

NO. 47775-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

KENNETH THOMAS, JR.,

Appellant.

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

The Honorable Kitty-Ann Van Doornik, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

1. The officer's pat-down search of appellant was unlawful under article I, section 7 of the Washington constitution and the Fourth and Fourteenth Amendments of the federal constitution.

2. The court erred in denying the motion to suppress evidence that was illegally obtained.

3. The court erred in entering: Finding of Facts 18, 21, 29,¹ 31,² 32,³ 33; and Conclusions of Law 2 and 3. CP 22-24.

Issue Pertaining to Assignment of Error

Where the officers did not have an objectively reasonable belief appellant was armed and presently dangerous, did the court err in denying appellant's motion to suppress evidence police obtained while searching him for weapons?

¹ Finding of Fact 29 is a conclusion of law in that it states the search was lawful. CP 23. A copy of the court's findings and conclusions is attached to this brief.

² Finding of Fact 31 is also a conclusion of law in that it states the officers observed unusual behavior which led them reasonably to conclude there was probable cause to believe the defendant and another person were presently armed and dangerous. CP 24.

³ Finding of Fact 32 is also a conclusion of law in that it states there was a reasonable and objective safety concern justifying the frisk for weapons. CP 24.

B. STATEMENT OF THE CASE

The court convicted appellant Kenneth Thomas Jr. of first degree unlawful possession of a firearm, following Thomas' unsuccessful motion to suppress the gun that was the basis for the charge. CP 156-62. In his motion to suppress, Thomas argued the gun was obtained during an illegal pat-down search for weapons, as the officers involved did not have a *reasonable* belief he was presently armed and dangerous. CP 3-12.

At the hearing on motion to suppress, Lakewood police officer John Feldman testified that just after 2:00 a.m. on February 21, 2015, he and his partner Michael Wiley were on patrol and turned east onto 84th Street South from South Tacoma Way. RP 8. Reportedly, a car with its license plate located on its dashboard – an infraction – passed them travelling west. RP 8-10. Wiley made a U-turn and initiated a traffic stop by turning on the patrol car's emergency lights and spotlighting the car. RP 8, 11.

According to Feldman, the rear two passengers "began kind of nervously looking back at us and looking back at each other and then looking back at us again." RP 11. Thomas was seated in the right rear passenger seat. RP 12.

The car turned onto South Tacoma Way and turned into the nearest safe place to park, an auto parts store just north of the intersection. RP 13. Wiley pulled in behind the car. RP 40. According to Feldman, the location of the stop was a “high crime” area. RP 23. The area was lit with ambient light from the auto parts store sign, as well as the patrol car’s spotlight. RP 13, 29. There was also a streetlight, but it was behind the patrol car. RP 13.

Wiley and Feldman respectively approached the driver’s and passenger’s sides of the car with flashlights in hand. RP 14. Inside the car were four adults in their twenties. RP 14-15. Specifically, there was a woman driver and another woman sitting behind her and two male passengers, including Thomas in the rear right seat. RP 12, 14-15. Feldman testified the two men were wearing “hooded-type” jackets baggy enough to conceal a weapon. RP 15, 35.

Wiley detained the driver and took her back to the patrol car to confirm her license status after she indicated she had a suspended license. RP 15-16. Meanwhile, Feldman remained at the “B pillar” of the car – between the front and back seat – on the passenger side. RP 17. Feldman testified he saw the front

passenger “slowly moving his hand to his right side.” RP 17. But when Feldman shined his flashlight on the man’s lap, “his hands would stop.” RP 17.

Feldman claimed that when he focused on the front passenger, he would notice movement by the back passenger and vice-versa:

The way I would describe it is almost like a game of red light, green light. When I would look at the defendant’s lap, he would stop moving. Then I would notice movement in the front passenger and I would illuminate his lap and his hands would stop. It was like a back and forth thing for a little bit.

RP 17-18.

Feldman testified that the front passenger “eventually got his hand all the way by his right side,” which caused Feldman to tap his flashlight on the window and say, “Hey stop[.]” RP 18. The front passenger immediately put his hands on the dash. RP 20.

When asked to describe Thomas’ movement, Feldman testified:

His hands started in the lap. He had a cup in his right hand kind of sitting between his legs. When I came up I could see both of his hands. And during that back and forth, his left hand disappeared from my view and it looked like he was kind of by his left hip.

RP 18-19.

