

**NO. 46395-4-II**

**IN THE COURT OF APPEALS OF THE STATE OF  
WASHINGTON,**

**DIVISION II**

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**CHRISTOPHER L. WITHERS,**

**Appellant.**

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**RESPONDENT'S BRIEF**

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**MIKE NGUYEN/WSBA 31641**  
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**Representing Respondent**

**HALL OF JUSTICE**  
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**I. ISSUES**

1. Did the trial correctly enter findings of fact and conclusions of law that were supported by the evidence and law?
2. Did the trial correctly deny the appellant's motion to suppress the evidence because the appellant was not unlawfully seized by the deputy.

**II. SHORT ANSWERS**

1. Yes. The trial court correctly entered findings of fact and conclusions of law that were supported by the evidence and law.
2. Yes. The trial court correctly denied the appellant's motion to suppress the evidence because the appellant was not unlawfully seized by the deputy.

**III. FACTS**

On October 14, 2013, the Cowlitz County Prosecutor filed an information charging the appellant with one count of possession of methamphetamine and one count of criminal impersonation in the first degree. CP 1-2. The state later amended the second count to a charge of making a false or misleading statement to a public servant. CP 29-30. The charges arose out of a social contact between the appellant and a deputy that culminated with the appellant's arrest on a warrant and an

officer finding methamphetamine in the appellant's pocket during a search incident to the appellant's arrest. RP 3-42 and 44-54.

Following the filing of the charges, the appellant moved to suppress the evidence on the basis that the officer unlawfully detained him and did not have a reasonable articulable suspicion based upon objective facts that the appellant was engaged in criminal conduct. CP 7-10. The state's response argued that the officer's contact with the appellant was a social contact that did not rise to the level of a seizure, that the appellant was legally arrested pursuant to an outstanding warrant once officers determined his identity, and that the search of the appellant was a valid search incident to the appellant's arrest. CP 22-29, 20-18.

On May 27 and June 3, 2014, Judge Stephen Warning of the Cowlitz County Superior Court presided over the appellant's motion to suppress and heard testimonies from Deputy Baker of the Cowlitz County Sheriff's Office, Officer Gower of the Kelso Police Department, and the appellant. RP 1-43 and 44-66. Deputy Baker testified that on October 7, 2014, during daylight hours, RP 3-6 and 22-23, he had just filled up his patrol vehicle at the motor pool and was driving north on south 13<sup>th</sup> Avenue to head back to the Hall of Justice. RP 4-5.

During the drive back, Deputy Baker heard over the radio that the Kelso Police Department had received a call from an off duty sheriff's

deputy concerning a suspicious circumstance of two individuals riding bikes and wheeling a third potentially stolen bike. While Deputy Baker was not dispatched to investigate the call, he kept an eye out for individuals fitting the descriptions reported because he was in the area. RP 4-5.

While driving north on south 13<sup>th</sup> Avenue, Deputy Baker observed two males riding two bikes and wheeling a third bike going south on south 13<sup>th</sup> Avenue. RP 5-6. The appellant was one of the rider. Ryan York was the other rider and the person wheeling the third bike. RP 12 and 22-24. Deputy Baker did not have a reasonable suspicion to believe that a crime had been committed to conduct a stop and wanted to just talk to the two individuals about the Kelso report because they matched the descriptions given by the dispatcher. RP 5-6.

After the two individuals rode past him, Deputy Baker turned around on south 13<sup>th</sup> Avenue, drove south on 13<sup>th</sup> Avenue past the two individuals, and pulled into the parking lot of Elm Place on south 13<sup>th</sup> Avenue. Deputy Baker exited his patrol vehicle and approached the two individuals on foot as they rode towards him on the sidewalk. Deputy Baker did not activate his overhead lights or siren and did not have his weapon drawn as he approached the two individuals. RP 5-6. Deputy Baker's vehicle did not block the sidewalk. RP 5-6, 16, and 38-39.

As he approached the two individuals, Deputy Baker initiated contact and said something to the effect of, "Hey, how are you doing?" RP16. Both individual stopped and spoke to Deputy Baker on the sidewalk. The contact between Deputy Baker and the two individuals was cordial in nature. Deputy Baker did not order the individuals to stop to talk to him, did not detain the individuals, and did not arrest the individuals. Both individuals were not obligated to stop or talk to Deputy Baker, were free to leave, were not cuffed, were not separated from each other, and remained on their bikes. At no time did the appellant indicate he wanted to leave or did not want to talk to Deputy Baker. RP 5-13, 17, 20, and 40-41.

