

NO. 71032-0-1

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

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STATE OF WASHINGTON,

Respondent,

v.

MARK M. MOE,

Appellant.

2014 JUN 19 PM 4:00

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON

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BRIEF OF RESPONDENT

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## **I. ISSUES**

1. Are the trial court's factual findings supported by substantial evidence?
2. Do the factual findings support the trial court's conclusions of law?
3. Has defendant met his burden to prove that a seizure occurred prior to when he was detained and handcuffed?

## **II. STATEMENT OF THE CASE**

### **A. FACTS OF THE CRIME.**

On February 8, 2013, Lynnwood Police Officers Koonce and Olesen were on patrol in a single unmarked vehicle. They drove through the Meadow Lynn Mobile Home Park around 7:38 p.m. Over the years there has been substantial criminal activity associated with this mobile home park and one trailer in particular where officers normally contact anyone present. Officer Koonce observed three people working on a car parked in the driveway of that trailer. Officer Koonce parked his vehicle thirty to forty feet away from the driveway and walked over to contact the three people. He did not activate his lights. As Officer Koonce walked over to contact the three people, Officer Olesen stayed back about four to five feet. One person who looked familiar to Officer Koonce

started making suspicious movement. It appeared that the person was attempting to conceal himself; the person turned his head to the side, pulled up his hooded sweatshirt and scooted under the car. RP<sup>1</sup> 2-6, 15-17, 30-31, 35.

Officer Koonce recognized the person from numerous prior contacts as Mark Moe, defendant. He had previously arrested defendant three or four times. Officer Koonce had received information within the past few weeks that defendant “was back in felony warrant status with the Department of Corrections.” RP 7, 9, 12, 18-19, 21-23, 28-29.

When defendant came out from under the car Officer Koonce said, “Hi Mark,” and asked why he had been hiding. Defendant denied he was hiding. Officer Koonce asked defendant if he was hiding because he had warrants. Defendant denied he had warrants. Officer Koonce said, “Well, I don’t think you’d be hiding from me if you knew you didn’t have warrants,” and then said, “Look, you either know you’re checking in with DOC or you don’t.” Defendant responded by dropping his head and saying that he might have a warrant. Officer Koonce regarded this as an

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<sup>1</sup> RP references the May 9, 2013 verbatim report of proceedings. Other verbatim reports of proceeding are designated by the date, e.g., RP (8/22/13).

acknowledgement by defendant "that he might have a warrant because he knew that he wasn't checking in with DOC." RP 8-10, 13, 18-19, 27-28, 37.

Officer Koonce directed Officer Olesen to detain defendant while he checked on his warrant status. Officer Olesen placed defendant in handcuffs. Within thirty seconds of detaining defendant Officer Koonce called to check on defendant's warrant status. Dispatch confirmed a warrant for defendant's arrest within minutes. The entire interaction, from when Officer Koonce first contacted the three individuals in the driveway to when the warrant was confirmed, took three to four minutes. RP 10-11, 23, 32, 39-40.

Once the warrant was confirmed, defendant was advised he was under arrest and searched. Officer Olesen found a clear plastic bag containing a brown sticky substance in defendant's front pocket. Officer Olesen recognized the substance as heroin; this was confirmed with a NIK test. RP 11-12, 23, 32-33, 35, 38.

## **B. PROCEDURAL HISTORY.**

On February 15, 2013, defendant was charged with Possession of a Controlled Substance, to wit: heroin. CP 109-110.

On May 9, 2013, defendant moved to suppress evidence as the fruit of an unlawful search and seizure. CP 74-83; RP 1-48. The court denied the motion. RP 48-60. On May 15, 2013, the court entered written findings and conclusions. CP 69-73.

On August 22, 2013, the case proceeded to bench trial on stipulated evidence and defendant was found guilty of Possession of a Controlled Substance. CP 43-68; RP (8/22/13) 2-7.

On October 14, 2013, on the agreed recommendation of the parties, defendant was sentenced to a Residential Chemical Dependency Treatment-Based Alternative consisting of to three to six months residential treatment followed by a term of 24 months community custody. CP 15-27; RP (10/14/13) 2-9. Defendant timely appealed. CP 1-14.

