

70003-1

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No. 70003-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

MIGUEL BROWN,

Appellant.

---

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

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OPENING BRIEF OF APPELLANT

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~~STATE OF WASHINGTON~~  
COURT OF APPEALS  
DIVISION ONE  
NO. 70003-1-I  
MIGUEL BROWN  
JAN TRASEN  
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A. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to suppress the fruits of a warrantless search.
2. The trial court erred in finding the stop was not a seizure.
3. The trial court erred in finding the officer asked, but did not demand, that Mr. Brown show his identification. (FOF 1(o)).
4. The trial court erred in finding the officer did not block the vehicle with his patrol car. (FOF 2(b)).

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Article I, Section 7 protects against the disturbance of private affairs without lawful authority. Warrantless searches and seizures are prohibited, and this rule is subject to a few narrowly drawn and jealously guarded exceptions. Here, an armed, uniformed police officer demanded Mr. Brown show his identification, although Mr. Brown had committed no crime and the officer had no reasonable suspicion that he had. Did this intrusion constitute an unlawful seizure?

C. STATEMENT OF THE CASE

On December 19, 2011, Tukwila Police Officer Donald Ames was on duty near the 76 gas station on Tukwila Boulevard. RP 19-22.<sup>1</sup> The uniformed officer was armed and was driving a marked patrol car. RP 33-34. He observed three men at the gas station, two of whom were panhandling, in violation of a Tukwila ordinance. RP 19-22, 24. Officer Ames momentarily left the gas station to issue a traffic infraction to a motorist; when he returned, the three men were sitting in a green vehicle parked at the gas station. RP 21-23.

Officer Ames approached the three men to ask them to leave the gas station, and he could smell alcohol on their breath. RP 25-26. Because he believed the men were impaired or intoxicated, he ordered the three men to leave the car at the gas station, or to find a licensed driver to take it away, in order to prevent a potential DUI offense. RP 26. The officer noted that he did not run field sobriety tests on the three men, although he did verify that the individual in the driver's seat was the registered owner of the car and had a license. RP 47, 50. Officer

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<sup>1</sup> The transcript quoted herein is contained in one consecutively-paginated volume referred to simply as "RP," except for the transcript from the stipulated facts trial, which is referred to as "2RP."

Ames also stated that the car was legally parked in the gas station's parking lot. RP 48.

Officer Ames became "irritated" with the three men, who were argumentative, yelling, and gesturing at him. RP 29-31, 51. He decided to retreat to a Jack-in-the-Box parking lot around the block, so that he could still monitor the car to see if the men attempted to start it. RP 29-30. The three men, meanwhile, left the car and retired to a nearby bench, as the officer had directed them. RP 28-29.

Approximately thirty minutes later, Officer Ames saw the three men return to the green car, accompanied by a fourth, later identified as Miguel Brown. RP 30-31. All four men all got into the car, but from the Jack-in-the-Box lot, the officer could not ascertain who was in the driver's seat. RP 31. Officer Ames quickly drove back to the gas station lot in order to verify that none of the three apparently impaired men was behind the wheel. Id. Once he parked his patrol car behind the green car, the officer approached the driver's side door on foot. RP 31-33. As soon as he approached the door, Officer Ames could see that driver was not one of the former three occupants of the vehicle, but a new individual. RP 33.

Standing over the driver's side window, Officer Ames advised the driver, Mr. Brown, that he needed to see his license, because the other three were intoxicated. RP 34. Mr. Brown informed the officer that he did not have a license. Id. Officer Ames stated that when Mr. Brown spoke, the officer could smell alcohol on his breath. RP 34. At this point, Officer Ames ordered Mr. Brown to remove the keys from the ignition – the car was running – and to step out of the car, which he did. RP 35. He told Mr. Brown to remove his hands from his pockets, asked for his name and date of birth, and whether he had any warrants. RP 37. A check of Officer Ames's computer revealed warrants for Mr. Brown. RP 37-38. Upon handcuffing Mr. Brown, the officer recovered a loaded firearm from Brown's right front pants pocket. RP 38-39.

A suppression hearing was conducted pursuant to CrR 3.5 and 3.6, after which the trial court denied Mr. Brown's motion to suppress. RP 96-97; CP 111-14; 115-19. Mr. Brown then agreed to proceed by a bench trial on a stipulated record. RP 98-100; CP 96-98. Mr. Brown was found guilty of unlawful possession of a firearm. 1/14/13 RP 13-15.

