

NO. 40996-8-II

COURT OF APPEALS
JUL 23 2009
BY *cm*

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

DAVID MARTIN, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Ronald Culpepper

No. 09-1-01856-3

BRIEF OF RESPONDENT

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Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR. 1

1. Was defendant arrested prior to the search of his bag where he was held at gunpoint by multiple clearly identifiable police officers and escorted into an enclosed room prior to the search? 1

B. STATEMENT OF THE CASE..... 1

1. Procedure 1

2. Facts 3

C. ARGUMENT..... 6

1. THE COURT CORRECTLY CONCLUDED THAT DEFENDANT WAS ARRESTED PRIOR TO THE SEARCH OF HIS BAG 6

2. DEFENDANT HAD VOLUNTARILY ABANDONED THE BAG PRIOR TO THE OFFICER’S SEARCH OF ITS CONTENTS. 10

D. CONCLUSION..... 12

Table of Authorities

State Cases

| | |
|---|--------|
| <i>State v. Armenta</i> , 134 Wn.2d 1, 9, 948 P.2d 1280 (1997) | 7 |
| <i>State v. Camarillo</i> , 115 Wn.2d 60, 71, 794 P.2d 850 (1990) | 6 |
| <i>State v. Cormier</i> , 100 Wn. App. 457, 459, 997 P.2d 950 (2000), review denied, 142 Wn.2d 1003, 11 P.3d 826 (2000)..... | 7 |
| <i>State v. Costich</i> , 152 Wn.2d 463, 477, 98 P.3d 795 (2004) | 11 |
| <i>State v. Eisfeldt</i> , 163 Wn.2d 628, 634, 185 P.3d 580 (2008) | 7 |
| <i>State v. Gleason</i> , 70 Wn. App 13, 17, 851 P.2d 731 (1993) | 8 |
| <i>State v. Glenn</i> , 140 Wn. App. 627, 639, 166 P.3d 1235 (2007)..... | 8 |
| <i>State v. Hill</i> , 123 Wn. 2d 641, 647, 870 P.2d 313 (1994) | 6, 7 |
| <i>State v. Nettles</i> , 70 Wn. App 706, 708, 855 P.2d 699 (1993), review denied, 123 Wn.2d 1010, 869 P.2d 1085 (1994)..... | 11 |
| <i>State v. O’Neill</i> , 148 Wn.2d 564, 571, 62 P.3d 489 (2003)..... | 7, 8 |
| <i>State v. Reynolds</i> , 144 Wn.2d 282, 287, 27 P.3d 200 (2001)..... | 11, 12 |
| <i>State v. Smith</i> , 154 Wn. App. 695, 699, 226 P.3d 195 (2010) | 6 |
| <i>State v. Young</i> , 86 Wn. App. 194, 197, 199, 935 P.2d 1372 (1997)..... | 11 |

Federal and Other Jurisdictions

| | |
|---|---|
| <i>State v. Patton</i> , 167 Wn.2d 379, 387 n. 6, 219 P.3d 651 (2009)..... | 9 |
| <i>U.S. v. Bravo</i> , 295 F.3d 1002 (9 th Cir. 2002)..... | 8 |
| <i>U.S. v. Corral-Franco</i> , 848 F.2d 536 (5 th Cir. 1988) | 8 |
| <i>U.S. v. Mendenhall</i> , 446 U.S. 544, 553, 100 S. Ct 1870 (1980)..... | 8 |

Constitutional Provisions

Article I, section 7 11
Fourth Amendment 11

Rules and Regulations

ER 3.5 1, 2
ER 3.6 1, 2

Other Authorities

Wayne R. LaFave, Search and Seizure, § 5.1(a), (4th edition 2004)..... 8

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Was defendant arrested prior to the search of his bag where he was held at gunpoint by multiple clearly identifiable police officers and escorted into an enclosed room prior to the search?

B. STATEMENT OF THE CASE.

1. Procedure

On April 7, 2009, the State filed an information with the Superior Court of Pierce County, charging defendant, David Martin, with one count of unlawful possession of a controlled substance with intent to deliver while armed with a firearm, two counts of unlawful possession of a firearm in the first degree, one count of unlawful possession of a controlled substance (40 grams or less of marijuana), and one count of unlawful use of drug paraphernalia. CP 1-3. On May 27, 2010, the State filed an amended information removing the charge for unlawful use of drug paraphernalia, and added a school zone enhancement to the charge of possession with intent to deliver, as well as three counts of bail jumping after failing to appear at court on May 20, 2009, September 16, 2009, and September 29, 2009. CP 53-56, RP 7.

