

NO. 36342-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

DELMAR GUCENE,

Appellant.

FILED APPEALS
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DIVISION II
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STATE OF WASHINGTON
BY 

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 07-1-00291-8

BRIEF OF RESPONDENT

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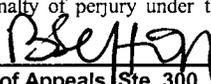
This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. 
DATED February 13, 2008, Port Orchard, WA
Original **AND ONE COPY** filed at the Court of Appeals, Ste. 300, 950 Broadway,
Tacoma WA 98402; Copy to counsel listed at left.

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the fact that the police used a dog to conduct the only search of the area of the car that Gucene had occupied somehow rendered the search not incident to his arrest?

2. Whether the trial court properly found there was no unreasonable delay between Gucene's arrest and the search of his car where he was stopped because his car matched that used in a shoplifting incident an hour and a half earlier, where after the stop, Gucene and the passengers were contacted, two were arrested on warrants, and their part of the car was searched, and where that search turned up merchandise from the victimized store, at which point the deputy went across the street to the store and verified that merchandise was stolen and that Gucene was involved in the theft, and whereupon Gucene was arrested and the car was searched within minutes thereafter?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Delmar Gucene was charged by information filed in Kitsap County Superior Court with possession of methamphetamine. CP 1.

Gucene moved to suppress the drugs, which the State opposed. CP 6,

11. After an evidentiary hearing, RP 2-70,¹ the trial court denied the motion. CP 17.

Gucene proceeded to trial on stipulated facts, and was convicted. CP

19. The trial court imposed a standard-range sentence. CP 33.

B. FACTS

Kitsap County Deputy Sheriff Lee Watson responded to a shoplifting call at the Castle Super Store in Silverdale around 5:00 p.m. RP 32-33. The manager described two white males in a blue Camaro and gave a plate number. RP 34-35.

Around 6:30 the same evening Deputy David Meyer saw the blue Camaro. RP 3-4. Meyer radioed Watson to confirm the license number, and then stopped the car. RP 4. The stop occurred in the parking lot of the Silverdale Home Depot. RP 4.

Gucene was the driver. RP 5. Maurice Sonnier occupying the front passenger seat and a white female was in the rear. RP 5, 9. Meyer requested Gucene's identification and contacted the dispatcher to check his driver's license status. RP 6. While he was doing that, deputies Watson and Wheeler arrived to assist. RP 6.

¹ All references are to the report of proceedings from the CrR 3.6 hearing held on March 28, 2007.

Each deputy was assigned to speak with one of the occupants of the car about the shoplifting. RP 6. Meyer took Gucene. RP 7. Gucene told Meyer he had been at the Castle store with the front-seat passenger, whom he identified as Maurice. RP 7. As they were leaving, the alarm went off and they fled. RP 7. Gucene denied that they had taken anything from the store. RP 7.

While Meyer was speaking with Gucene, the other deputies arrested the other two passengers on outstanding warrants. RP 7. Watson arrested Sonnier under a Bremerton misdemeanor warrant. RP 39. After waiving his rights, Sonnier told Watson that Gucene was the one who had taken the items from the store. RP 39-40.

Meyer then searched the parts of the car where the two passengers had been, incident to their arrests. RP 8. He found a white bag containing adult novelty items of the type sold at the Castle store. RP 8. There was no logo on the bag. RP 8. Meyer showed Watson the bag. RP 9.

Meyer drove about a minute to the Castle store and showed the bag to the manager, who confirmed that the contents were from the store. RP 10. The manager also showed Meyer some security videos, which showed Gucene and Sonnier entering the store together, and then Sonnier taking and concealing a bottle of lubricant, and Gucene taking an unidentified object and

putting it in his jacket. RP 10. Meyer could clearly identify Gucene and Sonnier in the video. RP 11.

Meyer radioed to Watson that he had probable cause for Gucene's arrest. RP 11. When Meyer returned to the scene, Gucene was already in custody in the back of Watson's car. RP 12.

