

FILED

JUL 26 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 28611-8-III

STATE OF WASHINGTON, Respondent,

v.

RONALD LEE COLLINS, Appellant.

APPELLANT'S BRIEF

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TABLE OF CONTENTS

Authorities Cited.....ii

I. INTRODUCTION.....1

II. ASSIGNMENTS OF ERROR.....2

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR2

IV. STATEMENT OF THE CASE.....2

V. ARGUMENT.....4

VI. CONCLUSION.....11

CERTIFICATE OF SERVICE12

AUTHORITIES CITED

Federal Cases

Cady v. Dombrowski, 413 U.S. 433, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973)9

Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)10

State Cases

State v. Aase, 121 Wn. App. 558, 89 P.3d 721 (2004).....4

State v. Chisholm, 39 Wn. App. 864, 696 P.2d 41 (1985)9

State v. Gleason, 70 Wn. App. 13, 851 P.2d 731 (1993)8

State v. Harrington, 167 Wn.2d 656, 222 P.3d 92 (2009)5, 6, 11

State v. Houser, 95 Wn.2d 143, 622 P.2d 1218 (1980)9

State v. Ladson, 138 Wn.2d 343, 979 P.2d 833 (1999).....4, 5, 9

State v. Rankin, 151 Wn.2d 689, 92 P.3d 202 (2004).....4

I. INTRODUCTION

Ronald Collins was selling individually wrapped muffins and brownies at a Phish concert at the Gorge Amphitheater. As he was getting ready to go to bed at about 2:00 in the morning, he was approached by Grant County Sheriff's deputies in fully marked uniforms. One deputy asked him why he was in such a hurry. A second deputy stood to the side of Collins. When Collins said that he was tired and going to bed, the first deputy told Collins he didn't believe his story, and that he believed there was marijuana in the brownies and asked Collins what he thought of that. Collins was arrested after he admitted that the brownies contained marijuana, and he was ultimately convicted of two drug-related felony charges.

The question presented in this case is whether law enforcement officers can approach and question individuals about suspected criminal activity under the guise of making a "social contact." Because, in this case, a reasonable person would not have felt free to terminate the contact and leave, the deputies unlawfully seized Collins when they approached him as he was getting ready to leave, interrupted his departure, and questioned him about suspected criminal activity. Accordingly, the evidence obtained as a result of his unlawful seizure should have been suppressed and his convictions should be reversed.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1: The trial court erred in denying Collins' motion to suppress.

ASSIGNMENT OF ERROR 2: The trial court erred in finding that Collins was not detained and in concluding that the deputies' actions in approaching and interrogating him constituted a lawful social contact.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE 1: Should the trial court have suppressed evidence obtained as a fruit of Collins' detention?

ISSUE 2: Is it a "social contact" when, while one deputy stands guard, another stops and questions a concertgoer about whether there is marijuana in his brownies?

IV. STATEMENT OF THE CASE

Ronald Collins was charged and convicted of possession of a controlled substance with intent to deliver (RCW 69.50.401(1)), and possession of psilocyn (RCW 69.50.4013). CP 17, 51-52. Before trial, he moved to suppress evidence on the grounds that he was unlawfully and pretextually seized. CP 5-10. The State argued that the encounter was a social contact. RP¹ 6.

At the CrR 3.6 hearing, Grant County Sheriff's Deputy Jason Ellard testified that on August 9, 2009, at about 2:00 a.m., he was patrolling a Phish concert at the Gorge Amphitheater in an area called

¹ The single-volume Report of Proceedings for the CrR 3.6 hearing, on Sept. 16, 2009, will be designated as "RP". Citations to other volumes will reference the date of the proceeding.

“Vendor Row.” RP 7. He was with another deputy, and a group of four deputies was five or ten feet away from them.² RP 14. Collins was sitting at a table to Ellard’s right. On the table in front of him were totes of individually wrapped brownies and muffins. RP 8.

Ellard thought that the brownies might have drugs in them. RP 8. About ten feet after he passed Collins, he turned back and saw Collins folding his table up and packing his things into his backpack.³ RP 9. Collins appeared to be leaving. RP 15. Ellard approached Collins and asked why he was packing up. Collins said that he was tired and was going to bed. Ellard told Collins he did not see why he would pack up and go and was vocally skeptical of Collins’ explanation. RP 15. Ellard stood in front of Collins and Deputy Bradley Poldevart stood to his right. RP 16, 21; RP (Trial 10/21/09) 2. According to Ellard, Collins did not leave “because I started talking to him.” RP 16.⁴

In the course of this confrontation, Ellard told Collins that he believed there was marijuana or hash in the brownies and asked what he thought about that. Collins admitted that there was marijuana in the

² Ellard testified that it is customary to patrol the Gorge Amphitheater in groups of up to eight because so many of the concertgoers know each other and signal each other when law enforcement officers approach. RP 46.

