



NO. 286894

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

STATE OF WASHINGTON,

Respondent,

v.

E.Q., a minor

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR YAKIMA COUNTY
The Honorable Susan L. Hahn

AMENDED APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied the juvenile's motion to suppress.
2. The trial court erred when it failed to enter written findings of fact and conclusions of law after the evidentiary hearing.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. It is well settled article I, section 7 of the Washington Constitution provides greater protection to individual privacy rights than the Fourth Amendment to the United States Constitution. An individual's privacy rights under article I, section 7 extend to automobile passengers. Under article I, section 7, officers are prohibited from seizing vehicle passengers unless the officers have an articulable suspicion a passenger is involved in criminal activity or unless the officers have legitimate safety concerns.

Here, an officer encountered a juvenile sitting in a car parked in front of a house, where an emergency 911 caller reported an assault against his daughter. A man was asleep in the backseat of the car. In his hand was a methamphetamine pipe. The officer ordered the juvenile out of the car and pat searched her for weapons. After the officer realized the juvenile was unarmed, the officer placed her in handcuffs. The officer did not know who the juvenile was or whether the juvenile was involved in the assault.

The officer conducted a warrants check. The officer later discovered the juvenile had an outstanding warrant and placed her under arrest. The officer asked the juvenile to empty her pockets. The juvenile complied and

the officer noticed methamphetamine. The juvenile was charged with possession of a controlled substance. The juvenile moved the trial court to suppress the evidence based on the unlawful seizure. The trial court concluded the seizure was lawful and denied the motion. Did the trial court err?

2. A trial court is required to enter written findings of fact and conclusions of law after an evidentiary hearing. A trial court's late entry of written findings and conclusions after an evidentiary hearing may warrant reversal of a conviction if an appellant can show prejudice from the delay or that the written findings were simply tailored to meet the issues presented in the appellant's opening brief. Reversal is appropriate only where a defendant can show prejudice resulting from the absence of findings and conclusions or following remand. Therefore, the appropriate remedy is remand.

Here, the trial court did not enter findings. Did the trial court err?

C. STATEMENT OF THE CASE

In early morning hours, a father called 911 to report his son punched his daughter and then shot her. 12/10/09 RP 10. Emergency dispatch notified local police. 12/10/09 RP 10. Five police officers responded to the emergency 911 call and arrived at the house where an emergency 911 caller had reported the assault. 12/10/09 RP 12; 12/10/09 RP 20. The officers arrived at the house approximately the same time. 12/10/09 RP 20-21.

One of the responding officers noticed a car parked in front of the house. The car was running; but had no driver. 12/10/09 RP 13; 12/10/09 RP 20. Although the emergency 911 caller did not mention a vehicle, the officer and another officer approached the car and encountered 2 passengers. 12/10/09 RP 23; 12/10/09 RP 13. One of the passengers was an older man who appeared asleep in the backseat. The other passenger was a girl about 16 years old in the front passenger seat. 12/10/09 RP 13; 12/10/09 RP 25. The officer recognized the older man. She had had passing encounters with him before, but had never arrested him. 12/10/09 RP 14-15. She did not recognize the girl. 12/10/09 RP 14.

The officer knocked on the window to get the man's attention. When she did, the man sat straight up. The officer noticed the man clutched a methamphetamine pipe. 12/10/09 RP 13. The officer ordered the girl out of the car, while another officer secured the man. 12/10/09 RP 13; 12/10/09 RP 26. By that time, several other officers were at the car to determine its involvement in the anonymous emergency 911 call. 12/10/09 RP 24.

The officer pat searched the girl, asked her name, date of birth, placed the girl in handcuffs, and conducted a warrants check. 12/10/09 RP 26. The officer then asked the girl if she knew about an assault and if anyone had a gun. 12/10/09 RP 29. The girl told the officer she did not know what was going on. 12/10/09 RP 29. The warrants check later revealed the girl had an outstanding warrant. 12/10/09 RP 26-27. The officer placed the girl under

arrest and sat the girl in a patrol car. 12/10/09 RP 17; 12/10/09 RP 27. The girl was 17 year old, E.Q. CP 53; CP 16-19.

The officer later contacted residents at the house. The father, who was the suspected emergency 911 caller, told the officer the assault had taken place on the other side of town. 12/10/09 RP 16. The woman who was the supposed victim told police she owned the car parked out front. She also told the officer she left the car running, but she did not know the girl or the man. The woman denied she had reported an assault and denied her car was used for drug use. 12/10/09 RP 16.