Meyer stated that on his return, Watson suggested they call a K-9 unit to come and search the car. RP 12. Watson indicated that Wheeler had told Watson that he had had previous contact with Gucene, and that Gucene was involved in drug activity. RP 40. Watson requested the drug dog because of what Wheeler told him. RP 41. Watson also stated that he arrested Gucene before he received the radio call from Meyer, based on what Sonnier had told him. RP 42. That arrest occurred about five minutes after Meyer left for the Castle store. RP 51, 53-54.

When the K-9 unit arrived, the dog searched the car and alerted to twelve-by-eight-inch cooler bag. RP 12. The bag was on the floorboard directly in front of the driver's seat. RP 12. Meyer and Watson had both seen the bag before the dog alerted. RP 12, 44. Both deputies were positive that until that point, the driver's side of the vehicle had not been searched. RP 13, 46.

III. ARGUMENT

A. USE OF DOG TO SEARCH THE PORTION OF THE CAR OCCUPIED BY GUCENE WAS A PROPER SEARCH INCIDENT TO ARREST WHERE IT WAS THE *ONLY* SEARCH CONDUCTED INCIDENT TO GUCENE'S ARREST, AND WAS CONDUCTED CONTEMPORANEOUSLY WITH HIS ARREST.

Gucene argues that the K-9 search that resulted in the discovery of the methamphetamine was beyond the scope of a search incident to arrest. This claim is without merit because the use of the dog did not impermissibly widen the search. Rather, it was the only search of the area of the car occupied by Gucene, and was properly part of the search incident to his arrest. Moreover, even if the use of the dog was improper, the discovery of the evidence was inevitable. As such, the trial court properly refused to suppress the drugs.

This Court reviews the denial of a suppression motion to determine whether substantial evidence supports the trial court's findings of fact and whether those findings support the conclusions of law. *State v. Dempsey*, 88 Wn. App. 918, 921, 947 P.2d 265 (1997); *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). The trial court as finder of fact, is the sole judge of the weight to be given conflicting testimony in a suppression hearing. Such findings are not subject to review on appeal. *State v. Haack*, 88 Wn. App. 423, 435, 958 P.2d 1001 (1997), *review denied*, 134 Wn.2d 1016 (1998).

The reason for this rule is that the trial court is in a better position to assess the credibility of the witnesses. *State v. Dykstra*, 84 Wn. App. 186, 190, 926 P.2d 929 (1996). Finally, unchallenged facts are verities on appeal. *Hill*, 123 Wn.2d at 647.

The Washington Constitution mandates that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Const. art. I, § 7. In contrast to the Fourth Amendment to the United States Constitution, the article I, section 7 provision “recognizes a person’s right to privacy with no express limitations.” *State v. O’Neill*, 148 Wn.2d 564, 584, 62 P.3d 489 (2003). A warrantless search is per se unreasonable unless it falls within one of the few narrowly drawn exceptions. *State v. Parker*, 139 Wn.2d 486, 496, 987 P.2d 73 (1999). One of these exceptions is that “[d]uring the arrest process, including the time immediately subsequent to the suspect’s being arrested, handcuffed, and placed in a patrol car, officers should be allowed to search the passenger compartment of a vehicle.” *State v. Stroud*, 106 Wn.2d 144, 152, 720 P.2d 436 (1986).

Here, Gucene’s reliance on *State v. Valdez*, 137 Wn. App. 280, 152 P.3d 1048 (2007), is misplaced. In *Valdez*, the Court set forth the circumstances that controlled the outcome in that case:

[W]hether the officers exceeded the scope of a proper search incident to Valdez’s arrest when they called for a drug-sniffing dog when (1) two officers were already on the scene;

(2) both the driver and the passenger had been removed from the vehicle; and (3) *the initial search of the vehicle was complete* and did not reveal evidence of weapons or drugs.

Valdez, 137 Wn. App. at ¶ 16 (emphasis supplied).