### **III. ARGUMENT**

#### **A. FINDINGS OF FACT AND CONCLUSIONS OF LAW.**

The court reviews a trial court's ruling on a motion to suppress evidence to determine whether substantial evidence supports the trial court's factual findings and whether the factual findings support the trial court's conclusions of law. State v. Winterstein, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009); State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). The rule in

Washington is that challenged findings entered after a suppression hearing that are supported by substantial evidence are binding, and, where the findings are unchallenged, they are verities on appeal. State v. O'Neill, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). The trial court's conclusions of law are reviewed de novo. Garvin, 166 Wn.2d at 249. In making its review, an appellate court may affirm on any grounds supported by the factual record, regardless whether such grounds were relied upon by the lower court. State v. Avery, 103 Wn. App. 527, 537, 13 P.3d 226 (2007). Here, substantial evidence supports the trial court's factual findings and those findings support the court's conclusions of law.

### **1. Findings Of Fact.**

Defendant assigns error to the undisputed finding of fact 1(g). Appellant's Brief at 1. Defendant argues that finding of fact 1(g) does not accurately summarize the interaction between Officer Koonce and defendant. Appellant's Brief at 9.

During both direct and cross examination, Officer Koonce was asked about his interaction with defendant immediately after he called defendant by name. He said:

- A. I asked him why he was hiding.
- Q. Did he reply?
- A. He denied that he was.

- Q. And did you say anything else?
- A. I asked him, "You're hiding from me because you have warrants?" And he initially I think denied that he had warrants and then I said, "Look, you either know you're checking in with DOC or you don't," and then he admitted that it was possible he might have a warrant.

RP 8. Officer Koonce was asked:

- Q. Do you remember his exact words about the warrant when you said you were either checking in with DOC or you're not?
- A. Well, he initially, like I said, I think denied that he was, A, trying to conceal his identity from me, and B, that he had warrants. And then I said, "Well, I don't think you'd be hiding from me if you knew you didn't have warrants." Then I said, "Look, you either know if you're checking in with DOC or you're not," and he obviously – it was pretty obvious to me that he was also under the influence of narcotics, which normally means folks are not checking in with DOC because then they'll violate their agreement with DOC not to use.
- Q. Okay. What did he say?
- A. He said at that time that, "Well, I might have a warrant. I don't know."

RP 9-10. Officer Koonce regarded this as an acknowledgement by defendant "that he might have a warrant because he knew that he wasn't checking in with DOC." RP 13.

On cross examination Officer Koonce acknowledged that he was paraphrasing his questions and defendant's answers. RP 19-

20. Officer Koonce was asked if defendant ever acknowledged that he had a warrant:

A. He denied it at first and then said that that was perhaps the case.

Q. Perhaps the case?

A. Well, he knows whether he's been checking in with DOC or not. When I brought that point up, he kind of dropped his head and was like, "Well, maybe."

RP) 27-28. Contrary to defendant's argument, substantial evidence supports the trial court's factual findings regarding Officer Koonce's interaction with defendant. Finding of Fact 1(g) reads:

Koonce asked the defendant why he was hiding from him and whether or not he had a warrant. The defendant initially denied that he had a warrant and then stated that he wasn't sure if he had [sic] warrant. Koonce told the defendant that he should know if he had a warrant as he would know if he was checking in with DOC or he wasn't. The defendant hung his head and then stated maybe. While the defendant said he did not know if a warrant was out, he did not deny he was failing to report to DOC.

CP 70. The trial court's findings are supported by substantial evidence and, therefore, are binding on appeal. O'Neill, 148 Wn.2d at 571.

## **2. Conclusions Of Law.**

Defendant also assigns error to the trial court's conclusions of law 4(e) and 4(g). Appellant's Brief at 1. Here, the trial court

correctly concluded that there was substantial evidence to justify a Terry<sup>2</sup> detention. CP 71-72; RP 53-54. Whether a warrantless seizure or a Terry stop passes constitutional muster is a question of law reviewed de novo. State v. Rankin, 151 Wn.2d 689, 694, 92 P.3d 202 (2004); State v. Bailey, 154 Wn. App. 295, 299, 224 P.3d 852 (2010). “While an inchoate hunch is insufficient to justify a stop, circumstances which appear innocuous to the average person may appear incriminating to a police officer in light of past experience. The officer is not required to ignore that experience.” State v. Glover, 116 Wn.2d 509, 514, 806 P.2d 760 (1991). An officer may rely on a combination of otherwise innocent observations to briefly detain a suspect, including information given the officer, observations the officer makes, and inferences and deductions drawn from his or her training and experience. United States v. Arvizu, 534 U.S. 266, 273-274, 122 S.Ct. 744, 750-751, 151 L. Ed. 2d 740 (2002); United States v. Cortez, 449 U.S. 411, 418, 101 S.Ct. 690, 695-696, 66 L. Ed.2d 621 (1981). The scope of an investigatory stop may be expanded if the stop itself confirms existing suspicion or arouses further suspicion. State v. Smith, 115 Wn.2d 775, 785, 801 P.2d 975 (1990). Having a reasonable,