Feldman testified he was worried Thomas might have a gun under his thigh. RP 19. According to Feldman, Thomas was avoiding eye contact and appeared nervous. RP 19-20. However, Feldman could not recall if Thomas moved after Feldman tapped his flashlight on the window. RP 32. All Feldman could say was that Thomas moved before Feldman tapped on the window. RP 32. Feldman never gave any directions to Thomas, as he had with the front passenger. RP 32.

When Feldman tapped on the window, he simultaneously drew his pistol but kept it down to his side, where the passengers could not see. RP 21. Right about that time, officers Criss and Ryan Moody arrived. RP 22. Feldman claimed he told Moody, "I can't see their hands any more." RP 22.

Moody testified that he perceived the situation as unusual when he saw Feldman had drawn his pistol. RP 43. Moody testified Feldman said one of the passengers was moving, but did not say which one. RP 55. Moody made the decision to have each man step out one at a time to be searched for weapons. RP 22, 41.

Moody patted down the front passenger and didn't find anything. RP 22, 41. While he was patting down Thomas,

however, Moody felt a hard object he perceived to be a gun. RP 45. When Feldman heard Moody ask, "Hey, is that a gun," Feldman grabbed Thomas' right hand. RP 23. Moody grabbed Thomas' left and handcuffed him. RP 23, 43. Moody removed a small handgun from Thomas' front waistband. RP 23, 46.

Moody acknowledged that he never actually saw either Thomas or the front passenger move before searching them for weapons. RP 52, 55. Thomas cooperated when asked to step out of the car. RP 53.

After hearing argument,⁴ the court denied the motion to suppress, reasoning there was an apparent safety threat:

So here, it's two in the morning. It's dark. It's cold. There are four occupants in the vehicle. The movements of the back passengers, right after the patrol car made a U-turn and before the lights were activated, appeared suspicious. They appeared nervous. They were looking back and looking at each other and looking back. The driver in this case was arrested. The movements of both the front passenger and the defendant, who's the back passenger, were concerning. The defendant moved his left hand so that the officer could not see it. There was no eye contact between the officer and the defendant. The defendant appeared nervous.

Again, normally people sit still at a traffic stop. Neither the front passenger nor the defendant did so in this case. It was a very short period of time.

⁴ The defense likened the case to State v. Setterstrom, 163 Wn.2d 621, 183 P.3d 1075 (2008), whereas the state likened it to State v. Horrace, 144 Wn.2d 386, 28 P.3d 753 (2001). RP 58, 63.

There's nothing that changed regarding the officer safety issue. . . .

In this case, it was very quick, the threat was still apparent. With the assistance of Officer Moody, the passengers were removed from the car and there was a protective patdown search. It's a minimal intrusion balanced with the concern of officer safety that was articulated.

So because of that, I'm going to deny the motion to suppress.

RP 84-85.

Thomas appeals the court's denial of his motion to suppress.

CP 44.

C. ARGUMENT

THE TRIAL COURT ERRED WHEN IT DENIED THOMAS' MOTION TO SUPPRESS EVIDENCE OBTAINED DURING AN ILLEGAL SEARCH.

Under the Fourth Amendment to the United States Constitution⁵ and article 1, § 7 of the Washington Constitution,⁶ warrantless searches are per se unreasonable unless they fall within one of the jealously and carefully drawn exceptions to the warrant requirement. State v. Hendrickson, 129 Wn.2d 61, 70, 917

⁵ The Fourth Amendment forbids violations of "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fourteenth Amendment applies the Fourth Amendment to the states. Mapp v. Ohio, 367 U.S. 643, 655, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961).

⁶ Article I, section 7 reads: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." This provision provides greater

P.2d 563 (1996) (quoting Arkansas v. Sanders, 442 U.S. 753, 759, 61 L. Ed. 2d 235, 99 S. Ct. 2586 (1979)). One of those exceptions is the protective frisk, or Terry stop, discussed in detail in Terry v. Ohio, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968).

Without probable cause and a warrant, an officer is limited in what he can do. He cannot arrest a suspect; he cannot conduct a broad search. State v. Setterstrom, 163 Wn.2d 621, 626, 183 P.3d 1075 (2008). An officer may frisk a person for weapons, but only if (1) he justifiably stopped the person before the frisk, (2) he has a reasonable concern of danger, and (3) the frisk's scope is limited to finding weapons. State v. Collins, 121 Wn.2d 168, 173, 847 P.2d 919 (1993) (citing Adams v. Williams, 407 U.S. 143, 146, 32 L. Ed. 2d 612, 92 S. Ct. 1921 (1972)).

