

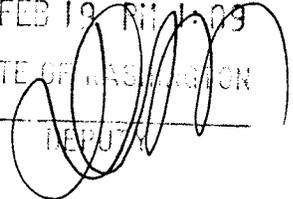
FILED  
COURT OF APPEALS  
DIVISION II

No. 38219-9-II

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COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

STATE OF WASHINGTON  
BY \_\_\_\_\_



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STATE OF WASHINGTON,

Respondent,

vs.

TODD VERNON NELSON,

Appellant.

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On Appeal from the Pierce County Superior Court  
Cause No. 08-1-01846-8  
The Honorable Brian Tollefson, Judge &  
the Honorable Kitty-Ann Van Doorninck, Judge

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OPENING BRIEF OF APPELLANT

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## **I. ASSIGNMENTS OF ERROR**

1. The trial court erred when it denied Appellant's CrR 3.6 Motion to Suppress.
2. The trial court erred when it concluded that Appellant was not seized when a police officer first contacted Appellant.
3. The trial court abused its discretion when it denied Appellant's request to instruct the jury on the affirmative defense of unwitting possession.
4. The trial court denied Appellant the opportunity to argue his theory of the case to the jury when it refused Appellant's request to instruct the jury on the affirmative defense of unwitting possession.

## **II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR**

1. Was Appellant seized when the police officer stopped his vehicle, activated his colored "wig-wag" lights, shined a flashlight on Appellant, approached Appellant and began questioning him? (Assignments of Error 1 & 2)
2. Where the State's evidence failed to establish that Appellant was aware of the existence or contents of a black fanny pack on the passenger seat of a car, where the evidence failed to connect Appellant directly to the fanny pack, and where the

defense presented evidence that the car did not belong to Appellant, did the trial court abuse its discretion, and was Appellant denied the opportunity to argue his theory of the case to the jury, when the trial court refused to instruct the jury on the affirmative defense of unwitting possession? (Assignments of Error 3 & 4)

### III. STATEMENT OF THE CASE

#### A. Procedural History

The State charged Todd Vernon Nelson in Pierce County Superior Court with one count of unlawful possession of a controlled substance (RCW 69.50.4013) and one count of unlawful use of drug paraphernalia (RCW 69.50.102, .412). (CP 1-2) Before trial, Nelson moved pursuant to CrR 3.6 to suppress the drugs and paraphernalia, arguing that he was unlawfully seized when contacted by the arresting officer. (CP 4-8; 07/22/08 RP 35-39)<sup>1</sup> Following a hearing, the trial court denied the motion. (07/22/08 RP 43-47; CP 58-62)

Nelson asked the court to instruct the jury on the defense of unwitting possession, but the court refused. (07/24/08 RP 98-101,

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<sup>1</sup> Citations to the transcripts will be to the date of the proceeding followed by the page number.

134; CP 31) The jury convicted Nelson of possession of a controlled substance, but acquitted him of using the drug paraphernalia. (07/25/08 RP 138-39; CP 56-57) The trial court denied Nelson's request for a DOSA, and imposed a standard range sentence of 24 months of confinement. (08/15/08 RP 13, 18-19; CP 114, 117) This appeal timely follows. (CP 197)

B. Substantive Facts

1. *Facts from the CrR 3.6 Hearing*

Puyallup Tribal Police Officer Paul Herrera was on patrol in East Tacoma on the night of April 15, 2008. (07/22/08 RP 3, 4, 5) As he drove along East Roosevelt Avenue, he noticed two vehicles parked on the side of the road with their bumpers touching. (07/22/08 RP 6) He thought the car in front may have backed into the truck parked behind it. (07/22/08 RP 6) He stopped his patrol vehicle, and saw a person hunched over in the driver's seat of the car. (07/22/08 RP 6, 7) He parked across the street from the car, activated the colored "wig-wag" lights on top of his patrol vehicle, and approached the driver. (07/22/08 RP 7, 25-26, 28) As he approached, he illuminated the driver and the interior of the car with his flashlight. (07/22/08 RP 8, 23, 29)

Herrera noticed that the steering column was broken and

wires were exposed, which sometimes indicates that a vehicle has been stolen. (07/22/08 RP 8) Herrera was also suspicious because the Emerald Queen Casino was nearby, and a high volume of vehicles are stolen from the Casino's parking lot. (07/22/08 RP11)

The car's window was rolled down slightly, so Herrera was able to communicate with the driver. (07/22/08 RP 7-8) He asked the driver, Nelson, whether the car belonged to him, and Nelson replied that it did not. (07/22/08 RP 9) Herrera stepped to the front of the car and ran a record check on the license plate. (07/22/08 RP10) The car had not been reported stolen. (07/22/08 RP10)