Defendant, through counsel, moved to suppress the physical evidence in his case, and his custodial statements. RP 6. On May 26, 2010, the court heard testimony on the ER 3.5 and ER 3.6 motions. *Id.*

On May 27, 2010, the court delivered an oral ruling denying the ER 3.5 and ER 3.6 motions to suppress, for which findings of fact and conclusions of law were filed at a later date. RP 100-106. Subsequently, defendant waived his right to a jury trial, and proceeded with a stipulated facts bench trial on the same day. RP 107-08, 110, 114. Defendant contested only the firearm enhancement to the charge of possession with intent to deliver. RP 114. The court found defendant guilty on all counts, but found that defendant was not armed with a firearm at the time of the possession with intent to deliver. RP 137.

Defendant had an offender score of seven. RPS 8.¹ Defendant advocated for a DOSA sentence, while the prosecutor advocated for an exceptional sentence. RPS 9-14, 15-19. The court determined that defendant was not a good candidate for DOSA, and denied the request for the sentencing alternative. RPS 25. On July 2, 2010, the court sentenced defendant to 110 months in prison each for the possession with intent to deliver, and unlawful possession of a firearm, 90 days for possession of marijuana, and 60 months each for the three counts of bail jumping. Each sentence is at the high end of the standard range. RPS 27.

¹ Because the records are not consecutively numbered, the state will refer to the record of the proceedings on May 26, 2010 and May 27, 2010 as RP, and the sentencing proceedings on July 2, 2010 as RPS.

2. Facts

On April 2, 2009, Alfredo Esparsa, a confidential informant with whom the Officer Walter Anderson of the Puyallup Police Department had worked for approximately 14 years, contacted the officer about a methamphetamine supplier. RP 13, 17. Officer Anderson testified that he had worked with Esparsa on over 50 cases, and considered him to be reliable and trustworthy. RP 18. Esparsa told Officer Anderson that he could arrange for defendant to sell him some crystal meth. RP 13. Officer Anderson and a team of four other officers went to the informant's house to facilitate the buy. RP 13, 20. Officer Anderson had the informant call defendant, and place the call on speaker phone. RP 14.

During the phone call, defendant identified himself by name, and said that he could get crystal methamphetamine. RP 14. There was a discussion between the informant and defendant about how much methamphetamine defendant had, and how much money the informant had. RP 15. The conversation ended with defendant informing Esparsa that he was only a few blocks away. RP 15.

The informant told the officers that defendant was always armed in his experience, and this was consistent with Officer Anderson's experience with methamphetamine dealers. RP 17, 48. The informant told the officers that defendant carried a firearm in his trunk. RP 17. Esparsa described the car that defendant would be driving as a gold Nissan Maxima with nice wheels. RP 19.

Defendant arrived at the informant's house at 8:52 p.m. RP 20. The car defendant arrived in was as described by the informant. RP 19, 57. Defendant went to the trunk of his car and removed something. RP 21. He then came to the rear door of the house. RP 21. The officers drew their weapons as defendant approached the breezeway. RP 21. When defendant was in the breezeway at the door, the officers opened it, identified themselves, and pointed their weapons at him. RP 21. The officers were all wearing full police gear and badges. RP 21. The police vests had large, 3 inch, letters reading "police" in bright yellow, across the chest. RP 21.

Defendant reached for something in his coat, and dropped a maroon camera bag on the ground. RP 46, 48. Officer Anderson and Detective Pigman patted down the defendant and moved him to the laundry room off of the breezeway. RP 47. Detective Pigman picked up the pouch, and noticed that it weighed more than what camera should. RP 48. Detective Pigman was concerned that the bag contained a weapon because the informant had told them that defendant was always armed, and the pat down search had not yielded a weapon. RP 48-49. The bag was within a few feet of defendant while he was being patted down, and defendant was not yet in handcuffs. RP 64.

Detective Pigman did not extensively manipulate the bag because he was afraid that any firearm inside would be accidentally discharged by doing so. RP 49. The detective was also concerned about the possibility

of being poked by a syringe. RP 49. Syringes are commonly associated with narcotics, and are not always capped. RP 49. Detective Pigman opened the pouch, and immediately saw a magazine for a semi-automatic pistol which contained ten bullets. RP 50. The following day, Detective Pigman found a digital scale, commonly used for weighing narcotics, a small quantity of marijuana, a bag of crystal methamphetamine, and several empty plastic baggies, commonly used to package drugs, as well as a small silver spoon. RP 50.