The State bears the burden of demonstrating these requirements. Hendrickson, 129 Wn.2d at 71; Collins, 121 Wn.2d at 172. This Court reviews the lower court's legal conclusions de novo. Setterstrom, 163 Wn.2d at 625.

protection than the Fourth Amendment. State v. Rankin, 151 Wn.2d 689, 694, 92 P.3d 202 (2004).

At issue here is criterion two. To justify a frisk without probable cause to arrest, an officer must have a reasonable belief, based on objective facts, that the suspect is armed and presently dangerous. Collins, 121 Wn.2d at 173. Reasonable belief that the suspect is armed and presently dangerous means, “some basis from which the court can determine that the detention was not arbitrary or harassing.” State v. Belieu, 112 Wn.2d 587, 601-602, 773 P.2d 46 (1989) (quoting Wilson v. Porter, 361 F.2d 412, 415 (9th Cir. 1966)).

Although an officer need not be absolutely certain that an individual is armed before conducting a search, the circumstances must be such that a reasonably prudent person in the circumstances would be warranted in the belief that his or her safety or that of others was in danger. Collins, 121 Wn.2d at 173; Terry, 392 U.S. at 27.

In finding the officers here had a legitimate safety concern, the court relied primarily on the apparent nervousness of the backseat passengers and the reported movements of the front passenger and Thomas, which the state did not prove were still occurring at the time of the frisk. Moody saw no movement by either man and Feldman testified the front passenger had his hands

on the dash and could not recall if Thomas moved after Feldman tapped his flashlight on the window.

Regardless, our state Supreme Court has held that nervousness and fidgety behavior do not justify a pat down search for weapons. Setterstrom, 163 Wn.2d at 627. In that case, someone called police one morning to complain about two young men in the lobby of the DSHS building in Tumwater; one was reportedly sleeping and the other appeared to be on drugs. When officers Stevens and Staley arrived, they observed Joseph Rice asleep on a bench and Michael Setterstrom sitting next to him filling out a benefits application. Setterstrom, 163 Wn.2d at 623-24.

When the officers approached, Stevens could see Setterstrom had partially filled out the form, including his name. When asked if that was his name, Setterstrom said yes. But when Stevens asked how to spell it, Setterstrom said it was not his name, that he was filling out the form for a friend and that his name was Victor Garcia. Stevens subsequently asked Rice, who was now awake, what Setterstrom's name was. Before he could answer, Setterstrom blurted, "Victor." Id. at 624.

Stevens described Setterstrom as "nervous and fidgeting, behavior that quickly escalated." Setterstrom, 163 Wn.2d at 624.

He believed Setterstrom was under the influence of methamphetamine. In Stevens' experience, individuals under the influence of methamphetamine can become violent without warning, although Setterstrom did not stand up, put his hands in his pockets or say or do anything threatening. Id.

Fearing for his safety, Stevens patted Setterstrom down and felt hard objects, none of which felt like a gun. Nonetheless, Stevens reached in Setterstrom's pocket and pulled everything out, including two small plastic bags filled with white powder. Stevens placed the items on the bench and placed Setterstrom under arrest. In a strange twist, Setterstrom swallowed these baggies. However, police seized Setterstrom's backpack and later obtained a warrant. When they searched it, they found a baggie of methamphetamine and drug paraphernalia. Setterstrom, 163 Wn.2d at 624-25.

The Supreme Court found these circumstances did not provide Stevens with an objectively reasonable belief Setterstrom was armed and presently dangerous:

The police received an anonymous call claiming Setterstrom was under the influence, heard a lie about his name, and observed his nervous, fidgety behavior. The record shows no threatening gestures or words. Setterstrom did not even stand. At most, the record shows that Setterstrom was under the influence; this is not a crime in itself.

Moreover, Setterstrom was lawfully in a public area of the DSHS building, filling out a DSHS benefits form. It seems likely that some people filling out benefits forms exhibit erratic behavior, making employment difficult and benefits applicable. This is not a situation where the officers encountered Setterstrom in a dark alley in a crime-ridden area.

Setterstrom, 163 Wn.2d at 626-27.

The circumstances leading to Moody's pat down of Thomas are remarkably similar to those leading to Stevens' pat down of Setterstrom. According to Feldman, Thomas appeared nervous and was not sitting still. However, like Setterstrom, Thomas did not even stand or make any threatening gestures or words. Moreover, the record does not show he continued to move his hands after Feldman tapped his flashlight on the window. As defense counsel argued below, if Feldman was objectively concerned for his safety, one would think he would have ordered Thomas to stop moving or show his hands, as he had done with the front passenger. And it was Moody (who saw nothing) that decided the men should be frisked. These facts do not add up to a legitimate safety concern.