For approximately five minutes, Deputy Baker spoke to both individuals about the Kelso report concerning the third bike. Appellant verbally indicated he was Jamie Withers and both individuals indicated a friend loaned them the third bike. Deputy Baker noticed the appellant had trouble providing the date of birth for Jamie Withers, ran Jamie Withers' name, and noticed the appellant did not match the physical descriptions for Jamie Wither. RP 8-10 and 17.

Shortly after Deputy Baker contacted the two individuals, Officer Gower arrived on scene. Officer Gower did not activate his overhead lights or siren. Deputy Baker informed Officer Gower of the disparity

between the physical descriptions and name given by the appellant. Officer Gower took over at that point and took approximately another 5 minutes to ascertain the appellant's identity and outstanding warrant. Officer Gower arrested the appellant on his outstanding warrant. RP 10-11, 14-15, and 19-20. Mr. York left the scene without incident. RP 11-12, 22-24, 33, and 51.

Officer Gower testified that when he arrived on scene, he parked next to Deputy Baker's vehicle and his vehicle was about five feet from the sidewalk. Officer Gower indicated that Deputy Baker's vehicle was pulled all the way into the parking lot and not blocking the sidewalk. RP 46-47. Officer Gower noticed Deputy Baker speaking to two individuals. It did not appear to Officer Gower that the two individuals were detained by Deputy Baker because they were not cuffed, were seated on their bikes, were not separated from each other, and were talking to each other. RP 47 and 49-50. After being told of the disparity between the physical descriptions and name given by the appellant, Officer Gower checked Spillman, learned that the appellant sometimes used his brother's name, Jamie Withers, and proceeded to pull up the appellant's picture and discover the appellant's outstanding warrant. RP 48-50 and 52. The appellant was then arrested on the outstanding warrant. RP 50.

The appellant testified that the bush bar of Deputy Baker's vehicle blocked the sidewalk and he could not have ridden his bike past Deputy Baker without dropping off of the curb. RP 25-26. Appellant indicated that Deputy initiated contact and said something to the effect of, "Stop. May I ask you guys a few questions." RP 26. Appellant testified that Deputy Baker spent five to eight minutes talking to them about the bike, RP 27, and the officers, "weren't really like totally accusatory like he was accusing us of stealing a bicycle but he was asked - - he was basically saying that a - - a report - - a report was given and that he was questioning us about the bicycle." RP 28. Appellant indicated he felt he was detained because Deputy Baker was aggressive and intimidating. RP 28-29. Appellant testified that Deputy Baker never asked to frisk the appellant, RP 31, and told appellant to, "Keep your hands up on your handle bars, away from your pockets where I can see them," RP 32, because "there [were] two of us, you know what I mean? So, I'm - - I'm pretty sure for his personal safety rights he didn't - - he didn't want us - - our hands where he could see them." RP 32.

At the conclusion of the appellant's motion, Judge Warning denied the appellant's motion to suppress the evidence. RP 62-63. On June 5, 2014, Judge Warning entered findings of fact and conclusions of law regarding the appellant's motion. RP 67-69. Findings of Fact number six

reads, "Deputy Baker approached both subjects and asked to speak to them. Both subjects voluntarily stopped and talked to Deputy Baker. Neither subjects were detained, cuffed, or placed under arrest. Both subjects remained with their bicycles. The defendant was one of the two subjects contacted by Deputy Baker." Findings of Fact number nine reads, "Deputy Baker thought it was suspicious that the defendant had trouble remembering the correct date of birth and looked up Jamey Leeroy Withers in his computer system. The defendant did not match the physical descriptions for Jamey Leeroy Withers." Conclusions of Law number three reads, "Deputy Baker's actions had all the hallmark of a social contact, except for is instruction for the defendant to keep his hands visible. Deputy Baker was justified in instructing the defendant to keep his hands visible for officer safety reasons and the instruction did not transform a social contact into a seizure." CP 35-39.

Following entry of findings on the appellant's motion, the appellant stipulated to facts sufficient to convict him of possession of methamphetamine and making a false or misleading statement to a public servant. Judge Warning found him guilty of the two charges and sentenced him to a standard range sentence. CP 31-42 and 41-54 and RP 69-74. Appellant now appeals Findings of Fact number six, Findings of

Fact number nine, Conclusions of Law number three, and Judge Warning's denial of his motion to suppress.

