

71321-3

71321-3

NO. 71321-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

BENEDICTO BAEZ ACEVEDO,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

Based on his experience and training involving weapons and his observation that defendant had his clenched fist under his leg, Trooper Axtman asked defendant to pull his hand up and put it in his lap. Did Trooper Axtman articulate an objective rationale predicated specifically on officer safety concerns to justify intrusion on defendant's movement as a passenger in a vehicle stopped for traffic infractions?

II. STATEMENT OF THE CASE

A. FACTS OF THE CRIME.

On October 26, 2012, at approximately 10:14 p.m., Trooper Axtman observed a vehicle stop three feet beyond the stop line at the intersection of Highway 2 and Kelsey Street, in Monroe, Washington. It was dark out, the roadway was wet and traffic was light. The vehicle's center brake light did not activate. Trooper Axtman activated his emergency equipment and the driver pulled into the Buzz Inn parking lot just off Highway 2. CP 53-54; 1RP 5-6, 17-19.

Trooper Axtman was the only officer on the scene. There were two occupants in the vehicle. Trooper Axtman did not know either the driver or the passenger. When Trooper Axtman

contacted the driver and asked for his license, registration and insurance card, he noticed a strong odor of fresh marijuana coming from inside the vehicle.¹ Trooper Axtman also observed that the passenger, Benedicto Baez Acevedo, defendant, had his left hand clenched in a fist, tucked down in his lap under his leg. CP 54; 1RP 7-8, 16, 18-19.

Based on the way defendant was sitting and holding his hand in a fist under his leg, Trooper Axtman had concerns for his safety. Trooper Axtman's training regarding vehicle stops included looking for weapons, specifically looking at the hands of occupants. Trooper Axtman also had prior experience involving individuals concealing weapons in a vehicle and small firearms that can be concealed in the hand. Trooper Axtman asked defendant to pull his hand up and put it in his lap. Defendant pulled his hand out, reached into his front pocket, pulled out a bag of marijuana and handed it to Trooper Axtman. Defendant was placed under arrest. Trooper Skinner arrived at the location and defendant was searched incident to arrest. A white substance, confirmed to be

¹ An officer with training and experience to identify the odor of marijuana who smells the odor emanating from the vehicle in which more than one occupant is present, has probable cause to search the vehicle. State v. Grande, 164 Wn.2d 135, 146, 187 P.3d 248, 253 (2008).

cocaine, was found in defendant pocket. CP 54-55; 1RP 4-5, 8-10, 15-17.

B. PROCEDURAL HISTORY.

Defendant was charged with Possession of a Controlled Substance—cocaine. On August 19, 2013, defendant filed a motion to suppress evidence. The State's response was filed on November 13, 2013. The suppression motion was heard on November 14, 2013. CP 58-74; 1RP 1-31.

Applying the criteria set forth in State v. Mendez, 137 Wn.2d 208, 970 P.2d 722 (1999), the court found that Trooper Axtman had specific articulable concerns for his safety based on his prior training and experience involving weapons and the way defendant had his hand clenched between his legs; and that it was reasonable for Trooper Axtman to ask defendant to remove his hand from under his leg and show his hand. The court concluded that there was an objective rationale predicated on specific safety concerns for Trooper Axtman to ask defendant to show his hand, and denied the motion to suppress. The court's written findings of fact and conclusions of law were entered on December 14, 2013. CP 53-57; 1RP 25-29.

On December 23, 2013, the case proceeded to stipulated bench trial on agreed documentary evidence. The court found defendant guilty of possessing cocaine, a controlled substance. Defendant was sentenced to 90 days confinement and ordered to pay \$1,600.00 in legal financial obligations. CP 4-52; 2RP 2-15. Defendant timely appealed.

III. ARGUMENT

A. STANDARD OF REVIEW.

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 Appellate court reviews only those facts to which error has been assigned. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). A trial court's erroneous determination of facts, unsupported by substantial evidence, will not be binding on appeal. Hill, 123 Wn.2d at 647. 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). Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding. State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009); Hill, 123 Wn.2d at 644. Here, the record contains substantial evidence supporting the trial court's findings.