D. ARGUMENT

THE COURT ERRED IN DENYING MR. BROWN'S MOTION TO SUPPRESS, AS THE WARRANTLESS SEARCH AND SEIZURE VIOLATED ARTICLE I, SECTION 7.

a. Constitutional principles prohibit unreasonable searches and seizures. The state and federal constitutions protect citizens from unlawful searches and seizures. U.S. Const. amend. 4; Const. art. I, § 7. The Fourth Amendment of the United States Constitution, made applicable to the states through the Fourteenth Amendment, guarantees: “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, . . . and no warrants shall issue, but upon probable cause.” U.S. Const. amend. 4; U.S. Const. amend. 14; Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

Under the Washington Constitution, “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Const. art. I, § 7. Washington courts have long recognized that article I, section 7 provides even greater protections to citizens’ privacy rights than those afforded by the Fourth Amendment of the federal constitution. See, e.g., State v. Rankin, 151 Wn.2d 689, 694, 92

P.3d 202 (2004); State v. O’Neill, 148 Wn.2d 564, 584, 62 P.3d 489 (2003); State v. Jones, 146 Wn.2d 328, 332, 45 P.3d 1062 (2002). The Washington provision “is not limited to subjective expectations of privacy, but, more broadly protects ‘those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.’” State v. Parker, 139 Wn.2d 486, 494, 987 P.2d 73 (1999) (quoting State v. Myrick, 102 Wn.2d 506, 511, 688 P.2d 151 (1984)).

A warrantless search is generally considered per se unreasonable. Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); State v. Walker, 136 Wn.2d 678, 682, 965 P.2d 1079 (1998). Thus, a warrantless search is presumed unlawful unless the search meets one of the narrowly drawn and jealously guarded exceptions to the warrant requirement. State v. Williams, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). The State bears the burden of demonstrating by clear and convincing evidence whether a search fits within one of these exceptions. Id. (citing State v. Houser, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980)).

b. The warrantless search of Mr. Brown was a seizure -- not a social contact. In the instant case, the trial court characterized the interaction between Officer Ames and Mr. Brown as merely a social contact. RP 94-97; CP 118.

A social contact, under Washington law, occupies “an amorphous area in our jurisprudence, resting someplace between an officer’s saying ‘hello’ to a stranger on the street and, at the other end of the spectrum, an investigative detention (i.e., Terry stop). See generally Terry v. Ohio, 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).” State v. Harrington, 167 Wn.2d 656, 664, 222 P.3d 92 (2009).

Every interaction between police officers and individuals does not rise to the level of a seizure, and effective law enforcement techniques may require interaction with citizens on the streets. Harrington, 167 Wn.2d at 665. However, subsequent police conduct may escalate an interaction that began as a social contact, into a seizure. Id. at 666; State v. Soto-Garcia, 68 Wn. App. 20, 22, 841 P.2d 1271 (1992).

In Harrington, the defendant was stopped by one police officer who did not activate his emergency lights or siren, and who asked for permission to speak to the defendant; this initial approach was initially

deemed a social contact. 167 Wn.2d at 665. The Court held that subsequent events “quickly dispelled the social contact, however, and escalated the encounter to a seizure.” Harrington, 167 Wn.2d at 666 (finding consent to search was obtained through exploitation of prior illegal seizure, requiring suppression of evidence and reversal due to violation of article I, section 7). The factors that a court may consider when determining whether a seizure has occurred include, but are not limited to, the arrival of additional police officers; the request to remove hands from one’s pockets; the display of a weapon; the request to search or frisk; and the request for identification. Id. at 667-68; State v. Young, 135 Wn.2d 498, 512, 957, P.2d 681 (1998) (embracing nonexclusive list of police actions likely resulting in seizure) (quoting United States v. Mendenhall, 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980)).

The Harrington Court emphasized,

The relevant question is whether a reasonable person in the individual’s position would feel he or she was being detained ... an encounter between a citizen and the police is consensual if a reasonable person under the circumstances would feel free to walk away.

167 Wn.2d at 663.

The Harrington Court noted that asking a person to perform an act such as removing his hands from his pockets “adds to the officer’s progressive intrusion and moves the interaction further from the ambit of valid social contact.” 167 Wn.2d at 667. Police actions which may meet constitutional muster when viewed individually may nevertheless constitute an unlawful search or seizure when the actions are viewed cumulatively. Id. at 668; State v. Soto-Garcia, 68 Wn. App. 20, 22, 841 P.2d 1271 (1992), abrogated on other grounds by State v. Thorn, 129 Wn.2d 347, 917 P.2d 108 (1996).

