

NO. 37573-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

KEVIN SMITH,

Appellant.

FILED
COURT OF APPEALS DIVISION II
STATE OF WASHINGTON
2008 OCT 14 PM 4:31

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

The Honorable Russell W. Hartman, Judge

FILED
COURT OF APPEALS
DIVISION II
08 OCT 16 PM 12:21
STATE OF WASHINGTON
BY *JWS*
DEPUTY

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it entered findings of fact VIII, XV, XVII, XXI. CP 18-19.¹

2. The trial court erred when it entered conclusions of law III and IV. CP 20.

3. The trial court erred when it refused to suppress unlawfully seized evidence.

Issue Pertaining to Assignments of Error

Did the State fail to show voluntary consent to search when corrections officers asked appellant to leave his motel room, once outside he was met by a police officer who asked for his name and identification, and at least one officer was armed with a visible assault rifle?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Kitsap County Prosecutor charged appellant Kevin Smith with one count of possession of methamphetamine. CP 1. A jury found him guilty and he was sentenced to 22 months, within the standard range. CP 99-101. Smith timely filed notice of appeal. CP 61.

¹ The court's Findings of Fact and Conclusions of Law are attached to this brief as an appendix.

2. Substantive Facts

Smith was in his room at the Chieftain Motel when three officers entered and asked him to leave. 1RP² 40; CP 18. Bremerton police were assisting the Department of Corrections (DOC) in arresting some of their clients. 1RP 17-18. The DOC was looking for Smith's niece, who was also in the room. 1RP 19-20. When Smith stepped out onto the walkway/balcony, he saw more officers, including one carrying an assault rifle. 1RP 35. Detective Floyd May approached Smith and asked his name. CP 18. Smith gave his correct name and date of birth. CP 18.

May stepped away for a few minutes to check for outstanding warrants. CP 18. Although Smith's name and date of birth turned up no warrants, the associated physical description concerned May. CP 18. May thought Smith was slightly shorter and had blue, rather than hazel, eyes. CP 18. May returned to Smith and asked for identification. 1RP 23; CP 19.

May's account of subsequent events differed from Smith's. Smith testified he handed May a laminated check-cashing card and a birth

² There are seventeen volumes of Verbatim Report of Proceedings referenced as follows: 1RP - 8/27/2007; 2RP - 9/4/2007; 3RP - 9/5/2007; 4RP - 9/6/2007; 5RP - 9/11/2007; 6RP - 10/1/2007; 7RP - 10/26/2007; 8RP - 2/1/2008; 9RP - 3/3/2008; 10RP - 3/7/2008; 11RP - 3/10/2008; 12RP - 3/17/2008; 13RP - 3/18/2008; 14RP - 3/19/2008; 15RP - 3/20/2008; 16RP - 3/24/2008; 17RP - 4/4/2008.

certificate. 1RP 44. One of the armed officers asked Smith if he had any weapons. 1RP 45. When he said he had a pocketknife and began to reach for it, the officer told him, "Don't make any sudden moves," and reached into Smith's back pocket. 1RP 45-46. The officer retrieved both the pocketknife and Smith's wallet. 1RP 46.

May testified Smith was already leaving the room when he encountered him. 1RP 20. There was at least one other officer on the balcony about six feet away, and a couple of other officers were "in the area." 1RP 34. May agreed a nearby patrol officer had an M-16 style semi-automatic rifle on his back and it was a "pretty imposing" weapon. 1RP 35.

Smith gave him only a non-legal identification card listing his name, date of birth, social security number, and physical description. 1RP 24. Since the card also listed Smith as having blue eyes and was not government-issued, May asked if Smith had anything else with his name on it, but did not return the card. 1RP 24-25. When Smith opened the wallet, May could see checks made out to an Eric Lopez, who May claimed to know. 1RP 27. May then asked Smith if he could look in the wallet and Smith handed him the wallet. 1RP 25, 27.

May found several pieces of identification and checks with various names on them in the wallet. 1RP 27-28. He suspected Smith of identity theft and told him to remain where he was. 1RP 27-28. Smith was handcuffed. 1RP 28. As May continued searching Smith's wallet, he found a small plastic wrapper with an off-white crystalline substance that he suspected was methamphetamine. 1RP 28.

Smith told May his roommate, Eric Lopez, had given him the checks and the white substance was rock salt for a bad tooth. 1RP 48; 15RP 92. May performed a field test that suggested the substance was methamphetamine. 1RP 28.