#### IV. ARGUMENTS

##### 1. **THE TRIAL COURT CORRECTLY ENTERED FINDINGS OF FACT AND CONCLUSIONS OF LAW SUPPORTED BY SUBSTANTIAL EVIDENCE.**

The standard of review of a trial court's findings of fact is the substantial evidence test. In Re J.N., 123 Wn.App. 564, 576 (2004). "Evidence is substantial if it persuades a rational, fair-minded person the truth of the finding." Id. at 576. "The resolution by a trial court of differing accounts of the circumstances surrounding the encounter are factual findings entitled to great deference." State v. Harrington, 167 Wash.2d 656, 662 (2009). Reviewing courts will not revisit issues of credibility, which lie within the unique providence of the trier of fact. State v. Ford, 110 Wn.2d 827 (1988). Trial court's conclusions of law are reviewed de novo. Harrington, 167 Wash.2d at 662.

There was substantial evidence to support the trial court's Findings of Fact number six:

Deputy Baker approached both subjects and asked to speak to them. Both subjects voluntarily stopped and talked to Deputy Baker. Neither subjects were detained, cuffed, or placed under arrest. Both subjects remained with their bicycles. The defendant was one of the two subjects contacted by Deputy Baker.

Deputy Baker testified he approached the appellant on foot, without drawing a weapon and without activating his patrol vehicle's overhead lights or siren, and said something to the effect of, "Hey, how are you doing?" RP16. Both individual stopped and spoke to Deputy Baker on the sidewalk. The contact between Deputy Baker and the two individuals was cordial in nature and at no time did the appellant indicate he wanted to leave or did not want to talk to Deputy Baker. Both individuals were free to leave, were not cuffed, were not separated from each other, and remained on their bikes. RP 5-13, 17, 20, and 40-41.

The appellant testified that Deputy initiated contact and said something to the effect of, "Stop. May I ask you guys a few questions." RP 26. Appellant testified that Deputy Baker spent five to eight minutes talking to them about the bike, RP 27, and the officers, "weren't really like totally accusatory like he was accusing us of stealing a bicycle but he was asked - - he was basically saying that a - - a report - - a report was given and that he was questioning us about the bicycle." Rp 28. Therefore, the trial court correctly entered Findings of Fact number six.

There was substantial evidence to support the trial court's Findings of Fact number nine:

Deputy Baker thought it was suspicious that the defendant had trouble remembering the correct date of birth and looked up Jamey

Leeroy Withers in his computer system. The defendant did not match the physical descriptions for Jamey Leeroy Withers.

Deputy Baker testified “The physicals saw - - they didn’t quite match up either.” RP 10. Officer Gower testified “I checked in Spillman records and looked at the record of the name he gave and the picture was kind of close but wasn’t him.” RP 48. Therefore, the trial court correctly entered Findings of Fact number nine.

The appellant testified that Deputy Baker never asked to frisk the appellant, RP 31, and told appellant to, “Keep your hands up on your handle bars, away from your pockets where I can see them,” RP 32, because “there [were] two of us, you know what I mean? So, I’m - - I’m pretty sure for his personal safety rights he didn’t - - he didn’t want us - - our hands where he could see them.” RP 32. The trial court correctly entered Conclusions of Law number three:

Deputy Baker’s actions had all the hallmark of a social contact, except for is instruction for the defendant to keep his hands visible. Deputy Baker was justified in instructing the defendant to keep his hands visible for officer safety reasons and the instruction did not transform a social contact into a seizure.

In State v. Nettles, 70 Wash.App. 706 (1993), a uniformed police officer pulled her marked patrol vehicle to the curb by the defendant and his companion. The officer exited her car and said to the two individuals, “Gentleman, I’d like to speak with you, could you come to my car?” Id. at

708. The officer did not draw her firearm and did not turn on her lights and siren. The defendant approached the officer and his companion walked away. As the defendant approached, the officer told him to remove his hands from his pockets and come towards her vehicle. The defendant withdraw one hand from his pocket and throw a plastic bag under her car. The officer suspected the bag contained a controlled substance and ordered the defendant to place his hands on her patrol vehicle. The officer seized the bag with the suspected drug and arrested defendant for unlawful possession of a controlled substance. Id. 708 and 711.