The search at issue in this case *was* the initial search incident to Gucene's arrest. The police were scrupulous about the extent of their searches incident to the various arrests of the occupants of the Camaro. In what was clearly an overabundance of caution in light of *State v. Bello*, ___ Wn. App. ___, 2008 WL 283663, ¶¶ 20-21 (Feb. 4, 2008) (police may search entire vehicle upon arrest of passenger, including containers known to belong to driver if they were within reach of where passenger was seated), the officers confined each search to the area directly occupied by that passenger. Not until after they developed probable cause to arrest Gucene did they search the part of the car he had occupied. The search was thus clearly part of "securing of the suspect and the scene," and was proper. *State v. Boursaw*, 94 Wn. App. 629, 634, 976 P.2d 130 (1999).

Contrary to Gucene's contention, *Brief of Appellant* at 9, the police did not "widen" the search by bringing in a dog. The K-9 search here was the *only* search of the area occupied by Gucene, and the *only* search of the car incident to² Gucene's arrest.

² Gucene's contention that the search was not contemporaneous to, and therefore not "incident to," his arrest is addressed *infra* at Point B.

Gucene nevertheless attempts to distinguish *Boursaw* on the grounds that in that case the police found evidence of drug paraphernalia prior to conducting the K-9 search. *Brief of Appellant* at 12. Such a distinction is untenable, however. It would amount to a conclusion that a full warrantless search could be conducted on the basis of probable cause or reasonable suspicion. This is plainly not the law.

Rather, what distinguishes the searches in *Valdez* and *Boursaw* is that in the latter case the canine search was “incident to” the arrest, *i.e.*, it was part of securing the scene, while in the former it was not. This true distinguishing factor between *Valdez* and *Boursaw* was specifically noted by this Court in *Valdez*: “*Boursaw* turned ‘on what constitutes activities related to “the securing of the suspect and the scene,” and at what point is the scene sufficiently secured.’” *Valdez*, 137 Wn. App. at ¶ 17 (*quoting Boursaw*, 94 Wn. App. at 634).

Applying this distinction to the present case, it is apparent that the search was proper. As noted, the search here was even narrower than that in *Boursaw*, where the dog was brought in quickly after an *initial* search. The trial court properly refused to suppress the evidence.

Moreover, even if Gucene’s argument were accepted, the trial nevertheless would have properly refused to suppress the evidence under the

doctrine of inevitable discovery. Where police have been found to have illegally seized evidence, the evidence may not be suppressed if the prosecution can establish by a preponderance of the evidence that (1) the police did not act unreasonably or to accelerate the discovery of the evidence in question; (2) proper and predictable investigatory procedures would have been utilized; and (3) those procedures would have inevitably resulted in the discovery of the evidence in question. *State v Reyes*, 98 Wn. App. 923, 993 P. 2d 921 (2000).

Here, the deputies acted with extreme caution with respect to discovering the evidence in question. They were aware of the presence of the bag before the defendant was arrested, but waited until he was in custody to search the area of the car where he had been sitting. They did not act unreasonable or do anything to accelerate the discovery of the evidence in question.

Upon lawfully arresting a passenger in a vehicle based on a warrant, an officer has authority to conduct a search of the vehicle incident to arrest. *State v. Chelly*, 94 Wn. App. 254, 970 P.2d 376, *review denied*, 138 Wn.2d 1009 (1999). The search incident to arrest is a proper and predictable investigatory procedure which the deputies utilized in a very conservative fashion. Rather than searching the entire passenger area of the car when they validly arrested the front passenger, they only searched the front passenger

area. If they had utilized the standard search incident to arrest procedures they would have discovered methamphetamine in the bag that was sitting in plain view in the driver's foot well of the car. Since the evidence would have been inevitably discovered if a dog had not been brought in, any alleged impropriety regarding the dog is of no consequence.