After the officer determined no assault had occurred at the house, she transported E.Q. to the hospital for medical clearance as was police procedure with juveniles suspected of drug or alcohol use. 12/10/09 RP 17. At the hospital, the officer asked E.Q. to empty her pockets. 12/10/09 RP 17. E.Q. complied and removed a pack of cigarettes. The officer then noticed a small plastic baggy with a white substance. 12/10/09 RP 18.

The State charged E.Q. with possession of a controlled substance. CP 53. E.Q. moved the trial court to suppress the evidence based on the unlawful seizure. CP 46-52. The trial court denied the motion. 12/10/09 RP 4-59. This appeal followed. CP 10-14.

D. ARGUMENT

- I. THE OFFICER UNLAWFULLY SEIZED THE JUVENILE PASSENGER WHEN SHE ORDERED THE JUVENILE OUT OF THE CAR, PAT SEARCHED THE JUVENILE FOR WEAPONS, AND HANDCUFFED THE JUVENILE EVEN THOUGH THE JUVENILE HAD NOT COMMITTED ANY CRIME.

a. Warrantless searches and seizures are per se unconstitutional. The Fourth Amendment to the United States Constitution protects an individual's right to privacy. It provides, in pertinent part, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...." U.S. Const. amend. IV.

Our state constitution similarly protects our right to privacy in article I, section 7, which mandates, "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." Const. art. I, section 7; State v. Grande, 164 Wash.2d 141, 187 P.3d 248 (2008). This provision protects "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant." State v. Myrick, 102 Wash.2d 511, 688 P.2d 151 (1984). This provision also differs from the Fourth Amendment in that it recognizes an individual's right to privacy with no express limitations. State v. White, 97 Wash.2d 110, 640 P.2d 1061 (1982). Consequently, it is well settled article I, section 7 of the Washington Constitution provides greater protection to individual privacy rights than the Fourth Amendment to the United States Constitution. State v. Jones, 146 Wash.2d 332, 45 P.3d 1062 (2002).

Our courts find warrantless searches or seizures per se unconstitutional unless one of the few exceptions to the warrant requirement applies. State v. Ladson, 138 Wash.2d 349, 979 P.2d 833 (1999). State v. Rankin, 151 Wash.2d 699, 92 P.3d 202 (2004). In fact, “[a]ny analysis of article I, section 7 in Washington begins with the proposition warrantless searches are unreasonable per se. State v. White, 135 Wash.2d 769, 958 P.2d 982 (1998) (citing State v. Hendrickson, 129 Wash.2d 70, 917 P.2d 563 (1996)). This is a strict rule. White, 135 Wash.2d at 769, 958 P.2d 982. Therefore, exceptions to the warrant requirement are limited and narrowly drawn. White, 135 Wash.2d at 769, 958 P.2d 982; Hendrickson, 129 Wash.2d at 70-71, 917 P.2d 563. The few carefully drawn exceptions to the warrant requirement include consent, exigent circumstances, plain view searches, inventory searches, searches incident to arrest, and investigatory stops pursuant to Terry v. Ohio. State v. Duncan, 146 Wash.2d 171-72, 43 P.3d 513 (2002); Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The State bears a heavy burden to prove one of those exceptions applies. See State v. Johnson, 128 Wash.2d 447, 909 P.2d 293 (1996); State v. Houser, 95 Wash.2d 149, 622 P.2d 1218 (1980).

“[N]ot every encounter between a police officer and a citizen is an intrusion.” United States v. Mendenhall, 446 U.S. 553, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980). However, a seizure occurs, under article I, section 7, when considering all the circumstances, 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. O'Neill, 148 Wash.2d 574, 62 P.3d 489 (2003). This determination is made by objectively looking at the actions of the law enforcement officer. State v. Young, 135 Wash.2d 501, 957 P.2d 681 (1998). Moreover, it is elementary that all investigatory detentions constitute a seizure. State v. Armenta, 134 Wash.2d 10, 948 P.2d 1280 (1997).