The trial court denied Smith's motion to suppress the contents of the baggie. 1RP 63. After a CrR 3.6 hearing, the court found Smith was asked to leave his motel room but was not told to remain and was initially free to leave. 1RP 60; Appendix at 2. The court concluded May was justified in requesting Smith's identification because of the discrepancy in the physical description. 1RP 61-62; Appendix at 3. The court found Smith voluntarily handed May his wallet and this act gave May implicit consent to search it. 1RP 62; Appendix at 3.

At trial, a forensic scientist testified the substance found in Smith's wallet was methamphetamine. 15RP 48, 50.

C. ARGUMENT

THE COURT SHOULD HAVE SUPPRESSED ALL EVIDENCE FROM THE UNLAWFUL SEARCH OF SMITH'S WALLET.

Under the Fourth Amendment and article 1, § 7 of the Washington Constitution,³ warrantless searches and seizures are per se unreasonable. State v. Hendrickson, 129 Wn.2d 61, 70, 917 P.2d 563 (1996) (quoting Arkansas v. Sanders, 442 U.S. 753, 759, 61 L. Ed. 2d 235, 99 S. Ct. 2586 (1979)). The State bears the burden of proving the existence of one of the jealously and carefully drawn exceptions to the warrant requirement, such as consent to search. Id. Coercion, whether explicit or implicit, invalidates consent to search. State v. Werth, 18 Wn. App. 530, 534, 571 P.2d 941 (1977) (citing Bumper v. North Carolina, 391 U.S. 543, 88 S. Ct. 1788, 20 L. Ed. 2d 797 (1968)). Courts should exclude evidence when police obtain consent to search by exploiting an unlawful detention. State v. Armenta, 134 Wn.2d 1, 17, 948 P.2d 1280 (1997). Here, May's warrantless search of Smith's wallet violated the state and federal constitutions because, assuming Smith gave consent, police obtained it during a coercive and unlawful seizure.

³ The Fourth Amendment provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." Article 1, § 7 provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

1. Smith Was Unlawfully Seized Before He Handed Over his Wallet.

A person is seized "when, by means of physical force or a show of authority, his or her freedom of movement is restrained and a reasonable person would not have believed he or she is (1) free to leave, given all the circumstances, or (2) free to otherwise decline an officer's request and terminate the encounter." State v. O'Neill, 148 Wn.2d 564, 574, 62 P.3d 489 (2003) (internal quotations and citations omitted). Whether a person has been seized is a mixed question of law and fact. State v. Thorn, 129 Wn.2d 347, 351, 917 P.2d 108 (1996).

In Finding of Fact VIII, the court found Smith was free to leave when May asked him his name outside his motel room. CP 18. This is incorrect. Generally, where an officer merely approaches an individual in public, requests to speak with him, and requests identification, no seizure has occurred. O'Neill, 148 Wn.2d at 577-580 (citing State v. Young, 135 Wn.2d 498, 511, 957 P.2d 681 (1998); Armenta, 134 Wn.2d at 11). But the law enforcement officers in this case did much more.

In State v. Soto-Garcia, the court found the "progressive intrusion into Soto-Garcia's privacy" created an atmosphere such that a reasonable person would not believe he or she was free to end the encounter. State v. Soto-Garcia, 68 Wn. App. 20, 25, 841 P.2d 1271 (1992). Soto-Garcia

was walking the streets late at night in an area known for drug trafficking when an officer approached him and began questioning him. Id. After Soto-Garcia answered the officer's initial questions "appropriately," the officer ran an identification check. Id. Although it revealed no outstanding warrants, the officer "remained curious" and asked Soto-Garcia if he had any cocaine on his person. Id. When Soto-Garcia answered no, the officer asked for consent to search. Id. The court affirmed the trial court's conclusion that Soto-Garcia was seized before giving consent to search. Id.

A similar progressive intrusion into Smith's privacy occurred here. First, DOC officers entered Smith's motel room and asked him to leave. CP 18. When he obeyed, Smith was met by May, who asked for his name. CP 18. Like Soto-Garcia, Smith responded "appropriately" by giving his correct name and date of birth. CP 18. May verified this information and confirmed there were no outstanding warrants, but he "remained curious" based on the eye-color and asked for identification. CP 18-19. Smith gave May his check-cashing card, but this was not acceptable to the detective. 1RP 25. While Smith searched for something to satisfy the officer's curiosity, May asked if he could look inside Smith's wallet. 1RP 25. This court should conclude, like the court in Soto-Garcia, that this progressive

intrusion into Smith's privacy created a coercive atmosphere and a reasonable person would not have felt free to leave or refuse.