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

articulated and well-founded suspicion that defendant had outstanding warrants for his arrest<sup>3</sup>, Officer Koonce detained him for further investigation. Police may handcuff a suspect detained pursuant to an investigative stop. State v. Wheeler, 108 Wn.2d 230, 235, 737 P.2d 1005 (1987); State v. Wakeley, 29 Wn. App. 238, 243 fn.1, 628 P.2d 835, review denied, 95 Wn.2d 1032 (1981); Houston v. Clark County Sheriff Deputy John Does 1-5, 174 F.3d 809, 815 (6th Cir. 1999) (detention in a police car and the use of handcuffs does not exceed the bounds of a Terry stop).

Further, it is undisputed that defendant was under custodial arrest at the time of the search. Appellant's Brief at 5; CP 70, 72; RP 11-12, 32-33, 51. The court reviews the validity of a warrantless search de novo. State v. Parris, 163 Wn. App. 110, 116, 259 P.3d 331 (2011). A search incident to lawful arrest is an exception to the warrant requirement. State v. MacDicken, 179 Wn.2d 936, 940, 319 P.2d 31 (2014); State v. Byrd, 178 Wn.2d 611, 617, 310 P.3d 793 (2013). Here, the factual findings support the trial court's conclusions of law.

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<sup>3</sup> "Of course, an officer may stop a person if there are reasonable grounds to believe that person is wanted for past criminal conduct." United States v. Cortez, 449 U.S. 411, 417 fn. 2, 101 S.Ct. 690, 695, 66 L. Ed.2d 621 (1981).

Defendant's argument that the trial court failed to correctly identify the moment at which he was seized is addressed below.

**B. DEFENDANT FAILS TO DEMONSTRATE THAT HE WAS SEIZED PRIOR TO BEING DETAINED AND HANDCUFFED.**

Defendant claims that he was seized when Officer Koonce said, "Look, you either know you're checking with DOC or you don't." Appellant's Brief at 7-11. To the contrary, the trial court's findings support the conclusion that the seizure occurred when defendant was detained and placed in handcuffs.

The defendant bears the burden of proving that a seizure occurred. O'Neill, 148 Wn.2d at 574; State v. Young, 135 Wn.2d 498, 510, 957 P.2d 681 (1998). Absent a "seizure," the constitutional protection against unreasonable searches and seizures is simply not implicated. Thorn, 129 Wn.2d at 350. Whether police have seized a person is a mixed question of law and fact. State v. Armenta, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997); State v. Thorn, 129 Wn.2d 347, 351, 917 P.2d 108 (1996), overruled on other grounds O'Neill, 148 Wn.2d at 571. What the police said and did and what the defendant said and did are questions of fact. Bailey, 154 Wn. App. at 299. What legal consequences flow from those facts is a question of law. Id. "Not

every encounter between an officer and an individual amounts to a seizure.” Armenta, 134 Wn.2d at 10. “An encounter between a citizen and the police is consensual if a reasonable person under the circumstances would feel free to walk away.” Bailey, 154 Wn. App. at 300.

A seizure occurs when an individual's freedom of movement is restrained and the individual would not believe he or she is free to leave or decline a request due to an officer's use of force or display of authority. State v. Rankin, 151 Wn.2d 689, 695, 92 P.3d 202 (2004); Thorn, 129 Wn.2d at 351-352 (“The relevant inquiry for the court in deciding whether a person has been seized is whether a reasonable person would have felt free to leave or otherwise decline the officer’s requests and terminate the encounter.”) A police officer's manner and tone are important in determining, objectively, whether a person would feel free to leave in a particular situation. Thorn, 129 Wn.2d at 353-54; O'Neill, 148 Wn.2d at 579. The standard is “a purely objective one, looking to the actions of the law enforcement officer.” O'Neill, 148 Wn.2d at 574; Young, 135 Wn.2d at 510-511. “In general ... no seizure occurs when a police officer merely asks an individual whether he or she will answer questions or when the officer makes some further request that falls

short of immobilizing the individual.” State v. Nettles, 70 Wn. App. 706, 710, 855 P.2d 699 (1993), review denied, 123 Wn.2d 1010, 869 P.2d 1085 (1994). Factors that may give rise to a seizure include “the threatening presence of several officers, the display of a weapon, touching the defendant, and commanding language or tone of voice.” State v. Knox, 86 Wn. App. 831, 839, 939 P.2d 710 (1997), overruled on other grounds O’Neill, 148 Wn.2d at 571; see also United States v. Mendenhall, 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980).