³ Ellard later testified that Collins remained seated throughout the contact. RP 17.

⁴ Poldevart testified at trial that he “stood cover” to the side in case Collins tried to run. RP (Trial 10/21/09) 38-39.

brownies. RP 10. He was arrested and searched, and the deputies found a brownie and a piece of chocolate in his pocket. CP 11. The brownies and muffins subsequently tested positive for marijuana and the chocolate tested positive for psilocyn. RP (Trial 10/22/09) 115, 117, 119, 122.

The trial court denied Collins' motion to suppress. CP 25. A jury convicted Collins, and he timely appeals. CP 47, 49, 67-68.

V. ARGUMENT

In reviewing the denial of a defendant's motion to suppress evidence, the Court of Appeals determines whether the factual findings are supported by substantial evidence and reviews de novo the trial court's conclusions of law. *State v. Aase*, 121 Wn. App. 558, 564, 89 P.3d 721 (2004). Because Collins challenges the trial court's legal conclusion that Ellard engaged in a lawful social contact, review here is de novo.

Article I, section 7 of the Washington Constitution, which prohibits the disturbance of private affairs, provides greater protection to individuals than the Fourth Amendment of the U.S. Constitution. *State v. Rankin*, 151 Wn.2d 689, 694, 92 P.3d 202 (2004). A warrantless seizure of a person is *per se* unconstitutional unless one of the few "jealously and carefully drawn" exceptions to the warrant requirement applies. *State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833 (1999). And officials may not

ostensibly stop a person for a lawful reason as a pretext for a stop that would not be legally justified. *Id.* at 351.

Here, the State argued that Ellard and Poldevart did not detain Collins, but merely initiated a social contact. RP 6. A seizure occurs when, considering all the circumstances objectively, 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. *State v. Harrington*, 167 Wn.2d 656, 663, 222 P.3d 92 (2009). Some factors considered in determining whether a person is seized include the presence of multiple officers, the display of a weapon, physical contact, or tone of voice suggesting compliance could be compelled. *State v. Young*, 135 Wn.2d 498, 512, 957 P.2d 681 (1998) (quoting *U.S. v. Mendenhall*, 446 U.S. 544, 554, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980)).

In *Harrington*, the Washington Supreme Court determined that the defendant had been unlawfully seized based on the following facts. Dustin Harrington was walking down Jadwin Avenue in Richland at about 11:00 at night. Officer Scott Reiber, who was patrolling in his vehicle, saw Harrington, stopped his car (without activating his lights), and got out to talk to him. Reiber asked Harrington if they could talk, and Harrington

consented. Reiber asked Harrington where he was coming from. Harrington responded that he was walking from his sister's house, but when Reiber asked him where that was, Harrington said he did not know. Reiber considered his answer suspicious and observed that Harrington seemed fidgety and nervous. There were bulges in Harrington's pockets and when he put his hands in his pockets, Reiber asked him to take them out. During the encounter, another law enforcement officer arrived in his vehicle and, making a U-turn, stopped, got out, and stood about seven or eight feet away from Harrington. Reiber then asked if he could pat Harrington down for officer safety reasons, and Harrington agreed. Reiber then discovered a glass pipe and a baggie of methamphetamine in Harrington's pocket. *Harrington*, 167 Wn.2d at 660-62.

The *Harrington* Court concluded that, while the initial contact was not coercive, the situation escalated beyond a valid social contact upon the arrival of the second officer and the requests to Harrington to take his hands out of his pocket and consent to a pat down search. 167 Wn.2d at 666-70. As the encounter became progressively more intrusive, it became inconsistent with a routine social contact and ultimately rose to the level of a seizure of Harrington. *Harrington*, 167 Wn.2d at 669-70.

This case shares many similarities with *Harrington*. Collins was sitting at his table when Ellard, Poldevart, and four other deputies in full uniform walked past him. RP 8, 14. Ellard turned around, saw that Collins was packing up to leave, and went back to stand in front of him. RP 9, 15. Poldevart stood guard at Collins' right in case he tried to run away. RP (Trial 10/21/09) 38-39. Ellard prevented Collins from leaving when he began speaking to him. RP 16. Ellard asked Collins where he was going and expressed disbelief at Collins' explanation that he was going to bed. RP 15. Ellard then confronted Collins with his suspicion that his baked goods contained marijuana and asked Collins what he thought of that. RP 10; CP 11.