In Nettles, the court found the officer did not unlawfully seize the defendant and the officer's request for the defendant to remove his hands did not transform the social contact into a seizure. Id. at 711-712. "Moreover, in the interest of promoting public safety, the encounter between Nettles and Officer Wong should not be characterized as a seizure. As a part of their 'community caretaking' function, police officers must be able to approach citizens and permissively inquire as to whether they will answer questions. In furtherance of this function, it is not unreasonable to permit a police officer in the course of an otherwise permissive encounter to ask an individual to make his hands visible, particularly under the circumstances of this case. Such a request, by itself,

does not immobilize an individual who has voluntarily agreed to speak with a police officer, does not produce property which an officer's possession of would immobilize the individual, and does not produce any incriminating evidence. Thus, the trial court properly concluded that the encounter between Officer Wong and Nettles never rose to the level of a seizure." Id. at 712.

The trial court correctly entered Findings of Fact number six, Findings of Fact number nine, and Conclusions of Law number three because they are supported by the evidence and the law.

**2. THE TRIAL COURT CORRECTLY DENIED THE APPELLANT'S MOTION TO SUPPRESS THE EVIDENCE BECAUSE THE APPELLANT WAS NOT UNLAWFULLY SIEZED BY THE DEPUTY.**

"Article I, section 7 permits social contacts between police and citizens. Young, 135 Wash.2d at 511, 957 P.2d 681. 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 Wash.2d at 511, 957 P.2d 681, Mendenhall, 446 U.S. at 555, 100 S.Ct. 1870; State v. Armenta, 134 Wash.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 stop." State v. Mote, 129 Wash.App. 276, 282 (2005). "Occupants

of vehicles parked in public places should be treated like pedestrians for article I, section 7 purposes.” Id. at 289.

“Citizens of this state expect police officers to do more than react to crimes that have already occurred. They also expect the police to investigate when circumstances are suspicious, to interact with citizens to keep informed about what is happening in a neighborhood, and to be available for citizens’ questions, comments, and information citizens may offer.” State v. O’Neill, 148 Wash.2d 564, 576 (2003). “Accordingly, we reject the premise that under article I, section 7 a police officer cannot question an individual or ask for identification because the officer subjectively suspects the possibility of criminal activity, but does not have a suspicion rising to the level to justify a Terry stop.” O’Neill, 148 Wash.2d at 577.

An individual asserting a seizure in violation of article I, section 7, bears the burden of proving that there was a seizure. State v. Young, 135 Wash.2d 498, 510 (1998). “A person is seized ‘only 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, etc..., or (2) free to otherwise decline an officer’s request and terminate the encounter.” O’Neill, 148 Wash.2d at 574. “Whether a seizure occurs does not turn

upon the officer's suspicion." O'Neill, 148 Wash.2d at 575. An individual's "subjective understanding of the situation is not relevant in determining whether or not there was a seizure." Mote, 129 Wash.App. at 292-293. An objective analysis, to determine whether or not a reasonable person in similar circumstances would feel he or she was being detained, is used to determine whether or not there is a seizure. O'Neill, 148 Wash.2d at 581.

In O'Neill, an officer saw a car parked in front of a store that had been closed for about an hour. The officer knew the store had been burglarized twice in the previous month and pulled behind the parked car. The officer proceeded to activate his spotlight, run a check of the parked vehicle's license plates, and learn the vehicle had been impounded within the previous two months for a drug situation. The officer noticed the parked vehicle was fogged over, approached the driver side, and shined his flashlight at the driver. The officer asked the driver to roll down the window and asked him what he was doing at there. The driver indicated his car broke down and the officer asked him to try to start the car again. When the car failed to start, the officer asked the driver for his identification. The driver did not have identification, verbally told the officer his name, and informed the officer that his driver's license was revoked. O'Neill, 148 Wash.2d at 571-572.

In O'Neill, the court found the officer's conduct, up to the point of asking for identification, was not a seizure because the officer's actions "in their entirety, viewed objectively, do not warrant the conclusion there was a show of authority amounting to a seizure prior to the request that O'Neill exit the car. It is important to bear in mind that the relevant question is whether a reasonable person in O'Neill's position would feel he or she was being detained. The reasonable person standard does not mean that when a uniformed law enforcement officer, with holstered weapon and official vehicle, approaches and asks questions, he has made such a show of authority as to rise to the level of a Terry stop. If that were true, then the vast majority of encounters between citizens and law enforcement officers would be seizures." Id. at 581. "The actions of the officer in this case, up to and including his request for identification, do not come close to the circumstances described in Young." Id. at 581.

