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Sep 29, 2015  
Court of Appeals  
Division I  
State of Washington

No. 73012-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

BRIAN KEMNOW,

Appellant.

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

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT

**The trial court erred in denying the motion to suppress because the evidence was obtained as a result of an unconstitutional seizure.**

1. A seizure, not a social contact, occurred here, and the State fails to address *Gantt* and *Young*.

As explained in the opening brief, the trial court erred in concluding Mr. Kemnow was not seized for purposes of the Fourth Amendment and article I, section 7. The trial court analyzed the shining of the spotlight in isolation, but whether a seizure occurred must be determined in light of *all* of the circumstances. Mr. Kemnow was seized because a reasonable person in his position would not have felt free to leave when the officer (1) approached him head-on in a narrow driveway while another officer entered the parking lot from the other driveway; (2) shined a spotlight on him; (3) questioned him regarding a suspected drug deal; and (4) requested identification. Br. of Appellant at 7-11 (citing *State v. Harrington*, 167 Wn.2d 656, 222 P.3d 92 (2009); *State v. Gantt*, 163 Wn. App. 133, 257 P.3d 682 (2011); *State v. Young*, 167 Wn. App. 922, 275 P.3d 1150 (2012)).

The State concedes that “all of the circumstances surrounding the incident” must be considered, and that a seizure has occurred when an officer, by “show of authority, has in some way restrained the liberty of a

citizen.” Br. of Respondent at 7 (quoting *Terry v. Ohio*, 392 U.S. 1, 19 n.16, L.Ed.2d 889, 88 S.Ct. 1868 (1968); *State v. Armenta*, 134 Wn.2d 1, 10-11, 948 P.2d 1280 (1997)). But the State fails to apply the rule it concedes controls, instead relying on three cases which hold that a request for identification, *without more*, is unlikely to amount to a seizure. Br. of Respondent at 11 (citing *Armenta*, 134 Wn.2d at 11; *State v. Mennegar*, 114 Wn.2d 304, 310, 787 P.2d 1347 (1990); *State v. Ellwood*, 52 Wn. App. 70, 73, 757 P.2d 547 (1988)).

The State also fails to address the application of *Gantt* and *Young* to this case, instead averring that *O’Neill* requires affirmance. Br. of Respondent at 9-10 (citing *State v. O’Neill*, 148 Wn.2d 564, 62 P.3d 489 (2003)). The State is wrong. In *O’Neill*, the Court held that a seizure occurred when an officer asked the defendant to exit his vehicle, but that it did not occur prior to that point. *See O’Neill*, 148 Wn.2d at 571-82. Before asking the suspect to exit the car, the officer had pulled up behind him, shined a spotlight on him, asked him what he was doing, and requested identification. *Id.* at 571-72.

Although those circumstances did not rise to the level of a seizure, the circumstances here are significantly different. Whereas only one officer was at the scene in *O’Neill*, here, two officers entered the parking lot from opposite ends. RP (9/24/14) 19-20; *see Young*, 167 Wn. App. at

931 (presence of multiple officers increases “show of authority” causing reasonable person to believe he is not free to leave). Whereas the officer in *O’Neill* simply asked the defendant what he was doing, in this case, Officer Hannawalt interrogated Mr. Kemnow about a suspected crime. CP 28; RP (9/24/14) 13-14. And most importantly, whereas the officer in *O’Neill* parked *behind* the suspect and did not physically impede him *at all*, here, Officer Hannawalt drove toward Mr. Kemnow head-on, in a narrow driveway, shined a spotlight on his face, and stopped in front of him. RP (9/24/14) 11-13; CP 28 Although Mr. Kemnow tried to hug “the extreme left side of the road,” the officer conceded it would have been difficult for Mr. Kemnow to maneuver around him. RP (9/24/14) 12-13. Thus, *Gantt* and *Young* are far more analogous to this case than *O’Neill*, and the State utterly fails to address those cases. See Br. of Appellant at 8-10 (discussing *Gantt*, 163 Wn. App. at 136-42; *Young*, 167 Wn. App. at 926-31).