Credibility determinations are for the trier of fact and cannot be reviewed on appeal. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). In testing the sufficiency of the evidence, the reviewing court does not weigh the persuasiveness of the evidence. Rather, the court must defer to the trier of fact on issues involving conflicting testimony, credibility of witnesses, and the weight and persuasiveness of the evidence. State v. Thomas, 150 Wn.2d 821, 874-875, 83 P.3d 970 (2004); State v. Asaeli, 150 Wn. App. 543, 567, 208 P.3d 1136 (2009); State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980); State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

Conclusions of law in an order pertaining to suppression of evidence are reviewed de novo. State v. Arreola, 176 Wn.2d 284, 291, 290 P.3d 983 (2012); Garvin, 166 Wn.2d at 249; State v. Armenta, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997). 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, the findings support the trial court's conclusions.

B. FINDINGS OF FACT.

Defendant assigns error to the trial court's findings of fact, 14, 15, 16, 17, and argues that they are not supported by substantial evidence. Brief of Appellant at 1-3. Contrary to defendant's argument, substantial evidence supports the trial court's factual findings, and, therefore, those findings are binding on appeal. O'Neill, 148 Wn.2d at 571.

1. Findings Of Fact 14 And 17.

14. While Trooper Axtman was standing at the driver's side window, he observed the defendant holding his hand in a fist, tucked under his knees by the passenger side floorboard.

17. Trooper Axtman had concerns about his safety based on the way the defendant was sitting, holding his hand in a fist, leaning towards the front passenger floorboard.

CP 54. At the suppression hearing, Trooper Axtman testified that there was nothing impeding his view of defendant while he was contacting the driver and he observed that defendant had his left

hand in a fist, tucked down in his lap under his leg. Trooper Axtman demonstrated for the court how defendant was seated including the position of his hand.² 1RP 7-8, 18-19. Trooper Axtman stated that he had concerns for his safety based on defendant's posture in the vehicle. 1RP 9. A reviewing court must defer to the trier of fact on issues involving conflicting testimony, credibility of witnesses, and the weight and persuasiveness of the evidence. Thomas, 150 Wn.2d at 874-875; Asaeli, 150 Wn. App. at 567; Delmarter, 94 Wn.2d at 638; Walton, 64 Wn. App. at 415-416. Here, substantial evidence supports the trial court's findings of fact 14 and 17.

2. Findings Of Fact 15 And 16.

15. Trooper Axtman is aware through training and experience of small weapons people can hold in their hand, including small firearms.
16. Trooper Axtman has experience with occupants in vehicles concealing firearms during vehicle stops by sitting on them.

CP 54. At the suppression hearing, Trooper Axtman described his training regarding looking for weapons during a vehicle stop. Trooper Axtman said that he wants "to look at their hands, because

² During argument the prosecutor described Trooper Axtman's demonstration; "defendant was leaning over, had his hand balled up in a fist towards the floor of the car." 1RP 23.

if there's an immediate threat, it may possibly be in their hands or next to them." 1RP 4-5. Trooper Axtman was asked, "Either in your training or experience, have you encountered individuals who are able to possess small weapons in their hand?" He replied that he had a few examples. His first example was a very tiny, five-shot .22 caliber handgun, owned by his wife, that fits in the palm of his hand, that someone would be able to hide very well without a person seeing it. His second example was a specific traffic stop where there was a car full of people who had a mixture of long guns and handguns all over the vehicle. There were guns in the center console, on the occupants persons, behind the driver's seat, and two guns were tucked underneath a passenger. 1RP 8-9. Substantial evidence supports the trial court's findings of fact 15 and 16.

3. Defendant Did Not Object To Any Of The Testimony Nor Offer Any Contrary Evidence Regarding Findings Of Fact.

There can be no question that any trier of the facts was entitled to make the above findings of fact on the evidence presented in the present case. Defendant did not object to any of Trooper Axtman's testimony. Nor did defendant offer any contrary evidence. The position taken by defendant at the time of

suppression hearing was that Trooper Axtman did not have a reasonable safety concern to justify telling defendant to pull his hand up and put it in his lap. CP 65-67; 1RP 21-22, 24.