Here, Officer Koonce parked his unmarked vehicle thirty to forty feet away and walked to the driveway where defendant was standing. He did not activate the emergency lights. RP 4-5. Officer Olesen stood back four to five feet. RP 31. Officer Koonce’s manner and tone did not rise to the level of a show of authority or force, he never commanded defendant to do anything, never displayed his weapon, and did not touch defendant. RP 7, 18, 35. To the contrary, Officer Koonce recognized defendant from prior contacts and called him by name, asked why he was hiding and if he had a warrant. CP 70; RP 7-8. Police questioning, without more, is unlikely to result in a seizure. Armenta, 134 Wn.2d at 11. In the present case, Officer Koonce did not take any action

that would lead a reasonable person to conclude he was not free to leave. Defendant was not restrained in any way prior to being handcuffed while Officer Koonce checked on his warrant status. Clearly Officer Koonce's action did not manifest a show of authority or restraint by means of physical force sufficient that a reasonable person would not have felt free to leave or otherwise decline the officer's requests and terminate the encounter.

Defendant argues that this case is controlled by State v. Barnes, 96 Wn. App. 217, 978 P.2d 1131, 1135 (1999). His reliance on Barnes is misplaced. In Barnes contact was established when the officer told Barnes he thought there was a warrant outstanding on him and requested that Barnes wait while he checked the warrant out. Barnes, 96 Wn. App. at 219. Barnes put his hand in his coat pocket several times while the status of the warrant was being checked. The officer told him to stop. When backup arrived, Barnes was told he would be patted down for weapons. Barnes resisted, was placed under arrest for obstructing<sup>4</sup> and searched incident to arrest. Barnes, 96 Wn. App. at 220. The court found that a reasonable person would not have felt free to

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<sup>4</sup> The court found that the arrest for obstructing was not lawful. Barnes, 96 Wn. App. at 224-225.

walk away at the point when the officer requested Barnes to wait until the warrant was checked out, and that the ensuing interaction was a detention, not a social encounter. The court concluded that once the officer communicated his belief that lawful grounds existed to detain Barnes, the encounter ceased to be consensual. Barnes, 96 Wn. App. at 223, citing State v. Soto-Garcia, 68 Wn. App. 20, 25, 841 P.2d 1271 (1992), abrogated on other grounds by State v. Thorn, 129 Wn.2d 347, 917 P.2d 108 (1996). In the present case, no evidence was presented that, prior to when defendant was handcuffed, Officer Koonce communicated an intention to detain defendant or that he asked defendant to wait. An officer's subjective belief is immaterial on the issue of whether a reasonable person would feel free to leave, unless the officer communicated that information to the defendant. Barnes, 96 Wn. App. at 224. It is also irrelevant whether the officer subjectively intended to detain defendant with or without his consent, again except to the extent this was communicated to the defendant. Barnes, 96 Wn. App. at 224; Knox, 86 Wn. App. at 839.

In Soto-Garcia the defendant was walking in public when the officer stopped him and asked if he had any cocaine on him, Soto-Garcia denied having cocaine, and the officer asked for consent to

a search. Soto-Garcia, 68 Wn. App. at 22. The court held that Soto-Garcia was seized at the time the police officer asked him if he had cocaine on his person and if he could search him. Soto-Garcia, 68 Wn. App. at 25. The request to search alone is inconsistent with a social contact. State v. Guevara, 172 Wn. App. 184, 189-191, 288 P.3d 1167 (2012); State v. Harrington, 167 Wn.2d 656, 669-670, 222 P.3d 92 (2009) (officer's progressive intrusion matured into a seizure when he requested to frisk without a reasonable safety concern). In the present case, Officer Koonce did not ask defendant for consent to be searched or frisked.