In addition to *Gantt* and *Young*, another case decided after the opening brief was filed is instructive. See *United States v. Smith*, 794 F.3d 681 (7<sup>th</sup> Cir. 2015). In *Smith*, two bike patrol officers approached a suspect in an alley, stopped five feet from him, and positioned their bicycles at a 45-degree angle to him. *Id.* at 682. One officer dismounted, approached the suspect, and asked if he was armed. *Id.* The suspect

revealed he had a gun, and he was arrested and ultimately convicted of unlawful possession of a firearm. *Id.*

The Court of Appeals reversed the conviction and held the evidence should have been suppressed. The trial court had ruled that no seizure occurred, but the appellate court recognized that a reasonable person under all of the circumstances would not have felt free to ignore the police and go about his business. *Smith*, 794 F.3d at 682.

Several factors suggesting a seizure in *Smith* also existed in Mr. Kemnow's case: (1) police made statements intimating the individual was a suspect of a crime; (2) the citizen's freedom of movement was intruded upon in some way; (3) the officers did not inform the suspect he was free to leave; and (4) no members of the public were present and able to observe the scene. *Id.* at 684-85; RP (9/24/14) 11-21. The government in *Smith* made an argument similar to the one the State made here, and the court roundly rejected it:

The government also contends that no seizure occurred here because the officers did not entirely block Smith's "path" or his "exit" from the alley with their bicycles. According to the government, all Smith had to do to end the encounter was walk "around" or "through" the officers. Common sense dictates that no reasonable person in an alley would feel free to walk "through" two armed officers on bicycles. And our case law makes clear that officers need not totally restrict a citizen's freedom of movement in order to convey the message that walking away is not an option.

*Smith*, 794 F.3d at 686. Similarly here, although the officer did not *entirely* block Mr. Kemnow's exit, common sense dictates that no reasonable person in a narrow driveway would feel free to maneuver around a police vehicle that had just driven straight toward him and stopped right in front of him.

In sum, there can be no doubt that Mr. Kemnow was seized under the totality of circumstances. As explained below and in the opening brief, the seizure was not supported by reasonable suspicion, and this Court should reverse.

2. The seizure was unconstitutional, and the State fails to address *Sieler*.

As explained in the opening brief, the detention was unlawful because the officer lacked reasonable suspicion of criminal activity. A named but unknown telephone informant surmised there was a drug transaction based on the presence of people in the church parking lot after hours, but the caller did not see any transactions, exchanges, or suspicious substances. Like the informant, the officer himself observed only the innocuous presence of Mr. Kemnow's truck in the parking lot. Thus, the officer lacked the reasonable suspicion of criminal activity necessary to justify the stop. Br. of Appellant at 11-18 (citing, *inter alia*, *State v. Sieler*, 95 Wn.2d 43, 621 P.2d 1272 (1980)).

The State does not really address this issue. *See* Br. of Respondent at 12-13. It begins the section by stating, “The case also presents an example of the difference between a seizure and a detention.” Br. of Respondent at 12. It is unclear what this sentence means. The cases addressing investigatory stops under the Fourth Amendment and article I, section 7, generally use the words “seizure,” “detention,” and “stop” interchangeably. *See, e.g., State v. Gatewood*, 163 Wn.2d 534, 539-42, 182 P.3d 426 (2008) (repeatedly using the words “seizure” and “stop” interchangeably to describe *Terry* stop); *Sieler*, 95 Wn.2d at 46-51 (repeatedly using the words “detention” and “stop” interchangeably to describe *Terry* stop). For constitutional purposes, “seizure” and “detention” are synonyms. Before an officer may detain (or seize) a person, he must have reasonable suspicion, based on specific articulable facts, that the individual is engaging in criminal activity. *Gatewood*, 163 Wn.2d at 539.

