

71608-5

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No. 71608-5-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MOHAMED AHMED,

Appellant.

REGISTERED - 9 AM 9:33
STATE OF WASHINGTON

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

APPELLANT'S REPLY BRIEF

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A. ADDITIONAL ASSIGNMENTS OF ERROR

After the filing of Ahmed's opening brief, the trial court entered written findings of fact and conclusions of law on the CrR 3.5 and CrR 3.6 hearings. Ahmed assigns¹ the following errors:

1. Lacking substantial evidence, the court erred in finding that Mr. Ahmed was "uncooperative and refused to provide Officer Harris with his identification." Finding of Fact (FF) 3 (CP 120).

2. Lacking substantial evidence, the court erred in finding that both officers frisked Ahmed for weapons before arresting him. FF 4. (CP 120).

3. Lacking substantial evidence, the court erred in finding that, prior to the arrest, multiple hard, cylindrical objects, cold to the touch, were felt during the frisk. FF 4. (CP 120).

4. Lacking substantial evidence, the court erred in finding that multiple wine bottles were found prior to the arrest. FF 4, 5. (CP 120).

5. Lacking substantial evidence, the court erred in finding that Ahmed proceeded to ask the arresting officers multiple questions instead answering whether he understood his rights. FF 5 (CP 120).

¹ Ahmed has filed a motion asking for permission to make these supplemental assignments of error.

6. Lacking substantial evidence, the court erred in finding that Ahmed tracked the “conversation” with the arresting officers and “appeared to comprehend the circumstances.” FF 6 (CP 121).

7. To the extent that it could be deemed a finding of fact, for lack of substantial evidence, the court erred in entering Conclusion of Law (CL) B7, which recounts that Ahmed was “uncooperative.” CL B7 (CP 121).

8. To the extent that they could be deemed findings of fact, for lack of substantial evidence, the court erred in entering conclusions of law B8 and B9, which recount that multiple wine bottles were found in Ahmed’s pockets during the frisk prior to the arrest. CL B8, B9 (CP 121-22).

10. To the extent that it could be deemed a finding of fact, for lack of substantial evidence, the court erred in determining that “Ahmed was tracking what the officers were saying and responded to the parts that he found important. The officers’ conduct in advising the defendant of his rights was appropriate.” CL C2 (CP 122).

11. To the extent it could be deemed a finding of fact, for lack of substantial evidence, the court erred in determining that Ahmed “did not show any confusion.” CL C3 (CP 122).

12. The court erred in admitting all the evidence obtained from Ahmed. CL B10 (CP 122).

13. The court erred in determining that the defendant waived his Miranda² rights and in admitting his subsequent statements to the police. CL C4; CL C5 (CP 122).

B. ARGUMENT

1. The trial court erred in denying the defendant's motion to suppress.

a. By removing a cold bottled beverage from the defendant's pocket, an object that the officer did not suspect to be a weapon, the officer exceeded the permissible scope of the protective frisk exception to the warrant requirement.

The scope of a frisk for weapons is strictly limited to protective purposes. State v. Garvin, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009). "During the course of a protective frisk, police may not intentionally seize items they know not to be weapons." State v. Fowler, 76 Wn. App. 168, 173, 883 P.2d 338 (1994). Once the officer determines that a questionable object is not a weapon, the officer may not intrude further. State v. Russell, 180 Wn.2d 860, 869-70, 330 P.3d 151 (2014); State v. Allen, 93 Wn.2d 170, 173, 606 P.2d 1235 (1980). Protective searches that go

² Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

beyond what is necessary to determine if the detained person is armed are unlawful. Minnesota v. Dickerson, 508 U.S. 366, 373, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993).

Seconds after Officer Leenstra finished ratcheting the handcuffs upon Ahmed, Officer Harris pulled a bottle of wine out of Ahmed's front left side pants pocket. Ex. 25. At the suppression hearing, Officer Harris testified that he had felt this object in Ahmed's pocket while conducting a frisk for weapons. 1/28/14RP 22, 80. It was round, cylindrical, cold, and "sweating." 1/28/14RP 80-84. Harris testified, not that he thought this object was a possible weapon, but that he suspected it was some kind of bottled or canned beverage. 1/28/14RP 22, 80, 85. Knowing that he was looking for wine, he pulled it out of Ahmed's pocket and confirmed that it was wine. 1/28/14RP 79, 85, 120-21, 169; Ex. 25. Officer Leenstra then identified it as matching the kind of wine from the 7-Eleven. Ex. 25.