Even without the progressive intrusions, the record shows Smith was seized upon being asked to leave his motel room. See O'Neill, 148 Wn.2d at 582 (upon being asked to exit a vehicle, a reasonable person would not feel free to leave); see also State v. Watkins, 76 Wn. App. 726, 729, 887 P.2d 492 (1995) (request that Watkins exit car was a seizure); see also United States v. Beaudoin, 362 F.3d 60, 68 (1st Cir. 2004) (officer's statement to "step outside" the motel room assumed to be seizure), vacated and remanded on other grounds sub nom Champagne v. United States, 543 U.S. 1102, 125 S. Ct. 1025, 160 L. Ed. 2d 1009 (2005). As in O'Neill and Watkins, where individuals were asked to step out of a car, asking Smith to leave his own motel room was a seizure. This Court should reject any argument that Smith could have walked away from his motel room, presumably leaving behind his belongings, rather than comply with May's requests. See State v. Rankin, 151 Wn.2d 689, 697, 92 P.3d 202 (2004) (asking passenger for identification during traffic stop is seizure because, unlike pedestrian, "a passenger faced with undesirable questioning by the police does not have the realistic alternative of leaving the scene"). Simply leaving one's place of abode is not a "realistic alternative."

Additionally, the intimidating presence of several officers or the display of a weapon can elevate police contact into a seizure. Young, 135 Wn.2d at 512 (quoting United States v. Mendenhall, 446 U.S. 544, 554-55, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980)). Here, May conceded he was not alone. At least two Department of Corrections officers were in Smith's motel room. 1RP 20. At least one other police officer was outside the room with Detective May. 1RP 34-35. And at least one other officer was in the area, visibly armed with an M-16-style assault rifle. 1RP 35. Under these circumstances, a reasonable person would not have felt free to leave or fail to answer May's questions.

Finally, Smith was seized because it appears May retained his identification card. When police retain an individual's identification or other item of value, the individual is not reasonably free to leave. See State v. Aranguren, 42 Wn. App. 452, 456-57, 711 P.2d 1096 (1985) (if officer retains suspect's driver's license while asking other questions, a seizure has occurred since suspect is effectively immobilized without license); State v. Thomas, 91 Wn. App. 195, 200-01, 955 P.2d 420 (1998) (seizure occurred when officer, while retaining Thomas's identification, took three steps back to conduct a warrants check on his hand-held radio); Armenta, 134 Wn.2d

at 12 (defendants not free to leave once officer placed their money in patrol car for safe keeping).

Smith handed his check-cashing card to May. CP 18. There was no evidence May returned the card before asking to look in Smith's wallet. If Smith had wanted to leave, he would have had to abandon his check-cashing card. May did not merely use the card to quickly note Smith's name and date of birth. Cf. State v. Hansen, 99 Wn. App. 575, 579, 994 P.2d 855 (2000) (holding license for no more than 30 seconds to simply record name and birth date is not a seizure). He kept it while he asked for other identification and, ultimately, while he asked to search Smith's wallet. A reasonable person would not have felt free to leave or decline the request.

2. Detective May Did Not Have Reasonable Suspicion of Criminal Activity.

An "officer may briefly detain and question a person reasonably suspected of criminal activity." Watkins, 76 Wn. App. at 729 (quoting State v. Rice, 59 Wn. App. 23, 26, 795 P.2d 739 (1990)). To justify that intrusion, however, an officer must be able to point to "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant th[e] intrusion." State v. Williams, 102 Wn.2d 733, 739, 689 P.2d 1065 (1984) (quoting Terry v. Ohio, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)). "Specific and articulable facts"

means that the circumstances must show "a substantial possibility that criminal conduct has occurred or is about to occur." State v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1986).

May agreed he had no legal basis to perform any search or arrest other than assisting the DOC officers. 1RP 29. He had no reasonable suspicion of criminal activity prior to approaching Smith. When he asked Smith's name, Smith gave him his correct name and date of birth. 1RP 30. When May called in with Smith's name and date of birth, he learned Smith's record was clear. 1RP 22. When he asked for a physical description, the description matched Smith except for a slight height disparity and a slight disparity in eye-color. 1RP 23, 32-34.