Herrera returned to Nelson and demanded his identification, which Nelson provided. (07/22/08 RP11) A check of Nelson's status revealed an outstanding warrant. (07/22/08 RP12) Herrera placed Nelson under arrest and took him into custody. (07/22/08 RP 13) Herrera conducted a search of the car incident to arrest, and located a dark fanny pack on the front passenger seat. (07/22/08 RP 14) He opened the pack, and found several hypodermic needles, spoons, and a black tar-like substance. (07/22/08 RP 14) The tar-like substance field tested positive for the presence of heroin. (07/22/08 RP 15)

Herrera testified that he initially stopped to investigate a possible collision between the car and the truck. (07/22/08 RP 17) Although Herrera did not specifically order Nelson to stay, he testified that Nelson was not free to leave and would have been detained had he tried to leave. (07/22/08 RP 15, 29)

## 2. *Facts from the Trial*

Herrera testified at trial consistent with his testimony at the CrR 3.6 hearing. (07/24/08 RP 26-57) He also testified about the condition of the items in the fanny pack. Herrera noticed the needles were dirty, and had small drops of a dark substance inside of them. (07/24/08 RP 37) The spoons were also dirty, and one had a burnt residue and a small piece of dirty cotton on it. (07/24/08 RP37)

Subsequent lab tests on the tar-like substance, the cotton and the residue on the spoon were positive for the presence of heroin. (07/24/08 RP 92-94) Herrera testified that users often heat heroin, a tar-like substance, on a spoon until it is in liquid form, pull it through cotton into a hypodermic needle, and inject it. (07/24/08 RP 54-55) The blackened appearance of the spoon indicates that it had been used in this type of process. (07/24/08 RP 55)

Herrera also testified that the fanny pack was zipped closed,

and the items inside were not visible until the pack was opened. (07/24/08 RP 46) Nelson was responsive and compliant throughout the entire contact. (07/24/08 RP 42, 47) No usable fingerprints were located on any of the items. (07/24/08 RP 65-67) Nelson also presented documents showing that he was not the registered owner of the car. (07/24/08 RP 97)

#### IV. ARGUMENT & AUTHORITIES

- A. The trial court erred when it denied Nelson's CrR 3.6 motion to suppress because Officer Herrera seized Nelson without a reasonable suspicion of criminal activity.

Article I, section 7 of the Washington State Constitution protects a citizen's right to be free from unreasonable search and seizure. The right to be free from unreasonable governmental intrusion into one's private affairs encompasses automobiles and their contents. State v. Parker, 139 Wn.2d 486, 494, 987 P.2d 73 (1999); City of Seattle v. Mesiani, 110 Wn.2d 454, 456-57, 755 P.2d 775 (1988). The individual asserting a seizure in violation of art. I, § 7 bears the burden of proving that there was a seizure. State v. Young, 135 Wn.2d 498, 510, 957 P.2d 681 (1998). Where the facts are undisputed, the determination of whether there is a violation of art. I, § 7 is a question of law reviewed de novo. State

v. Rankin, 151 Wn.2d 689, 694, 92 P.3d 202 (2004).

When analyzing police-citizen interactions, the court must first determine whether a warrantless search or seizure has taken place, and if it has, whether the action was justified by an exception to the warrant requirement. State v. O'Neill, 148 Wn.2d 564, 574, 62 P.3d 489 (2003). In this case, the State argued, and the trial court agreed, that the initial contact between Herrera and Nelson was not a seizure. (07/22/08 RP 31-34, 43-47; CP 9-16, 58-62)

"[N]ot every encounter between a police officer and a citizen is an intrusion requiring an objective justification." Rankin, 151 Wn.2d at 695 (quoting United States v. Mendenhall, 446 U.S. 544, 553, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980)). Art. I, § 7 permits social contacts between police and citizens. Young, 135 Wn.2d at 511. An officer's mere social contact with an individual in a public place with a request for identifying information, without more, is not a seizure or an investigative detention. Young, 135 Wn.2d at 511; State v. Armenta, 134 Wn.2d 1, 11, 948 P.2d 1280 (1997). This is true even when the officer subjectively suspects the possibility of criminal activity, but does not have suspicion justifying a *Terry*<sup>2</sup>

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<sup>2</sup> See Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

stop. O'Neill, 148 Wn.2d at 574-75. Police officers are able to approach citizens and permissively inquire into whether they will answer questions as part of their "community caretaking" function. State v. Nettles, 70 Wn. App. 706, 712, 855 P.2d 699 (1993).

However, a seizure occurs, under art. I, § 7 when, considering all the circumstances, an individual's freedom of movement is restrained and the individual would not believe he or she is free to leave or decline a request due to an officer's use of force or display of authority. O'Neill, 148 Wn.2d at 574. This determination is made by objectively looking at the actions of the law enforcement officer. Young, 135 Wn.2d at 501.