C. CONCLUSIONS OF LAW.

Defendant also assigns error to the trial court's conclusions of law 1, 2 and 3. Brief of Appellant at 1-2. To the contrary, the trial court correctly concluded that based on his training and experience Trooper Axtman had articulated concerns for officer safety that justified his request for defendant to put his hand in lap.

The Fourth Amendment to the United States Constitution protects individuals against unwarranted searches and seizures. Article I, section 7 of the Washington Constitution provides greater protection to individuals than the Fourth Amendment. State v. Rankin, 151 Wn.2d 689, 694, 92 P.3d 202 (2004). Generally, evidence obtained in violation of article I, section 7 must be suppressed. State v. Allen, 138 Wn. App. 463, 469, 157 P.3d 893 (2007). An automobile passenger is not seized when a police officer merely stops the vehicle in which the passenger is riding. Rankin, 151 Wn.2d at 695; but see, Brendlin v. California, 551 U.S. 249, 259, 127 S. Ct. 2400, 2408, 168 L. Ed. 2d 132 (2007) (automobile passenger is entitled to challenge constitutionality of

traffic stop³ because passenger is seized under the Fourth Amendment when a police officer stops the vehicle in which the passenger is riding). Article I, section 7 prohibits law enforcement officers from making requests of passengers for investigative purposes unless there is an independent basis that justifies the request. Rankin, 151 Wn.2d at 699. A request reasonably related to officer safety is an independent basis. Rankin, 151 Wn.2d at 699, n. 5; State v. Hudson, 124 Wn.2d 107, 112, 874 P.2d 160 (1994).

A police officer's ability to control the scene and ensure his or her own safety must be done with due regard to the privacy interests of the passenger, who was not stopped on the basis of probable cause by the police. State v. Mendez, 137 Wn.2d 208, 220, 970 P.2d 722, 728 (1999) abrogated on other grounds by Brendlin v. California, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007). To satisfy article I, section 7, an officer must be able to articulate an objective rationale predicated specifically on safety concerns, for officers, vehicle occupants, or other citizens, before restraining a passenger's movement. Mendez, 137 Wn.2d at 220.

³ Defendant does not challenge the legality of the vehicle stop for the observed infractions.

[T]o the extent such an objective rationale exists, the intrusion on the passenger is de minimis in light of the larger need to protect officers and to prevent the scene of a traffic stop from descending into a chaotic and dangerous situation for the officer, the vehicle occupants, and nearby citizens.

Id. The inquiry into the presence or absence of an objective rationale requires consideration of the circumstances present at the scene of the traffic stop. To satisfy this objective rationale, an officer does not need to meet the Terry⁴ standard of reasonable suspicion of criminal activity. Mendez, 137 Wn.2d at 220. “The officers need only point to some fact that creates a ‘heightened awareness of danger’ such as would warrant an ‘objectively reasonable officer in securing the scene in a more effective manner by ordering the passenger to alight from the car.’” City of Spokane v. Hays, 99 Wn. App. 653, 659, 995 P.2d 88 (2000), citing Mendez, 137 Wn.2d at 221 n. 5. Terry must be met only if the purpose of the officer's interaction with the passenger is investigatory.⁵ Mendez, 137 Wn.2d at 220.

⁴ Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

⁵ Even under Terry's requirement that the officer point to “specific and articulable facts” which create an objectively reasonable belief that a suspect is “armed and presently dangerous” the officer “need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent [person] in the circumstances would be warranted in the belief that his [or her] safety or that of others was in danger.” State v. Collins, 121 Wn.2d 168, 173, 847 P.2d 919 (1993), quoting Terry, 392 U.S. at 27.