The trial court appears to have concluded this slight disparity in the physical description amounted to reasonable suspicion of criminal activity.⁴ CP 19; Appendix at 3. It does not. When a person gives an officer a correct name and address and the officer has no reason to suspect it is false, the officer has no justification for detaining the person further. See State v. Cole, 73 Wn. App. 844, 849-50, 871 P.2d 656 (1994) (confirming

⁴ Findings of Fact XV and XVII state, "That Detective May needed to increase his involvement with the Defendant once the reported Cencom eye color did not match the defendant's," and "That it was reasonable for Detective May to ask the Defendant for identification because of the discrepancy in eye color." CP 19; Appendix at 3.

identity not sufficient grounds for detention after passenger gave name and address and signed infraction for not wearing seatbelt). No reasonable suspicion is created by Smith's proximity to persons sought by the Department of Corrections or by a history of prior drug activity at Smith's motel. See, e.g., State v. Crane, 105 Wn. App. 301, 312, 19 P.3d 1100 (2001) ("Neither close proximity to others suspected of criminal activities nor presence in a high crime area, without more, will justify a seizure."); State v. Richardson, 64 Wn. App. 693, 697, 825 P.2d 754 (1992) (presence in high crime area or proximity to other suspected of crime does not create reasonable suspicion to detain).

In the end, the State was required, but failed, to demonstrate, "a substantial possibility that criminal conduct ha[d] occurred or [was] about to occur." Kennedy, 107 Wn.2d at 6. May lacked reasonable suspicion to detain Smith.

3. The Unlawful Detention Tainted the Subsequent Consent to Search.

In determining whether an illegal detention vitiates a subsequent consent to search, this Court considers four factors:

(1) temporal proximity of the illegality and the subsequent consent, (2) the presence of significant intervening circum-

stances, (3) the purpose and flagrancy of the official misconduct, and (4) the giving of Miranda⁵ warnings.

Armenta, 134 Wn.2d at 17 (quoting Soto-Garcia, 68 Wn. App. at 27). The trial court here concluded by handing over his wallet, Smith impliedly or explicitly consented to the search. CP 19. Even if this is the case, the illegal detention rendered any consent involuntary.

Here, the illegal detention and search were simultaneous. There was no intervening period and no significant intervening circumstances. May approached Smith outside the motel room, asked his name, requested identification, and retained Smith's identification card until Smith handed over his wallet. May's actions, combined with those of the other officers, led to an unjustified detention. There was no reason to question Smith other than the hope of conducting an otherwise unauthorized search. There is no evidence May gave Miranda warnings until after the search of Smith's wallet. The illegal detention, therefore, invalidated any consent.

When police order a person out of her home and then continue to give orders, subsequent consent to search is not voluntary. Werth, 18 Wn. App. at 535-36. Acting on an informant's tip but without a search warrant, police ordered Werth to come out of her home and keep her hands in view.

⁵ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Id. at 535. When she came out, they ordered her away from the door. Id. She was not told she could refuse consent, and she saw at least one officer armed with a shotgun. Id. The court explained "many coercive factors" rendered Werth's consent involuntary and held the trial court had erred in denying her motion to suppress. Id. at 531, 535-36.

Similarly coercive circumstances undermine the trial court's finding of voluntary consent in this case. Like Werth, Smith was ordered out of his abode. Like Werth, when Smith came outside, he was not free to leave because he encountered more officers, one asking questions and one visibly armed. This Court should hold, as it did in Werth, that any consent was involuntary and the trial court erred in denying the motion to suppress.

The progressively intrusive police conduct in Soto-Garcia, discussed above, was also held to obviate the defendant's consent to search. 68 Wn. App. at 29. The court applied the same factors as the Armenta court and found Soto-Garcia was neither told he could refuse consent nor given Miranda warnings, the misconduct was intrusive, and there were no reasonable grounds for the detention. 68 Wn. App. at 28. The same is true for Smith. Once he was illegally seized, Smith was not free to refuse May's request for consent to search, and any consent was involuntary. Under the four factors articulated in Armenta, the coercive nature of the

illegal detention rendered the subsequent consent involuntary. Reversal is required.

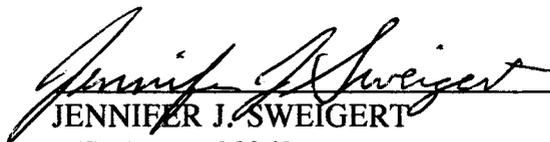
D. CONCLUSION

Smith was unlawfully seized. Because the circumstances of the seizure vitiated any consent to search Smith's wallet, all evidence obtained during that search should be suppressed. Without the evidence obtained during that search, there is insufficient evidence of any crime, and Smith's conviction should be reversed.