There are several reasons why the facts of this case do not establish a simple social contact. First, as in *Harrington*, the presence of multiple law enforcement officers, including one who stood guard on Collins, produced a show of authority that a reasonable person would not feel free to disregard. Ellard's questioning became progressively more intrusive and confrontational, and less of a friendly conversation, when he argued with Collins' explanation that he was going to bed. Although it was apparent to Ellard that Collins was trying to leave, Ellard's questioning prevented Collins from doing so. Under the circumstances presented in this case, as in *Harrington*, a reasonable person would not have felt at

liberty to terminate the increasingly confrontational conversation, turn his back on the officers (one of whom was standing guard in case he tried to run), and continue on his way.

Second, it is clear that the so-called “social contact” was really a pretext for Ellard to investigate his suspicion that Collins’ baked goods might have some kind of drug in them. Ellard admitted that he was suspicious of the brownies before he ever contacted Collins, and that he initiated contact with Collins when he saw that Collins was putting his things in his backpack and getting ready to leave. RP 8, 18, 45. Similar facts were presented in *State v. Gleason*, 70 Wn. App. 13, 851 P.2d 731 (1993), in which law enforcement officers stopped and questioned the defendant on the sidewalk based solely on the fact that he was a Caucasian in a largely Hispanic neighborhood. Similarly here, Ellard’s suspicion that Collins was engaged in criminal activity was based solely on the fact that Collins was at a Phish concert and Ellard had previously heard of marijuana brownies. As in *Gleason*, when Ellard stopped Collins from leaving to question him, a reasonable person would not have felt free to leave. 70 Wn. App. at 17.

Lastly, it is well-established that there is a difference between non-investigative police encounters, where officers perform functions *other*

than the enforcement of laws, and encounters initiated for the purpose of investigating suspected criminal activity. For example, police may permissibly perform non-investigatory, community caretaking functions like rendering aid without running afoul of constitutional protections. *State v. Chisholm*, 39 Wn. App. 864, 867, 696 P.2d 41 (1985). However, such encounters may not be a subterfuge for search for evidence of criminal activity. *Id.* at 867-68. Legitimate community caretaking functions must be divorced from criminal investigation. *Cady v. Dombrowski*, 413 U.S. 433, 441, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973). When it is apparent that the true purpose of the encounter is to investigate a crime, the encounter will not be excused as an act of community caretaking. *See, e.g., State v. Houser*, 95 Wn.2d 143, 151-52, 622 P.2d 1218 (1980).

A social contact is like an act of community caretaking in that it lies “someplace between an officer's saying ‘hello’ to a stranger on the street and, at the other end of the spectrum, an investigative detention.” *Harrington*, 167 Wn.2d at 664. While officers may approach individuals for purposes of engaging in casual conversation, it is clear that when such encounters are simply a subterfuge, or a pretext, to investigate criminal activity, they lack the authority of law that permits intrusion into individual privacy. *See Ladson*, 138 Wn.2d at 352-53. Where, as here,

the so-called “social contact” is, in reality, a display of law enforcement authority intended to prevent the individual from leaving until criminal activity can be investigated, it is not difficult to conclude that the encounter falls much closer to the “investigative detention” side of the spectrum than simply stopping to say “hello.”

In sum, under the facts presented in this case, Deputies Ellard and Poldevart approached Collins in a manner intended to intimidate him into staying and explaining what he was doing. They admittedly did so not out of legitimate curiosity, but because they suspected he was engaged in criminal activity. They confronted him with their suspicions in such a way that no reasonable person would have felt free to remain silent or walk away. And they did so without individualized suspicion, based upon articulable facts, that would give rise to a belief that Collins was probably engaged in criminal activity. *See Terry v. Ohio*, 392 U.S. 1, 21-22, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

Ellard and Poldevart’s encounter with Collins constituted an investigative detention that was not supported by a reasonable, individualized suspicion of criminal activity. Accordingly, the detention was unlawful, and Collins’ motion to suppress should have been granted.

VI. CONCLUSION

As the *Harrington* Court observed, there is a difference between police stopping individuals to say “hello” and stopping them to investigate a suspicion of criminal activity. The facts in this case cross the line.

Indeed, “We do a disservice to the public and to police by moving the so-called “social contact” into just another form of seizure, albeit without any cause or suspicion of crime or danger to the public or the police.”

Harrington, 167 Wn.2d at 670 (quoting *Harrington*, 144 Wn. App. 558, 564, 183 P.3d 352 (2008) (Sweeney, J., dissenting)). Because it is evident that the encounter in this case was a deliberate confrontation intended to intimidate Collins and obtain evidence of criminal activity, no reasonable observer could dismiss the incident as a mere social interaction. The motion to suppress should have been granted, and Collins’ convictions should, accordingly, be reversed and dismissed.

RESPECTFULLY SUBMITTED this 22nd day of July, 2010.



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DECLARATION OF SERVICE

I, the Undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 22nd day of July, 2010 in Walla Walla, Washington.


Andrea Burkhart