B. THE TRIAL COURT PROPERLY FOUND THERE WAS NO UNREASONABLE DELAY BETWEEN GUCENE'S ARREST AND THE SEARCH OF HIS CAR WHERE HE WAS STOPPED BECAUSE HIS CAR MATCHED THAT USED IN A SHOPLIFTING INCIDENT AN HOUR AND A HALF EARLIER, WHERE AFTER THE STOP, GUCENE AND THE PASSENGERS WERE CONTACTED, TWO WERE ARRESTED ON WARRANTS, AND THEIR PART OF THE CAR WAS SEARCHED, WHERE THAT SEARCH TURNED UP MERCHANDISE FROM THE VICTIMIZED STORE, AT WHICH POINT, THE DEPUTY WENT ACROSS THE STREET TO THE STORE AND VERIFIED THAT MERCHANDISE WAS STOLEN AND THAT GUCENE WAS INVOLVED IN THE THEFT, AND WHEREUPON GUCENE WAS ARRESTED AND THE CAR WAS SEARCHED WITHIN MINUTES THEREAFTER.

Gucene next claims that the search was improper because it was not contemporaneous with his arrest. Guccene fails to meet his burden of showing that the time between his arrest and search was unreasonable.

The general standard of review is set forth at the previous point. With

regard to the timeliness of the search, “it was incumbent upon [the arrestee] to offer some evidence supporting her argument the delay was caused by activities unrelated to the arrest.” *Boursaw*, 94 Wn. App. 629, 633, 976 P.2d 130 (1999) (quoting *State v. Parker*, 88 Wn. App. 273, 282, 944 P.2d 1081 (1997), *reversed on other grounds*, 139 Wash.2d 486, 987 P.2d 73 (1999) (alteration the Court’s)). Here, Gucene has wholly failed to meet his burden of showing that any delay was due to factors unrelated to his lawful detention, investigation, arrest and securing of the scene.

First, the State disputes Gucene’s calculation that “a minimum of 39 minutes transpired” from the time of the stop to the search. By the State’s count, it was only 20 minutes:

It was approximately one minute from the time Meyer stopped the car until the other deputies arrived. RP 15. Running total: one minute.

Meyer talked to Gucene for maybe two minutes. RP 17. It was very brief. RP 17. After the other two were arrested, Meyer began searching the car. RP 17. Running total: three minutes.

It took a few minutes to search the car. RP 19. The search incident to the arrest of the passengers took about five minutes. RP 24. Running total: eight minutes.

It took less than a minute to get to the Castle store, which was across

the street, about a tenth of a mile away. RP 25. Meyer arrived back at the scene within about ten minutes of leaving. RP 25. Running total: 18 minutes.

The dog handler arrived a minute or two later. RP 26. It took the handler less than a minute from the time he arrived until he began the search. RP 26. Running total: 20 minutes.

More importantly, however, all the activities were a proper part of investigating the crime and securing the scene. The time that transpired was not spent dealing with extraneous matters. To the contrary, Gucene was stopped because his car matched that used in a shoplifting incident an hour and a half earlier. After the stop, Gucene and the passengers were contacted. Two were arrested on warrants, and their part of the car was searched. That search turned up merchandise from the victimized store. At that point, Meyer went across the street to the store and verified that merchandise was stolen and that Gucene was involved in the theft.³ Gucene was thereupon arrested and the car was searched within minutes thereafter. The trial court did not err in finding that the search was contemporaneous with the arrest. This claim

³ It was reasonable to detain Gucene at this point without arresting him. *State v. Acrey*, 148 Wn.2d 738, 747, 64 P.3d 594 (2003) (“If the results of the initial stop dispel an officer’s suspicions, then the officer must end the investigative stop. If, however, the officer’s initial suspicions are confirmed or are further aroused, the scope of the stop may be extended and its duration may be prolonged.”).

should be rejected.

IV. CONCLUSION

For the foregoing reasons, Gucene's conviction and sentence should be affirmed.

DATED February 13, 2008.

Respectfully submitted,

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