DATED this 14 day of October, 2008.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER J. SWEIGERT

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III.

That DOC officers entered a room at the Chieftain Motel where the Defendant was located.

IV.

That the Defendant was asked to leave the room.

V.

That the Defendant was not told he had to remain in the area outside the room.

VI.

That the Defendant was standing on the balcony outside the room he had exited when Detective May approached him.

VII.

That Detective May asked the Defendant his name.

VIII.

That it was acceptable for Detective May to ask the Defendant his name because the Defendant was free to leave.

IX.

That the Defendant gave Detective May his correct name and date of birth.

X.

That Detective May ran the Defendants name through Cencom.

XI.

That approximately three minutes passed between the Defendant giving his name to Detective May and the physical description coming back from Cencom.

XII.

That the Department of Licensing information that Cencom returned was that the Defendant had hazel eyes, was 5'10", and weighted approximately 180 pounds.

XIII.

That Judge Anna Laurie was asked to look at the Defendant's eyes at the 3.6 hearing and they appeared to be blue.

XIV.

That there was no real discrepancy between the height and weight of the Defendant and the information on height and weight that Cencom provided.



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XV.

That Detective May needed to increase his involvement with the Defendant once the reported Cencom eye color did not match the Defendant's.

XVI.

That Detective May asked the Defendant for identification.

XVII.

That is was reasonable for Detective May to ask the Defendant for identification because of the discrepancy in eye color.

XVIII.

That the Defendant gave Detective May an identification card that appeared to be a check cashing card.

XIX.

That the identification card the Defendant gave Detective May carried forward the eye color discrepancy, stating the Defendant's eyes were blue.

XX.

That, while the Defendant was holding his wallet, Detective May noticed checks from "Eric Lopez" inside.

XXI.

That the Defendant handed Detective May his wallet, consenting implicitly if not explicitly to the search of the wallet.

XXII.

That Detective May found various cards with other names on them inside the Defendant's wallet.

XXIII.

That Detective May had probable cause to arrest the Defendant for identity theft at that time.

XXIV.

That the Defendant's wallet was searched incident to that arrest.

XXV.

That Detective May found a white, powder substance in the Defendant's wallet.

XXVI.



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That the substance found in the wallet was later tested using a NIK test kit and tested positive for methamphetamine.

CONCLUSIONS OF LAW

I.

That the above-entitled Court has jurisdiction over the parties and the subject matter of this action.

II.

That the actions above happened in Kitsap County, State of Washington.

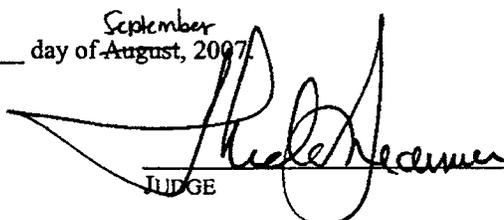
III.

That there was no improper contact between Detective May and the Defendant in this situation.

IV.

That the Defendant consented to the search of his wallet.

SO ORDERED this 11 day of ^{September}~~August~~, 2007

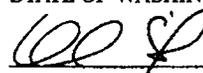


JUDGE

PRESENTED BY-

APPROVED FOR ENTRY-

STATE OF WASHINGTON



KATE T. SIGAFOOS, WSBA No. 37017
Deputy Prosecuting Attorney



Attorney for Defendant

WSBA No. 19773

Prosecutor's File Number-07-104824-8



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

| | | |
|---------------------|---|--------------------|
| STATE OF WASHINGTON |) | |
| |) | |
| Respondent, |) | |
| |) | |
| vs. |) | COA NO. 37573-7-II |
| |) | |
| KEVIN SMITH, |) | |
| |) | |
| Appellant. |) | |

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 14TH DAY OF OCTOBER 2008, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] ALEXIS WALLACE
KITSAP COUNTY PROSECUTOR'S OFFICE
MSC 35
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PORT ORCHARD, WA 98366-4681

- [X] KEVIN J. SMITH
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DIVISION II
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STATE OF WASHINGTON
BY  DEPUTY

SIGNED IN SEATTLE WASHINGTON, THIS 14TH DAY OF OCTOBER 2008.

x *Patrick Mayovsky*