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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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NO. 38540-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

JESSE JOHNSON, Appellant.

APPELLANT'S BRIEF

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I. ASSIGNMENTS OF ERROR

1. The trial court erred by finding that Officer Williams' detention of Mr. Johnson was a "social contact." CCofL 3, FF 7.
2. The trial court erred by concluding that there was no seizure. CCofL 4.
3. The trial court erred by finding that all the items found during the subsequent search were "lawfully obtained and admissible." CCofL 6.
4. The trial court erred by denying Johnson's motion to suppress the evidence obtained during a search of the vehicle subsequent to the illegal seizure.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err by denying the motion to suppress where the police officer blocked Mr. Johnson's car with his patrol car and conducted an investigation based solely on suspicion that Mr. Johnson's car was illegally parked in a handicapped parking stall?

III. STATEMENT OF THE CASE

On April 8, 2008, at 8:35 a.m., Officer Jared Williams, working as a truancy officer for the school district, observed a vehicle parked in the parking lot of a public park. RP 8/4/08 5. The vehicle was parked in a handicapped parking spot without a permit displayed. RP 8/4/08 6.

Officer Williams pulled in behind the suspect vehicle and parked his car behind it at an angle. RP 8/4/08 8, 18. Officer Williams was not parked in a marked stall. RP 8/4/08 18-19. He approached the woman sitting in the driver's seat and asked her why she was parked in the handicapped spot and for identification. RP 8/4/08 9. He saw a man asleep in the passenger seat. RP 8/4/08 9. He did not inform the driver or passenger that they were free to leave. RP 8/4/08 19-20. He then walked back to the patrol car and ran her name through the police database. RP 8/4/08 10.

The database revealed no outstanding warrants for the driver, but that she was named in a restraining order. RP 8/4/08 10. Officer Williams then approached the passenger side, opened the door, woke the man, and asked him for his name and identification. RP 8/4/08 10.

The man identified himself as Duane Johnson. RP 8/4/08 10. Officer Williams ran the name through his computer and found no

outstanding warrants by that name but the computer contained a notation that the name was a possible alias for a Jesse Johnson. RP 8/4/08 12.

Officer Williams reviewed the booking photo of Jesse Johnson and determined that was the name of the passenger. RP 8/4/08 12. There were outstanding warrants listed for Jesse Johnson. RP 8/4/08 12.

Officer Williams then returned to the vehicle and placed Mr. Johnson under arrest. RP 8/4/08 12-13. He then asked the driver to step out of the vehicle and searched it incident to arrest. RP 8/4/08 16.

Inside the vehicle, he found trace amounts of heroin on cotton balls, a push rod and tin cooking dishes, a crack pipe, and one small rock of crack cocaine. RP2 33, 34, 36, 43, 66, 67. The driver was then arrested as well. RP 8/4/08 16.

Officer Williams testified that he did not need personal info to issue a parking infraction for parking in a handicapped stall. RP 8/4/08 20. However, he chose to use that opportunity to investigate further because the fogged windows caused him to suspect "criminal activity." RP 8/4/08 24.

Mr. Johnson was charged with two counts of unlawful possession of a controlled substance, one count of obstructing a law enforcement officer, and one count of unlawful use of drug paraphernalia.¹ CP 45-46.

Mr. Johnson brought a motion to suppress the evidence, arguing that Officer Williams' detention and subsequent search were unconstitutional. CP 4-11, RP 8/4/08 41-42. The court denied the motion, finding that no seizure occurred and ruled that the evidence was admissible. RP 8/4/08 43, CP 22-25.

In the first jury trial Mr. Johnson was convicted of obstructing a law enforcement officer, but a hung jury resulted in a mistrial on the remaining three counts. CP 35, RP1-2.

Mr. Johnson was brought to trial a second time, only on the charges of unlawful possession of a controlled substance and unlawful use of drug paraphernalia. RP1-2. The court carried over the ruling on the suppression motion made prior to the first trial. RP1-6 The evidence obtained during the search was admitted at trial. RP2-32, 33, 34, 35, 36, 39, 41, 42, 43.

¹ Johnson was also charged with possession of a dangerous weapon, but was acquitted of that charge during the first trial. CP 1-3, 35-39.