The question in this case is whether a reasonable person in Nelson's position would have believed he was free to go or otherwise terminate the encounter, given the actions of Officer Herrera. Young, 135 Wn.2d at 510-11.

For example, in Young, the Court found no disturbance of private affairs under art. I, § 7 where a police officer shined a spotlight on a person in a public street at night. 135 Wn.2d at 512-13. The Court held that "[m]ere illumination alone, without additional indicia of authority, does not violate the Washington Constitution." 135 Wn.2d at 514.

In State v. Thorn, the Court concluded that there was no seizure of a person in a vehicle parked at night in the parking lot of a closed public park, where a police officer approached the vehicle after seeing inside the car a flicker he suspected was a lighter, and asked, "Where is the pipe?" 129 Wn.2d 347, 349, 917 P.2d 108 (1996) (overruled on other grounds by O'Neill, 148 Wn.2d at 571).

The trial court in this case relied primarily on O'Neill when it found that Nelson was not "seized." (07/22/08 RP 44-47; CP 61) In that case, our state Supreme Court found no seizure where an officer driving a squad car pulled up behind a car parked in front of a store that had been closed for an hour, activated the squad car's spotlight, and then approached the parked car and shined his flashlight into it. 148 Wn.2d at 578. The Court noted that the officer made no demands and issued no orders, and that the actions of shining a spotlight on the car and asking O'Neill to roll his window down did not constitute a seizure. 148 Wn.2d at 578-79.

This case differs from Young, Thorn and O'Neill, and compels a different result. Here, the officer did more than merely shine a flashlight to illuminate Nelson and the vehicle. He also stopped his vehicle nearby and activated his colored "wig-wag" lights, then approached Nelson and began questioning him about

the vehicle. The use of the lights coupled with the use of the flashlight would certainly give a reasonable person the impression that this was an official detention; a reasonable person would not feel that he or she was free to end the encounter and leave. The facts here go beyond those present in Young, Thorn and O'Neill. The actions of the officer in this case, viewed objectively, show that the initial contact was not purely a casual social contact, and instead rose to the level of a seizure. The trial court's conclusion to the contrary was incorrect.

“[I]f a police officer's conduct or display of authority, objectively viewed, rises to the level of a seizure, that seizure is valid only where there are 'specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant' the detention of the person.” O'Neill, 148 Wn.2d at 576 (quoting Terry v. Ohio, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)). The level of articulable suspicion necessary to support an investigative detention is “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). In this case, the facts known to Herrera when he initiated contact with Nelson do not give rise to an articulable suspicion of criminal conduct.

Herrera testified that when he saw the car's bumper and the truck's bumper touching, he suspected that the car may have backed into the truck. (07/22/08 RP 6) He testified that he stopped in order to investigate the possible collision. (07/22/08 RP 17) But a minor fender bender is not a crime. Herrera simply did not have any facts at this point that would support a *Terry* stop. Nevertheless, Herrera stopped his vehicle, activated his colored "wig-wag" lights, approached Nelson with flashlight in hand, and began questioning him about the his status in relation to the car. (07/22/08 RP 7-8, 9, 23, 25-26, 28, 29)

Because the initial contact was a seizure and detention, conducted without a reasonable and articulable suspicion of criminal activity, all evidence and statements obtained as a result of the contact should have been suppressed. Kennedy, 107 Wn.2d at 4 (citing Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L.Ed.2d 441 (1963)).

- B. The trial court erred when it refused to instruct the jury on the affirmative defense of unwitting possession because the evidence presented at trial would permit a reasonable juror to find, by a preponderance of the evidence, that Nelson unwittingly possessed heroin.

The State has the burden of proving the elements of unlawful possession of a controlled substance as defined in the

statute: the nature of the substance and the fact of possession. State v. George, 146 Wn. App. 906, 914-15, 193 P.3d 693 (2008). Guilty knowledge or knowing possession is not, however, an element of the crime of possession of a controlled substance. State v. Cleppe, 96 Wn.2d 373, 380-81, 635 P.2d 435 (1981). The affirmative defense of unwitting possession, which can be raised by the defense, therefore ameliorates the harshness of this strict liability crime. State v. Bradshaw, 152 Wn.2d 528, 538, 98 P.3d 1190 (2004) (citing Cleppe, 96 Wn.2d at 381).

Nelson proposed a jury instruction defining the unwitting possession defense:

A person is not guilty of possession of a controlled substance if the possession is unwitting. Possession of a controlled substance is unwitting if a person did not know that the substance was in his or her possession or did not know the nature of the substance.

The burden is on the defendant to prove by a preponderance of the evidence that the substance was possessed unwittingly. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true.