Detective Pigman then formally advised defendant that he was under arrest, placed him in handcuffs, and read him the *Miranda* warnings. RP 53. Defendant did not express any confusion about his rights, and was very cooperative with the detective. RP 55. Once defendant was in handcuffs, the officers lowered their weapons. RP 68-69. Detective Pigman asked for permission to search defendant's vehicle, and defendant agreed. The detective then read a consent to search form aloud to defendant, and defendant read it by himself. RP 57. After reviewing the form, defendant signed it. RP 58. Once defendant had granted permission to search the vehicle, the officers escorted him to the vehicle so that he could observe, and limit the scope of the search if he saw fit. RP 59.

In the vehicle, Detective Pigman found two receipts for .32 caliber ammunition in the driver's side door, a small bag containing a glass smoking pipe and a small amount of marijuana in the center console, as well as a small amount of marijuana and second glass pipe behind the

driver's seat. RP 59-60. Officer Anderson found a Crown Royal bag containing 28 rounds of .45 caliber ammunition, and Detective Crowe found a Kel-Tec .32 caliber semi-automatic pistol in a holster, along with an empty magazine. RP 60. The gun was located between the driver's seat and the center console. RP 60.

C. ARGUMENT.

1. THE COURT CORRECTLY CONCLUDED THAT DEFENDANT WAS ARRESTED PRIOR TO THE SEARCH OF HIS BAG.

An appellate court reviews only those findings to which error has been assigned; unchallenged findings of fact are verities upon appeal. *State v. Hill*, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994). As to challenged factual findings, the court reviews the record to see if there is substantial evidence to support the challenged facts; if there is, then those findings are also binding upon the appellate court. *Hill*, 123 Wn.2d at 644. Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the finding. *Hill*, at 644. Credibility determinations are for the trier of fact and are not subject to appellate review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The court reviews conclusions of law *de novo*. *State v. Smith*, 154 Wn. App. 695, 699, 226 P.3d 195 (2010) (citing *State*

v. *O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003); *State v. Einfeldt*, 163 Wn.2d 628, 634, 185 P.3d 580 (2008)).

Defendant does not assign error to any of the court's findings, but does challenge the court's conclusion number 1 that defendant was arrested before the search of his bag. Petitioner's brief at 1. Whether a person has been seized, is a mixed question of law and fact. *State v. Armenta*, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997), *see also State v. Cormier*, 100 Wn. App. 457, 459, 997 P.2d 950 (2000), *review denied*, 142 Wn.2d 1003, 11 P.3d 826 (2000). By extension, the same standard applies to whether a person has been arrested. Because defendant does not assign error to the court's findings, review is limited to a *de novo* determination of whether the trial courts conclusions were properly derived. *Id. citing, State v. Hill*, 123 Wn. 2d 641, 647, 870 P.2d 313 (1994).

Whether a defendant has been placed under arrest depends first on whether they have been seized. "A seizure depends upon whether a reasonable person would believe, in light of all the circumstances, that he or she was free to go or otherwise end the encounter. Whether a seizure occurs does not turn upon the officer's suspicions. Whether a person has been restrained by a police officer must be determined based upon the interaction between the person and the officer." *O'Neil*, 148 Wn.2d 564, 575. A person is "seized" only when, by means of physical force or a

show of authority, his freedom of movement is restrained. *U.S. v. Mendenhall*, 446 U.S. 544, 553, 100 S. Ct 1870 (1980). “Where an officer commands a person to halt or demands information from the person, a seizure occurs.” *O’Neil*, 148 Wn.2d at 575, citing *Mendenhall*, 446 U.S. at 554, 100 S. Ct. 1870; *State v. Gleason*, 70 Wn. App. 13, 17, 851 P.2d 731 (1993). Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer’s request might be compelled. *Mendenhall* at 554.

The relevant question in determining whether the seizure of defendant was an arrest is whether a reasonable person would have “understood the situation to constitute a restraint on freedom of movement of the degree which the law associates with a formal arrest.” Wayne R. LaFave, *Search and Seizure*, § 5.1(a), (4th edition 2004)(quoting *U.S. v. Corral-Franco*, 848 F.2d 536 (5th Cir. 1988)). The subjective motivation, or the unspoken perception of the officer regarding whether the defendant was under formal arrest is irrelevant. *State v. Glenn*, 140 Wn. App. 627, 639, 166 P.3d 1235 (2007).

The ninth circuit has held that an arrest may have occurred even where the officer has told the defendant that he is not under arrest. *U.S. v. Bravo*, 295 F.3d 1002 (9th Cir. 2002). Since a suspect can be under arrest

where an officer has restricted the freedom of the suspect but stated that he is not under arrest, where the officer has not stated one way or the other the defendant can also be under arrest based on the circumstances.