The evidence establishes that Officer Harris removed the object from Ahmed's pocket not to allay any safety concerns, but to further his investigation. It went beyond what was necessary. Accordingly, Officer Harris exceeded the scope of the protective frisk exception to the warrant requirement. Garvin, 166 Wn.2d at 253 (squeezing bag inside defendant's pocket to determine if bag contained drugs exceeded scope of protective frisk; officer's purpose was not to find weapons, but to look for drugs).

The State's contention that Officer Harris removed the beverage from Ahmed's pocket because it was a hard object that could have been used as a weapon is not supported by the record. Br. of Resp't at 10-11. Harris simply did not so testify. Neither did Harris testify that he removed the object so that he could more easily look for the suspected knife that Harris thought Ahmed might have. Br. of Resp't at 12. This Court should disregard these fictions.

The State misreads State v. Hudson, 124 Wn.2d 107, 874 P.2d 160 (1994). Br. of Respondent at 9. There, the Court recounted that a frisk for weapons under Terry³ is limited: "If the officer feels an item of questionable identity that has the size and density such that it might or might not be a weapon, the officer may only take such action as is necessary to examine such object." Hudson, 124 Wn.2d at 113. Contrary to the State's representation, the Court did not hold that the officer there "lawfully removed a hard object bulging in the defendant's pocket to determine if it was a weapon." Br. of Resp't at 9 (citing Hudson, 124 Wn.2d at 110, 119-20). In Hudson, the officer felt a hard bulge in the defendant's right jacket pocket and thought it might be a weapon. Hudson, 124 Wn.2d at 110. The officer reached in and felt a baggie that

³ Terry v. Ohio, 392 U.S. 1, 27, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

the officer thought likely contained cocaine. Hudson, 124 Wn.2d at 110. Because it was “unclear whether the detective’s discovery was made before he knew the Defendant was unarmed and whether the detective’s recognition of the cocaine was immediate, *i.e.*, not the result of manipulation,” the Court remanded so that the trial court could decide “whether the nature of the particular object at issue is such that there can be a credible claim of recognition by touch.” Hudson, 124 Wn.2d at 119-20.

This Court should reject the State’s narrow reading of Garvin. Br. of Resp’t at 13. In Garvin, the officer exceeded the scope of a protective frisk by squeezing and manipulating an object that the officer knew was not a weapon. Garvin, 166 Wn.2d at 253. Here, by pulling out the bottle from Ahmed’s pocket, Officer Harris acted analogously. He had already concluded that this object was a canned or bottled beverage. While this beverage was in a hard container, Harris did not testify that such objects were weapons. Indeed, he admitted that he pulled out the beverage because he thought it might be the wine that was reported stolen. This is not permissible. During a Terry frisk, once an officer determines an object is not a weapon, the officer must move on. The officer is not entitled to examine the object further. Officer Harris’s authority was spent.

b. The error was prejudicial.

As argued, the error in failing to grant Ahmed's motion to suppress under CrR 3.6 was not harmless beyond a reasonable doubt. Br. of App. 17-19. The State does not argue harmless error in relationship to this issue. Br. of Resp't at 8-13

c. Correction to the court's findings and conclusions on this issue.

The trial court's findings erroneously recount that both Officer Harris and Leenstra frisked Ahmed prior to arresting him. FF 4. (CP 120). As the video shows, prior to the arrest, only Officer Harris briefly frisked Ahmed. Ex. 25.

The findings also erroneously recount that, prior to the arrest, multiple hard, cylindrical objects, cold to the touch, were felt during the frisk. FF 4. (CP 120). Only Officer Harris felt one such object. Ex. 25. Similarly, the court erred in finding that multiple wine bottles were found prior to the arrest. FF 4, 5. (CP 120). Police found other wine bottles in Ahmed's pockets during a search incident to the arrest, not during the frisk. Ex. 25.

2. The trial court erred in admitting the defendant's statements.

a. Because the defendant did not waive his rights to silence and to an attorney, the court erred in admitting statements elicited through custodial interrogation.

Absent the State meeting its burden to show a valid waiver of Miranda, statements elicited during custodial interrogation are inadmissible. Berghuis v. Thompkins, 560 U.S. 370, 384, 130 S. Ct. 2250, 176 L. Ed. 2d 1098 (2010). A waiver may be implicit rather than explicit. North Carolina v. Butler, 441 U.S. 369, 374, 99 S. Ct. 1755, 60 L. Ed. 2d 286 (1979).