To the court below, Setterstrom was distinguishable because the frisk occurred in the daytime at a DSHS office and the court specifically wrote, "This is not a situation where the officers

encountered Setterstrom in a dark alley in a crime-ridden area.”
RP 82; Setterstrom, 163 Wn.2d at 627.

But neither did the officers here have such an encounter. Thomas was merely a passenger in a car driving through a crime-ridden area, presumably on his way somewhere else. Moreover, he was not in a dark alley. He was in a car parked in front of a store with ambient light from its signage and there was also light from the spotlight of the patrol car. The driver was peaceably taken into custody for a non-violent driving offense. This was not a situation where the environment suggested criminal activity. Contrary to the lower court’s ruling, the officers here did not have an objectively reasonable basis to believe Thomas was armed and presently dangerous.

In response, the state may argue, as it did below, the circumstances are analogous to those in State v. Horrace, 144 Wn.2d 386, and the search therefore justified. Any such argument should be rejected, however. In Horrace, while awaiting the results of the radio check, the trooper observed the driver leaning to his right (toward Horrace who was in the passenger seat), tipping his shoulder down, as though doing something between the seats. Concerned the driver could have been retrieving or concealing a

weapon, the trooper asked, "what all the movement was up there," to which the driver responded, "My butt itches, I was scratching it." Horrace, at 389.

The Supreme Court held the trooper had a reasonable safety concern justifying his frisk of Horrace after the driver was arrested:

Having agreed in Kennedy^[7] that the driver's forward lean was sufficient to arouse the officer's suspicion that a weapon had been concealed, we recognize in the present case that the more extensive movements of the driver could have caused the trooper to suspect concealment of a weapon. And just as the officer in Kennedy reasonably directed his weapons search to the place where the driver had reached (that is, beneath the driver's seat), the trooper in the present case concluded that, given the driver's pronounced movements in Horrace's direction, the driver could have concealed a weapon in or behind Horrace's jacket. Indeed, when the trooper asked the driver about the movements, the trooper received a flippant, obviously evasive answer that did nothing to allay his fears. . . . In light of the analysis in Kennedy, we conclude that in the present case the trooper's protective pat-down search of Horrace was based, as Terry requires, on specific, objective facts and the rational inferences drawn from those facts.

Horrace, 144 Wn.2d at 396-97.

⁷ State v. Kennedy, 107 Wn.2d 1, 11, 726 P.2d 445 (1986) (driver's movement in leaning forward as if to put something under the seat was sufficient to give officer an objective suspicion driver was secreting something under the seat, possibly a weapon, justifying protective search of that area).

There were no such “extensive movements” in this case. As indicated, the state did not prove continuing movement at the time of the frisks. Moreover, there was no “flippant, obviously evasive answer” as the officers here never asked what Thomas was doing with his left hand or to show his hands. For these reasons, Horrace is inapposite and the officer’s pat down of Thomas unconstitutional.

The exclusionary rule mandates the suppression of evidence gathered through unconstitutional means. State v. Garvin, 166 Wn.2d 242, 254, 207 P.3d 1266 (2009). The firearm recovered during the illegal search must therefore be suppressed. Thomas’ conviction must be reversed and the charge dismissed with prejudice because there is insufficient evidence to prove guilt beyond a reasonable doubt once the unlawfully obtained evidence is excluded. State v. Kinzy, 141 Wn.2d 373, 393-94, 5 P.3d 668 (2000) (no basis remained for conviction where motion to suppress evidence should have been granted).

D. CONCLUSION

The court erred in denying Thomas' motion to suppress. This Court should reverse his conviction as there is no remaining evidence to support the charge once the gun is properly excluded.

Dated this 16th day of December, 2015

Respectfully submitted

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DIVISION TWO**

STATE OF WASHINGTON)	
)	
Appellant,)	
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v.)	COA NO. 47775-1-II
)	
KENNETH THOMAS,)	
)	
Respondent.)	

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 16TH DAY OF DECEMBER, 2015, 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] KENNETH THOMAS
 DOC NO. 340143
 WASHINGTON STATE PENITENTIARY
 1313 N. 13TH AVENUE
 WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 16TH DAY OF DECEMBER, 2015.

X *Patrick Mayovsky*

NIELSEN, BROMAN & KOCH, PLLC

December 16, 2015 - 4:13 PM

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