(CP 31) The trial court refused to give the instruction to the jury. (07/24/08 RP 101) A trial court's decision regarding jury instructions is reviewed for an abuse of discretion. State v. Lucky, 128 Wn.2d

727, 731, 912 P.2d 483 (1996).

A defendant in a criminal case is entitled to have the jury fully instructed on the defense theory of the case. State v. Hughes, 106 Wn.2d 176, 191, 721 P.2d 902 (1986). A defendant is entitled to an unwitting possession instruction when the evidence presented at trial would permit a reasonable juror to find, by a preponderance of the evidence, that the defendant unwittingly possessed the contraband. State v. Buford, 93 Wn. App. 149, 151, 967 P.2d 548 (1998). A trial court errs by not instructing the jury on the defense of unwitting possession when evidence supporting the defense is adduced at trial. State v. May, 100 Wn. App. 478, 482-83, 997 P.2d 956 (2000).

“In evaluating whether the evidence is sufficient to support a jury instruction on an affirmative defense, the court must interpret it most strongly in favor of the defendant and must not weigh the proof or judge the witnesses' credibility, which are exclusive functions of the jury.” May, 100 Wn. App. at 482. The affirmative defense of unwitting possession “must be considered in light of all the evidence presented at trial, without regard to which party presented it.” State v. Olinger, 130 Wn. App. 22, 26, 121 P.3d 724 (2005). Accordingly, a defendant may exercise his right to remain

silent and rely on the State's evidence and cross-examination of the State's witnesses to support a defense instruction. State v. Finley, 97 Wn. App. 129, 134-35, 982 P.2d 681 (1999).

The trial court here abused its discretion when it refused to give an unwitting possession instruction because there was evidence in the record which, viewed favorably to Nelson, supported a conclusion that he did not know that there were drugs in the car. Nelson presented evidence that the car did not belong to him. (07/24/08 RP 62) The State presented no evidence to establish how long Nelson had been in the car, and no evidence to show that the fanny pack was not in the car before Nelson entered it. Officer Herrera testified that the contact occurred at night, and he needed a flashlight to illuminate the interior of the car. (07/24/08 RP 32, 41) Herrera also testified that the fanny pack was closed, and that the items inside were not visible until the pack was opened. (07/24/08 RP 46) There were no prints or other items that linked Nelson to the fanny pack or its contents. (07/24/08 RP 48, 65-67) Based on these facts, a reasonable juror could have found that Nelson was unaware of the presence of the fanny pack or unaware of the contents of the fanny pack, and that he therefore unwittingly possessed the heroin.

The reviewing court reads the instructions as a whole to see whether they permit the parties to argue their theory of the case. State v. Linehan, 147 Wn.2d 638, 643, 56 P.3d 542 (2002). The instructions in this case did not permit Nelson to argue that he could and should be acquitted if the evidence showed he did not know that the fanny pack contained a controlled substance. In fact, because the State need only prove possession, not knowing possession, the jury was told that it must convict regardless of whether Nelson knew the fanny pack and heroin were in the car. (CP 46, 47, 49)

And in this case, the instructional error is not harmless. In order to prove the crime of use of paraphernalia, the State had to prove that Nelson used the syringes. (CP 50, 52) The State's evidence established that the needles and spoon were likely used to inject heroine. (07/24/08 RP 37, 54-55) But the jury clearly was not convinced that Nelson was the individual who used the paraphernalia, as it acquitted Nelson of this charge. (07/25/08 RP 139; CP 57)

Unlike with the crime of unlawful possession, to prove use of paraphernalia the State had to prove a direct connection between the paraphernalia and Nelson. (CP 47, 49, 50, 52) The jury did not

find this connection. If the jury had been instructed that it could acquit Nelson of possession of the controlled substance if it found he unwittingly possessed the fanny pack, then the outcome of trial likely would have been different.

**V. CONCLUSION**

The trial court erred when it denied Nelson's motion to dismiss because the initial contact was a seizure conducted without a reasonable suspicion of criminal activity. The trial court also abused its discretion when it refused to instruct the jury on the defense of unwitting possession, and this error was clearly prejudicial. For these reasons, Nelson's conviction must be reversed.

DATED: February 18, 2009



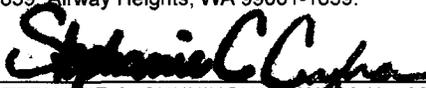
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**CERTIFICATE OF MAILING**

I certify that on 02/18/2009, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: (1) Kathleen Proctor, DPA, Prosecuting Attorney's Office, 930 Tacoma Ave. S., Rm. 946, Tacoma, WA 98402-2105; and (2) Todd V. Nelson, DOC# 278875, Airway Heights Corrections Center, P.O. Box 1839, Airway Heights, WA 99001-1839.



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