The Washington Supreme Court has concluded that, “whether an officer informs the defendant he is under arrest is only one of all of the surrounding circumstances, albeit an important one.” *State v. Patton*, 167 Wn.2d 379, 387 n. 6, 219 P.3d 651 (2009). Where a suspect was not yet under the physical control of the officer, but had been advised that he was under arrest, the totality of the circumstances still had to be examined before it could be determined that the suspect had been arrested. *Id.* The Court explicitly noted that informing the defendant they are under arrest is not a dispositive factor. *Id.* The moment defendant is informed he is under arrest cannot then be the moment the arrest actually takes place *de facto*.

In the case at hand, defendant was seized when he encountered the police. After defendant came to the door, he encountered multiple armed police officers, all readily identifiable by their police issue raid gear and badges. RP 21, 47, CP 111-117, finding 11. Defendant was not free to go as soon as he came upon the police, with their weapons drawn and aimed at him. RP 63. No reasonable person would feel free to walk away at that point in time. Defendant was clearly seized.

Defendant encountered readily identifiable police officers. This contact almost immediately also rose to the level of formal arrest. The

officers ordered defendant to stop. *Id.* The officers then escorted defendant at gun point into the laundry room of the residence. *Id.* at finding 14. The degree of seizure of defendant under the circumstances amounted to the restraint on freedom associated with a formal arrest. A reasonable person would have felt that they were under arrest, given the totality of the circumstances. Because the contact with the defendant progressed so quickly from a seizure to arrest, and because officer safety concerns were implicated, the officers were unable to formally advise defendant that he was under arrest and give his *Miranda* warnings until after both defendant and the bag were searched for weapons. Accordingly the court's conclusion that the search of the bag occurred after defendant was arrested was proper.

The findings of fact are verities, and support the conclusion that defendant was arrested before the search.

2. DEFENDANT HAD VOLUNTARILY ABANDONED THE BAG PRIOR TO THE OFFICER'S SEARCH OF ITS CONTENTS.

Even if the court were to find that the defendant was not arrested prior to the search of the bag, it should nonetheless uphold the search of the bag as lawful. The court may yet affirm on any ground the record

adequately supports, even if the trial court did not consider that ground.

State v. Costich, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

“Needing neither a warrant nor probable cause, law enforcement officers may retrieve and search voluntarily abandoned property without implicating an individual’s rights under the Fourth Amendment or under article I, section 7 of our state constitution.” *State v. Reynolds*, 144 Wn.2d 282, 287, 27 P.3d 200 (2001), *see also State v. Young*, 86 Wn. App. 194, 197, 199, 935 P.2d 1372 (1997) (holding defendant who had dropped a charred can containing drugs in the bushes as he walked away had voluntarily abandoned the container), *State v. Nettles*, 70 Wn. App 706, 708, 855 P.2d 699 (1993), *review denied*, 123 Wn.2d 1010, 869 P.2d 1085 (1994) (holding that drugs dropped by defendant prior to seizure were voluntarily abandoned).

Here, the court’s findings support a conclusion that defendant had voluntarily abandoned the bag prior to its search. Upon encountering police, defendant reached into his pocket and removed a maroon pouch. CP 111-117, finding 12. “After dropping the maroon pouch, the defendant’s mannerisms reflected to Detective Pigman that he did not want to be associated with the pouch.” CP 111-117, finding 13. This action shows that defendant intended not to be associated with the pouch or its contents. As such, defendant voluntarily abandoned his property,

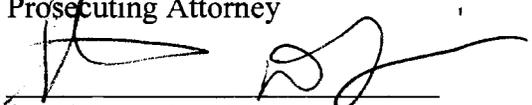
and the police needed neither probable cause nor a warrant to search the bags contents. *Reynolds*, 144 Wn.2d 287. The search of the bag was lawful because defendant voluntarily abandoned it. This court should also uphold and the trial court's ruling not to suppress the evidence on that basis.

D. CONCLUSION.

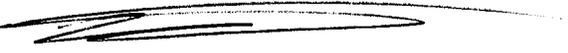
Because the trial court's conclusions are supported by the findings, the State respectfully requests that denial of defendant's motion to suppress be affirmed.

DATED: FEBRUARY 25, 2011.

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

2-25-11 Theresa Ka
Date Signature

COCKE & ASSOCIATES
ATTORNEYS

FILED AT 11:21:00

STATE OF WASHINGTON

BY _____
DEPUTY