Here, under Harrington, the initial contact with the other three men in the car might be viewed as a social contact. Officer Ames stated that his first contact with the three men was just a warning regarding the panhandling ordinance, and the officer was willing to let the three men leave their car at the gas station, despite their apparent level of impairment or intoxication. RP 23-24, 26. However, it must be noted that Mr. Brown had not even entered the scene at this point, and whatever the officer may have reasonably suspected as to the three men was irrelevant as to Brown. In his testimony, Officer Ames characterized the three men as “argumentative” and causing him such “irritation” that he retreated with his patrol car to a Jack-in-the-Box

approximately 150 feet away, in order to avoid their yelling and gesticulating. RP 30.

When the three original men later walked back to the car with a fourth man, Mr. Brown, to have him move the car, the tone of the officer's interaction with the men changed dramatically. Officer Ames quickly drove back to the gas station in order to ascertain who was in the driver's seat – something he testified that he could not see from his perch at the Jack-in-the-Box. RP 31. Once he pulled into the gas station parking lot, he parked behind the suspects' car and approached on foot. RP 32.<sup>2</sup> As the officer approached the driver's side door, he could tell that it was the fourth man – not one of the three he had suspected of being impaired – who was behind the wheel. RP 33, 59.

At this point, Officer Ames concedes he had no reason to think Mr. Brown, the individual behind the wheel, was intoxicated, or had committed any other crimes or infractions. RP 59. Officer Ames “advised him [he] needed to see his driver's license.” RP 34. Although at this stage, Officer Ames already had all of the information he needed

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<sup>2</sup> Although the officer denied blocking the car, he told the defense investigator, “But as soon as the brake lights came on, I figured I would just go approach the car and block it in and see who is driving before it became drunk driving.” RP 59 (emphasis added). Appellant assigns error to FOF 3b. CP 117-18.

– he had verified that the individual in the driver’s seat was not one of the three apparently impaired men – he demanded to see Mr. Brown’s identification, which raised the level of intrusion. RP 34.<sup>3</sup>

As the Supreme Court discussed in Harrington, a reasonable person would not have felt free to leave at this point, or indeed, free to refuse the request to show identification after Officer Ames, an armed and uniformed officer, displayed this show of authority. 167 Wn.2d at 670. The violation of Brown’s privacy here is comparable to that in Harrington, where the Court stated:

We note this progressive intrusion, culminating in seizure, runs afoul of the language, purpose, and protections of article I, section 7. Our constitution protects against disturbance of private affairs – a broad concept that encapsulates searches and seizures. Article I, section 7 demands a different approach than does the Fourth Amendment; we look for the forest amongst the trees.

Id. at 670.

As in Harrington and Soto-Garcia, although the initial contact with police may have been social, Officer Ames escalated the contact

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<sup>3</sup> Appellants assigns error to FOF 1(o). CP 116.

into a seizure by both his words and his actions.<sup>4</sup> Harrington, 167 Wn.2d at 670; Soto-Garcia, 68 Wn. App. at 29.

Indeed, Officer Ames conceded that had Mr. Brown attempted to drive or walk away without showing his identification, the officer would have stopped him, indicating Mr. Brown was never actually free to leave. RP 62.

c. Brown was searched in violation of constitutional principles, requiring suppression of the evidence and reversal of his conviction. Where police unconstitutionally seize an individual prior to arrest, the exclusionary rule calls for suppression of evidence obtained via the government's illegality. State v. Garvin, 166 Wn.2d 242, 254, 207 P.3d 1266 (2009) ("The exclusionary rule mandates the suppression of evidence gathered through unconstitutional means.").

The warrantless search of Mr. Brown violated Article I, Section 7. Because the arrest warrants – and later the firearm -- were only found subsequent to, and as a result of, the exploitation of an illegal seizure, exclusion of the evidence and reversal of Mr. Brown's conviction is required.

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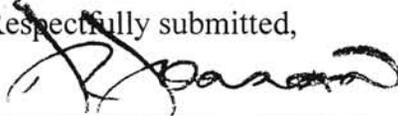
<sup>4</sup> See also David K. Kessler, Free to Leave? An Empirical Look at the Fourth Amendment's Seizure Standard, 99 J.Crim. L. & Criminology 51 (2009) (noting "people

E. CONCLUSION

For the foregoing reasons, Mr. Brown respectfully requests this Court reverse his conviction and remand the case for further proceedings.

DATED this 1<sup>st</sup> day of October, 2013.

Respectfully submitted,

 (19271) for:

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feel compelled to comply with authority figures,” and “most people would not feel free to leave when they are questioned by a police officer on the street”).

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COURT OF APPEALS  
DIVISION ONE  
SEATTLE, WA

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 1<sup>ST</sup> DAY OF OCTOBER, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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**SIGNED** IN SEATTLE, WASHINGTON THIS 1<sup>ST</sup> DAY OF OCTOBER, 2013.

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