Forensic evidence established that trace amounts of heroin were found on the cotton balls, RP2-66, and less than .1 gram of cocaine was present, RP2-67.

Mr. Johnson took the stand and testified that the drugs belonged to his girlfriend, the woman in the driver's seat and that he did not possess them, or the paraphernalia. RP2-75, 76.

The jury convicted Mr. Johnson on all three counts and he was sentenced to twelve months and a day, concurrent, on the two possession convictions and 90 days on the unlawful use of drug paraphernalia conviction. CP 45-50, 57-61. This appeal timely follows.

IV. ARGUMENT

ISSUE 1: THE TRIAL COURT ERRED BY DENYING THE MOTION TO SUPPRESS BECAUSE MR. JOHNSON WAS ILLEGALLY DETAINED WHEN THE POLICE OFFICER BLOCKED MR. JOHNSON'S CAR WITH HIS PATROL CAR AND CONDUCTED AN INVESTIGATION BASED SOLELY ON SUSPICION THAT MR. JOHNSON'S CAR WAS ILLEGALLY PARKED IN A HANDICAPPED PARKING STALL.

The Fourth Amendment and article I, section 7 of our state constitution prohibit unreasonable searches and seizures. *State v. Day*, 161 Wn.2d 889, 893, 168 P.3d 1265 (2007); *State v. O'Neill*, 148 Wn.2d 564, 584, 62 P.3d 489 (2003); *State v. Young*, 135 Wn.2d 498, 957 P.2d 681 (1998). As a general rule warrantless searches and seizures are per se unreasonable, and the State bears the burden of demonstrating the

applicability of a recognized exception to the rule. *Day*, 161 Wn.2d at 893-94; *Young*, 135 Wn.2d at 510. One such exception is that officers may briefly stop and detain a person they reasonably suspect is, or is about to be, engaged in “criminal conduct.” *Day*, 161 Wn.2d at 893. This is often referred to as a “*Terry* stop.” *Day*, 161 Wn.2d at 893 (citing *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)).

“When officers merely suspect a civil infraction has been committed, there is no ground for a *Terry* stop.” *Day*, 161 Wn.2d at 898. A parking infraction on a parked car is a “civil infraction.” *Day*, at 898. If the initial stop is not lawful or exceeds the scope of a lawful search, the fruits of the search may not be admitted in court. *Day* at 895.

In this case, the officer had only the suspicion that the vehicle was illegally parked in a handicapped parking spot. RP8/4/08 6. Thus, this suspicion that a parking infraction was being committed, did not justify a seizure under the constitution, even a limited seizure such as a *Terry* stop. *Day* states that in these circumstances, the officer may approach and speak with the occupants of the vehicle, but may not detain them. *Day* at 898, fn. 7.

In *Day*, the deputy saw a car illegally parked without a permit. 161 Wn.2d at 892. The deputy testified that he approached the car to look for a permit and as he approached, he suspected drug activity and saw an

empty handgun case on the floor. 161 Wn.2d at 892. The deputy asked Day if there was a gun in the car and when Day said there was, he asked Day to step out of the car. 161 Wn.2d at 892. The deputy then frisked Day and handcuffed him, asked the passenger to step out as well and frisked her—telling both they were not under arrest. 161 Wn.2d at 892. He then had the car searched and found a handgun under the passenger seat. 161 Wn.2d at 892.

The Supreme Court suppressed the evidence obtained in the search, holding that suspicion of a parking infraction does not give rise to a *Terry* Stop exception. 161 Wn.2d at 897.

Terry has also been extended to traffic infractions, “due to the law enforcement exigency created by the ready mobility of vehicles and governmental interests in ensuring safe travel, as evidenced in the broad regulation of most forms of transportation.” *State v. Johnson*, 128 Wn.2d 431, 909 P.2d 293 (1996) (footnote omitted) (citing *United States v. Ross*, 456 U.S. 798, 806-7, 102 S. Ct. 2157, 72 L.Ed.2d 572 (1982)). However, we see no reason to extend it even further to parking infractions. The reasons underlying extending *Terry* to traffic violations simply lose force in the parking context.

Day, at 897. The only permissible contact in this situation, according to *Day*, is where the officer approaches to speak with the occupants of the car. 161 Wn.2d at 898, fn. 7. That is because merely approaching, without more, has not been held to be a seizure.