The non-inclusive factors warranting an officer's direction to a passenger at a traffic stop may include: the number of officers, the number of vehicle occupants, the behavior of the occupants, the time of day, the location of the stop, traffic at the scene, affected citizens, and officer knowledge of the occupants. Mendez, 137 Wn.2d at 220-221. Here, Trooper Axtman was alone when he stopped a vehicle for traffic infractions at approximately 10:14 p.m. There were two occupants in the vehicle. It was dark out and traffic was light. The driver pulled into the Buzz Inn parking lot. Trooper Axtman did not know either the driver or defendant. CP 53-54; 1RP 5-7, 16-19. Based on his experience and training with weapons and his observation that defendant had his clenched fist under his leg, Trooper Axtman asked defendant in a soft tone of voice to pull his hand up and put it in his lap. CP 54; 1RP 9. In the course of an otherwise permissive encounter, a police officer may ask an individual to make his hands visible, particularly when there is a concern for the officer's safety. State v. Nettles, 70 Wn. App. 706, 712, 855 P.2d 699 (1993). Such a request, by itself, does not immobilize an individual or produce any incriminating evidence. Id.; see also State v. Terrazas, 71 Wn. App. 873, 879, 863 P.2d 75 (1993) (fact that passenger had his hands under a blanket did not

justify a protective Terry sweep of the car). Courts are particularly reluctant to substitute their judgment where the officer's conduct is connected to safety concerns rather than investigatory goals. State v. Belieu, 112 Wn.2d 587, 601–602, 773 P.2d 46 (1989); State v. Adams, 144 Wn. App. 100, 104, 181 P.3d 37 (2008).

The Constitution does not require an officer to wager his physical safety against the odds that a suspected assailant is actually unarmed. We cannot in good conscience sit in the calm reflective atmosphere of an appellate court and conclude, in an act of pointless hairsplitting, that a pat down of the defendant incident to the stop would have been constitutional but the officer is legally precluded from attempting to seize a clenched or concealed hand to determine whether it might hold a weapon.

State v. Belieu, 112 Wn.2d 587, 602, n. 3, 773 P.2d 46 (1989). In the present case, the trial court correctly concluded that based on his training, experience and observation Trooper Axtman had an articulable concern for officer safety justifying his request defendant to pull his hand up and put it in his lap.

D. THE COCAINE DEFENDANT WAS CONVICTED OF POSSESSING WAS FOUND DURING A LAWFUL SEARCH INCIDENT TO ARREST.

Even if the court were to find that Trooper Axtman's request for defendant to put his hand in his lap was improper, it does not follow that defendant's arrest was invalid. The request for defendant to put his hand in his lap was not an operative factor in

causing defendant to produce the marijuana from his pocket. Evidence is not “fruit of the poisonous tree” if the connection between the challenged evidence and the illegal actions of the police is “attenuated as to dissipate the taint.” State v. Eserjose, 171 Wn.2d 907, 921, 259 P.3d 172 (2011). The court makes a commonsense evaluation of the facts and circumstances of the particular case to determine whether there is a nexus between the evidence in question and the police conduct. State v. Thomas, 91 Wn. App. 195, 201, 955 P.2d 420 (1998). Here, Trooper Axtman asked defendant to put his hands in his lap. Instead, defendant put his hand into his pocket and spontaneously retrieved a bag of marijuana and handed it Trooper Axtman. There is no casual nexus between Trooper Axtman’s request that defendant put his hand in his lap and defendant reaching into his pocket and producing a bag of marijuana.

Defendant was arrested for possession of marijuana and searched incident to his arrest. It is undisputed that defendant was under custodial arrest at the time of the search incident to his arrest. Brief of Appellant at 5; CP 54; 1RP 10. 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). Six bags of white substance, confirmed to be cocaine, were found in defendant's pocket. CP 24, 50, 52; 1RP 10, 15-16. The court reviews the validity of a warrantless search de novo. State v. Parris, 163 Wn. App. 110, 116, 259 P.3d 331 (2011). There is a sufficient factual record to support finding the search was incident to a lawful arrest.

IV. CONCLUSION

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

Respectfully submitted on August 25, 2014.

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