The facts in the present case are more comparable to cases where a social contact did not mature into an unlawful seizure. State v. Bailey, 154 Wn. App. 295, 224 P.3d 852, review denied, 169 Wn.2d 1004, 236 P.3d 205 (2010); State v. Smith, 154 Wn. App. 695, 226 P.3d 195, review denied, 169 Wn.2d 1013, 236 P.3d 207 (2010); State v. Johnson, 156 Wn. App. 82, 231 P.3d 225 (2010), remanded, 172 Wn.2d 1001, 257 P.3d 1112 (2011). In Bailey and Johnson, defendants were approached by officers and asked to identify themselves. Police checked for and confirmed outstanding warrants for both men, and then discovered drugs in a subsequent search incident to the arrest on the warrants. Bailey,

154 Wn. App. at 298; Johnson, 156 Wn. App. at 86–88. In Bailey, the court noted that the officer did not display force by using sirens or lights, and that Bailey voluntarily approached the officer and answered his questions. The court concluded that, without more, a reasonable person would have felt free to leave. Bailey, 154 Wn. App. at 302. In Johnson, the court cited several factors in concluding that the incident was not an unlawful seizure; the officer parked some distance behind Johnson, did not activate his lights, was not accompanied by other officers, and did not demand identification or ask Johnson to step out of the car. Johnson, 156 Wn. App. at 92. In Smith the officer asked Smith for identification. Smith was holding his wallet open and the officer asked to look in it. The officer found cards in different names and drugs in the wallet. The court found that the officer did not ask Smith “about illegal activity, attempt to control his actions, or request to frisk him.” The court concluded that the contact was not an unlawful seizure because the officer merely asked for identification and looked through Smith's open wallet with Smith's permission. Smith, 154 Wn. App. at 702.

In the present case, Officer Koonce parked some distance from where defendant was standing, did not display force, did not

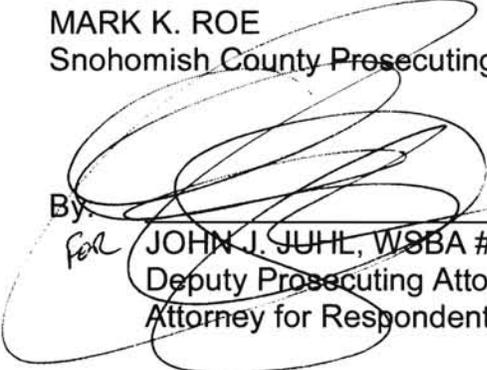
demand information, defendant voluntarily answered questions, and Officer Koonce did not request to search or frisk defendant. Defendant has not shown that he was seized prior to being detained and handcuffed.

#### **IV. CONCLUSION**

For the reasons stated above, the appeal should be denied and defendant's conviction affirmed.

Respectfully submitted on June 18<sup>th</sup>, 2014.

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June 18, 2014

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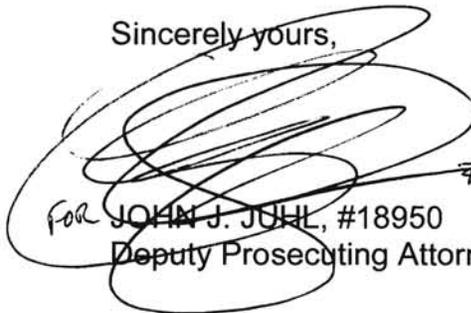
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COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2014 JUN 19 PM 4:00

**Re: STATE v. MARK M. MOE  
COURT OF APPEALS NO. 71032-0-1**

Dear Mr. Johnson:

The respondent's brief does not contain any counter-assignments of error. Accordingly, the State is withdrawing its cross-appeal.

Sincerely yours,

  
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for JOHN J. JUHL, #18950  
Deputy Prosecuting Attorney

cc: Nielsen, Broman & Koch  
Appellant's attorney(s)

18th June 14  


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

THE STATE OF WASHINGTON,  Respondent,  v.  MARK M. MOE,  Appellant.
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No. 71032-0-1

AFFIDAVIT OF MAILING

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 18<sup>th</sup> day of June, 2014, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

THE COURT OF APPEALS - DIVISION I  
ONE UNION SQUARE BUILDING  
600 UNIVERSITY STREET  
SEATTLE, WA 98101-4170

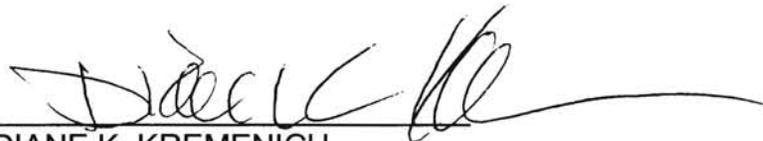
NIELSEN, BROMAN & KOCH  
1908 EAST MADISON STREET  
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containing an original and one copy to the Court of Appeals, and one copy to the attorney for the appellant of the following documents in the above-referenced cause:

BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 18<sup>th</sup> day of June, 2014.

  
\_\_\_\_\_  
DIANE K. KREMENICH  
Legal Assistant/Appeals Unit