In Mote, a deputy patrolled a neighborhood experiencing drug activity problems about 11:45 pm and noticed a legally parked car near an intersection. The car had two occupants inside and had its dome and rear lights on. Concerned about drug activity and frequent vehicle prowls, the deputy parked behind the parked vehicle. The deputy had his headlights on and contacted the occupants on the driver's side. The occupants appeared nervous. The deputy asked the occupants what they were doing

vehicle's door. The driver was asked for his identification and complied with the request to produce identification. The driver appeared intoxicated and was told to sleep it off and not drive. The officers ended their contact and left. After 30 minutes, one of the officers saw the parked vehicle leave the parking lot and stopped the vehicle from failing to signal. The driver was arrested for driving under the influence. Id. at 345. On appeal, the defendant argued the initial contact with the officers was a warrantless seizure and sought to suppress their observation of him being intoxicated. In Cerrillo, the court found the officer did not present a show of authority sufficient to constitute a seizure of the defendant despite the officer knocking on the car's window, asking the defendant for his identification, and asking the defendant to explain what he was doing in the parking lot. Id. at 348-349.

In State v. Johnson, 156 Wash.App. 82 (2010), an officer saw an occupied vehicle parked in a handicap parking space and did not have a disabled place card or disabled license plate required to park in the space. Without activating his emergency lights or siren, the officer parked his patrol vehicle at an angle, about 10 to 15 feet behind the parked vehicle. The officer noticed the vehicle was steamed up and saw a male and a female occupant asleep inside the parked vehicle. The female occupant was observed to have numerous sores and appeared to be tweaking. The

officer suspected possible drug use and decided to check to see whether the occupants were okay. The officer contacted both occupants, asked the driver why she was parked in a disabled spot, requested identification from both occupants, and ran both occupants' name. The officer did not tell the either occupants that they could not leave. Id. at 86-88. In Johnson, the court found the officer lawfully contacted the occupants and asked the occupants for their identifications when the officer found the vehicle was parked in a spot reserved for disabled persons. Id. at 92.

In Nettles, a uniformed police officer pulled her marked patrol vehicle to the curb by the defendant and his companion. The officer exited her car and said to the two individuals, "Gentleman, I'd like to speak with you, could you come to my car?" Nettles, 70 Wn.App. at 708. The officer did not draw her firearm and did not turn on her lights and siren. The defendant approached the officer and his companion walked away. As the defendant approached, the officer told him to remove his hands from his pockets and come towards her vehicle. The defendant withdraw one hand from his pocket and throw a plastic bag under her car. The officer suspected the bag contained a controlled substance and ordered the defendant to place his hands on her patrol vehicle. The officer seized the bag with the suspected drug and arrested defendant for unlawful possession of a controlled substance. Id. 708 and 711. In Nettles, the

court found the officer did not unlawfully seize the defendant and the officer's request for the defendant to remove his hands did not transform the social contact into a seizure. Id. at 711-712.

Like the above cases, Deputy Baker's actions of contacting the appellant, asking the appellant for his name, and asking the appellant to keep his hands visible did not amount to an unlawful seizure. Deputy Baker did not use physical force or display a show of authority that would cause a reasonable person to believe he or she is not free to leave. The appellant's reliance on Harrington and State v. Soto-Garcia, 68 Wn.App. 20 (1992), are not persuasive and distinguishable from the appellant's case because the officers in both of those cases used physical force and displayed a show of authority when they asked and performed a pat down frisk and a search of the two defendants. Harrington, 167 Wn.2d at 661-662 and Soto-Garcia, 68 Wn.App. at 22-23. In the appellant's case, Deputy Baker did not ask and did not frisk the appellant. Deputy Baker did not use physical force or display a show of authority that would cause a reasonable person to believe he or she was not free to leave. Therefore, the trial court correctly denied the appellant's motion to suppress the evidence.

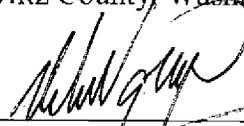
V. CONCLUSION

The appellant's convictions should be affirmed because the trial court correctly held that Deputy Baker's interaction with the appellant was a social contact and not an unlawful seizure.

Respectively submitted this 9 day of January, 2015.

RYAN JURVAKAINEN  
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By:

  
\_\_\_\_\_  
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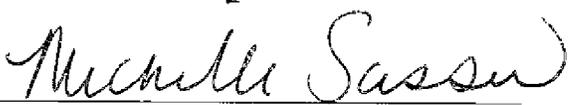
**CERTIFICATE OF SERVICE**

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington, on the 9<sup>th</sup> day of January, 2015.

  
Michelle Sasser  
Michelle Sasser

# COWLITZ COUNTY PROSECUTOR

**January 09, 2015 - 11:40 AM**

## Transmittal Letter

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