
MOTION TO SUPPRESS EVIDENCE

A hearing on the admissibility of physical, oral, or identification evidence was held on August 30, 2011, before Judge Palmer Robinson. After considering the evidence submitted by the parties and hearing argument, to wit: (1) briefing submitted by the parties; (2) testimony from Seattle Police Department Officer Juan Tovar; and (3) oral argument of the parties, the court makes the following findings of fact and conclusions of law as required by CrR 3.6:

FACTS:

A. That Officer Juan Tovar is a commissioned law enforcement officer employed by the Seattle Police Department (SPD).

B. That on November 10, 2010, he was working within the scope of his law enforcement duties with SPD.

C. That on that date, at or around 2:00 pm, Juan Tovar was on patrol as a bicycle officer in the City of Seattle, County of King, State of Washington.

D. That Officer Tovar came into contact with the defendant at about 2:00 pm, in the area of Second and yesler, in the City of Seattle.

E. That Officer Tovar knew the defendant from a prior arrest. That arrest had taken place not more than a year prior to November 10, 2010.

F. During the prior arrest, Officer Tovar was told by a DOC officer that the defendant's DOC conditions prohibited from being the City of Seattle. The DOC officer told Tovar at that time that if he saw the defendant in Seattle, he was to stop the defendant and contact DOC.

G. That Officer Tovar believed these DOC conditions were still in effect on November 10, 2010 when he approached the defendant and told him he was not supposed to be in the City of Seattle.

1 H. That the defendant responded to the effect that he was "just passing through", and  
Officer Tovar responded that the defendant was not supposed to be in Seattle, period.

2 I. That Officer Tovar contacted DOC Officer Brooks Raymond and advised him that he  
3 had Lomack stopped in downtown Seattle.

4 J. That Raymond told Officer Tovar to place the defendant under arrest. Officer Tovar  
then arrested the defendant and searched the defendant's person.

5 K. That Officer Tovar found two small pieces of suspected crack cocaine in defendant's  
6 left pants pocket, a crack pipe in his right pants pocket, and a bottle of alcohol in his rear pocket.

7 L. That the defendant was transported to the West precinct of the Seattle Police  
Department.

8 M. That Officer Tovar field tested the suspected crack cocaine, which tested positive.

9 N. That aside from writing a report, doing necessary paperwork, and handling evidence in  
10 the case, Officer Tovar had no further involvement.

O. That officer Tovar is a credible witness.

11 CONCLUSIONS OF LAW AS TO THE ADMISSIBILITY OF THE EVIDENCE  
SOUGHT TO BE SUPPRESSED:

12 1. Whether the information relied on by an officer in stopping the defendant was stale or  
13 not is dependent on the reasonableness of the subjective intent of the officer conducting the stop.

14 2. The applicable case law does not require that the officer be correct that the DOC  
15 conditions of conduct justifying a stop are still in effect, just that the belief be reasonable.

16 3. Office Tovar had a reasonable belief that the DOC condition prohibiting the defendant  
17 from being in Seattle was in effect on November 10, 2010 based on his prior arrest of the  
defendant not more than a year earlier.

18 4. That when Officer Tovar stopped the defendant, questioned him, and called DOC,  
defendant had been seized and was not free to leave.

19 5. It was conceivable that the defendant was in Seattle with permission from his CCO for  
20 a medical appointment, but the case law does not require the officer to exhaust the realm of  
possibilities before detaining an individual on suspicion that he is violating DOC conditions.

21 6. The motion to suppress the narcotics found on the defendant and to dismiss the case  
22 are denied.

23 THE STATEMENT MADE BY THE DEFENDANT TO OFFICER TOVAR:

24 Defense stipulated that the statement to Officer Tovar indicating that he was "just passing  
25 through" Seattle was made at a time when the defendant was neither in custody nor subject to  
interrogation; as such, Miranda rights were not required to be read to him before he made it. The  
26 court finds the statement to be admissible by stipulation.

27 In addition to the above written findings and conclusions, the court incorporates by  
reference its oral findings and conclusions.

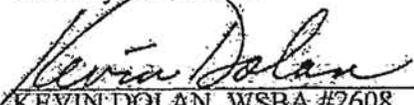
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Signed this 12 day of December, 2011.

  
JUDGE PALMER ROBINSON

Presented By:  
  
SUSAN HARRISON, WSBA #40719  
Deputy Prosecuting Attorney  
Attorney for Plaintiff

  
KEVIN DOLAN, WSBA #2608  
Attorney for Defendant

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

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 68094-3-I
	)	
JOHN LOMACK,	)	
	)	
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 27<sup>TH</sup> DAY OF JUNE 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] JOHN LOMACK  
DOC NO. 911671  
AIRWAY HEIGHTS CORRECTIONS CENTER  
P.O. BOX 2049  
AIRWAY HEIGHTS, WA 99001

**SIGNED** IN SEATTLE WASHINGTON, THIS 27<sup>TH</sup> DAY OF JUNE 2012.

x *Patrick Mayovsky*