In the opening brief, Mr. Kemnow explained that *Sieler* controls this case and requires reversal. Br. of Appellant at 14-16. Yet the State does not address *Sieler* at all in its response. Nor does the State address the fact that neither the informant nor the officer witnessed a transaction or saw drugs, but saw only the presence of vehicles in a parking lot. This

Court can presume that the State was unable to respond to *Sieler*, and that it implicitly acknowledges that case compels reversal.

Another case decided since the filing of the opening brief also supports Mr. Kemnow's argument. *See State v. Z.U.E.*, \_\_\_ Wn.2d \_\_\_, 352 P.3d 796 (2015). In *Z.U.E.*, multiple people called 911 to report that a man carried a gun through a park and then entered a car with several other people. *Id.* at 798. One caller said she saw a 17-year-old girl hand the gun to the man before the man carried the gun through the park. *Id.* Police were familiar with the park's reputation as a gang hangout site. *Id.*

Officers went to the area and stopped a car in which there were two male occupants and two female passengers. *Id.* The officers believed they were investigating a minor in possession of a firearm and a gang-related assault with a deadly weapon. *Id.* They stopped the car even though neither of the male passengers matched the description given by 911 callers. *Id.* No guns were found, but *Z.U.E.* had marijuana and was eventually convicted of unlawful possession of a controlled substance. *Id.* at 799.

The Supreme Court agreed with this Court that the seizure was unlawful and the evidence should have been suppressed. *Z.U.E.*, 352 P.3d at 797. The Court reiterated its holding from *Gatewood* that article I, section 7 is more protective than the Fourth Amendment in the context of

a *Terry* detention. *Id.* at 800; *accord id.* at 801 n.4. In other words, the Washington Constitution requires “a stronger showing by the State” that “specific and articulable facts” rise to the level of reasonable suspicion of criminal activity. *Id.*

The Court also reaffirmed *Sieler* and applied it to the facts at hand. *Z.U.E.*, 352 P.3d at 800-803. As particularly relevant here, the Court rejected the State’s assertion that officers were justified in stopping the car to investigate a minor in possession of a firearm. *Id.* at 802. The Court stated, “Similar to the facts in *Sieler* ..., the officers’ alleged suspicion hinged on a named, but otherwise unknown, 911 caller’s assertion that the subject was engaged in criminal activity.” *Id.* And as in *Sieler*, the State could not point to any officer observations supporting a reasonable suspicion of a crime. “At most, the officers were able to verify that a female of a matching description was located in the general area. But corroboration of an innocuous fact, such as appearance, is insufficient.” *Z.U.E.*, 352 P.3d at 802.

The same is true here. As in *Z.U.E.* and *Sieler*, the officer’s alleged suspicion hinged on a named, but otherwise unknown, 911 caller’s assertion that the subject was engaged in criminal activity. And as in *Z.U.E.* and *Sieler*, the officers were able to verify only the innocuous presence of a person matching the caller’s description. Thus, as in those

cases, this Court should reverse and remand with instructions to suppress the evidence obtained as a result of an unlawful seizure.

B. CONCLUSION

For the reasons set forth above and in the opening brief, Mr. Kemnow asks this Court to reverse his conviction and remand with instructions to suppress the evidence and dismiss the charge with prejudice.

Respectfully submitted this 29th day of September, 2015.

s/ Lila J. Silverstein  
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STATE OF WASHINGTON,	)	
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Respondent,	)	
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	)	
BRIAN KEMNOW,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29<sup>TH</sup> DAY OF SEPTEMBER, 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:

- |     |  |                   |                                     |
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| [X] | ERIK PEDERSEN, DPA<br>SKAGIT COUNTY PROSECUTOR'S OFFICE<br>COURTHOUSE ANNEX<br>605 S THIRD ST.<br>MOUNT VERNON, WA 98273 | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |
| [X] | BRIAN KEMNOW<br>20906 COOK RD<br>BURLINGTON, WA 98233  | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |

**SIGNED** IN SEATTLE, WASHINGTON THIS 29<sup>TH</sup> DAY OF SEPTEMBER, 2015.

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