The circumstances did not support the conclusion that Ahmed impliedly waived his Miranda rights. At the time of arrest, Ahmed was heavily intoxicated and appeared to be confused about what was happening.⁴ Ex. 21, 25. It was night. Ex. 25. He was handcuffed. Ex. 25. He was standing in a parking lot surrounded by three police officers with at least two other officers nearby. Ex. 25. He was quickly read his rights and then was immediately asked if he understood them.⁵ Ex. 25.

⁴ Contrary to the court's findings, the evidence shows that Ahmed was at least somewhat confused as to what was happening. FF 6 (CP 121); CL C3 (CP 122).

⁵ Although, Officer Leenstra asked twice, "Do you understand your rights?", the first question oddly appears to be directed to the officer standing behind Ahmed. Ex. 25 at 2:45-47. Officer Leenstra looks at that officer when

Ahmed did not acknowledge that he understood his rights. Ex. 25. Rather, Ahmed asked one question to the police,⁶ did someone who looks like him commit a crime? Ex. 25. The officers did not answer his question. Ex. 25. They did not ask Ahmed if he wished to speak with them. Ex. 25. And they did not clarify whether Ahmed understood his rights. Ex. 25. Instead, they immediately interrogated him. Ex. 25. Under these circumstances, that Ahmed responded to these questions is insufficient to imply waiver.

As argued, these facts are dissimilar to other cases where waiver was properly implied. See, e.g., Berghuis, 560 U.S. at 385-86 (defendant received written copy of Miranda warnings and given time to read and reflect upon the warnings); State v. Gardner, 28 Wn. App. 721, 723-24, 626 P.2d 56 (1981) (valid waiver where intoxicated defendant spoke clearly, read, and initialed the police department rights form); State v. Gross, 23 Wn. App. 319, 321, 324, 597 P.2d 894 (1979) (waiver valid where defendant said he understood his rights).

asking the question and that officer can be heard saying “Yeah.” Ex. 25 at 2:46-47. Officer Leenstra then repeats the question to Ahmed. Ex. 25.

⁶ Thus, the court erred in finding that Ahmed proceeded to ask the arresting officers multiple questions. FF 5 (CP 120).

Reuben also does not support the State. There, although the Court found that the intoxicated defendant understood his rights, the evidence there showed the defendant had paid attention to the officer when he was read his rights by maintaining eye contact with the officer. State v. Reuben, 62 Wn. App. 620, 621, 625, 814 P.2d 1177 (1991). Moreover, the court ultimately determined there was not a valid waiver because the defendant invoked his right to silence. Reuben, 62 Wn. App. at 626.

The State cites no case with facts similar to this case where the waiver was implied. This Court should hold that this evidence failed to prove that Ahmed waived his Miranda rights.

b. The error was prejudicial.

Constitutional error is prejudicial and the State bears the burden to prove the error harmless beyond a reasonable doubt. State v. Nysta, 168 Wn. App. 30, 43, 275 P.3d 1162 (2012). The State has not meet its burden. At trial, Ahmed explained that while he left the store without paying for the wine, he had intended to return and pay. 2/5/2014RP 20-21, 39. The inadmissible evidence, particularly Ahmed's statement to police that he already paid for the wine, significantly undermined Ahmed's defense. 2/5/14RP 45. Absent this evidence, the jury likely would have found reasonable doubt on whether Ahmed committed theft. This Court should reverse.

C. CONCLUSION

In frisking Ahmed, the police did not limit their search for weapons, violating the state and federal constitutions. And in interrogating Ahmed while he was in custody without securing a waiver, the police violated Miranda. The evidentiary fruits of these violations were prejudicial. Accordingly, this Court should reverse.

DATED this 5th day of February, 2015.

Respectfully submitted,



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DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 71608-5-I
v.)	
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MOHAMED AHMED,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 5TH DAY OF FEBRUARY, 2015, I CAUSED THE ORIGINAL **REPLY 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:

<p>[X] STEPHANIE KNIGHTLINGER, DPA [paoappellateunitmail@kingcounty.gov] KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104</p>	<p>(X) () () ()</p>	<p>U.S. MAIL HAND DELIVERY E-MAIL BY AGREEMENT VIA COA PORTAL</p>
<p>[X] MOHAMED AHMED (NO VALID ADDRESS) C/O COUNSEL FOR APPELLANT WASHINGTON APPELLATE PROJECT</p>	<p>() () (X)</p>	<p>U.S. MAIL HAND DELIVERY RETAINED FOR MAILING ONCE ADDRESS OBTAINED</p>

SIGNED IN SEATTLE, WASHINGTON THIS 5TH DAY OF FEBRUARY, 2015.

X _____ 

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