Here, the trial court found the officer had in fact seized E.Q. when she ordered E.Q. out of the car. 12/10/09 RP 45. The trial court concluded however the seizure was lawful. 12/10/09 RP 46. This Court must review the trial court's conclusion de novo. State v. Armenta, 134 Wash.2d at 9.

b. Officers are prohibited from effecting a seizure against a vehicle passenger unless the officer has an articulable suspicion that person is involved in criminal activity. Our courts have examined privacy rights of vehicle passengers in light of the broad protection afforded under article I, section 7. See State v. Parker, 139 Wash.2d 486, 987 P.2d 73 (1999); State v. Mendez, 137 Wash.2d 208, 970 P.2d 722 (1999). And our cases have strongly and rightfully reinforced our constitution's protection of individual privacy. Parker, 139 Wash.2d at 505, 987 P.2d 73.

For example, in State v. Larson, our Supreme Court held a passenger is unconstitutionally detained under article I, section 7 when an officer requests identification unless other circumstances give the officer independent

cause to question the passenger. Larson, 93 Wash.2d 642, 611 P.2d 771 (1980).

Likewise, in State v. Rankin, our Supreme Court held the freedom from disturbance in private affairs afforded to vehicle passengers in Washington under article I, section 7, prohibits law enforcement officers to effect a seizure against a passenger unless the officer has an articulable suspicion that that person is involved in criminal activity. Rankin, 151 Wash.2d at 699, 92 P.3d 202 (2004).

The Supreme Court further found officers may engage passengers in conversation. However, as soon as the interaction develops into an investigation, the interaction runs afoul of article I, section 7 unless there is justification for the intrusion. Rankin, 151 Wash.2d at 700.

Similarly, in State v. Mendez, the Supreme Court further found police must “be able to articulate an objective rationale predicated specifically on safety concerns, for officers, vehicle occupants, or other citizens, for ordering a passenger to stay in the vehicle or to exit the vehicle.” 137 Wash.2d at 220, 970 P.2d 722 (emphasis added). This standard is appropriate where the officer orders the passenger to take certain action in an effort to control the scene. State v. Parker, 139 Wash.2d 502, 987 P.2d 73 (1999) (quoting Mendez, 137 Wash.2d at 220, 970 P.2d 722).

A passenger’s privacy interest must be balanced, though, against valid concerns for officer and public safety during traffic stops. Mendez, 139

Wash.2d at 219. To achieve this balance, our Supreme Court has held that an officer's directive to a passenger to remain in or exit the vehicle for reasons of safety must be supported by an articulable objective rationale. Mendez, 139 Wash.2d at 220. Non-exclusive factors warranting an officer's directive may include: "the number of officers, the number of vehicle occupants, the behavior of the occupants, the time of day, the location of the stop, traffic at the scene, affected citizens, or officer knowledge of the occupants." 137 Wash.2d at 221, 970 P.2d 722.

In State v. Mendez, two police officers stopped a car at 12:50 p.m. for failure to stop at a stop sign. As soon as the car pulled over, the defendant, a 16-year-old front seat passenger, got out of the car and began walking away. When the officer told him to get back into the car, 'the defendant turned, fumbled with his shirt and reached inside his clothes more than once, and continued walking away. He then ran, even after a subsequent command to return to the vehicle. Mendez, 139 Wash.2d at 213. The officers chased him down and put him under arrest.

The Supreme Court concluded the defendant was seized when the officer first uttered the command for him to get back into the car. Mendez, 139 Wash.2d at 222-23. Since defendant fumbled with his clothes after he was seized, the state could not use his movements to retroactively justify the prior seizure. Id. at 224. The court concluded the officers did not meet the objective rationale test because:

[The defendant] was already walking away when he was told to stop. The officers were present in this instance in broad daylight in Yakima. No specific safety concerns were present at the scene. They had control of the situation as the driver remained where he was directed. The other passengers remained in the vehicle. [The defendant] had not committed a crime. Without more, and in view of the officers' testimony that [the defendant] did not do anything to make them fearful for their safety except run away, we cannot conclude ... that 'increased police protection' justified the seizure and subsequent arrest of the defendant ...

(Emphasis added) *Id.* at 225-226.

In light of the *Mendez* factors, the officer here did not articulate an objective rationale predicated on safety concerns. The officer claimed her focus was on safety because the situation possibly involved a weapon.

12/10/09 RP 14; 12/10/09 RP 22. However, the officer did not meet the objective rationale test.

Unlike the car in *Mendez*, the car here was not stopped for a traffic violation but was parked in front of the house where the emergency 911 caller reported the alleged assault. 12/10/09 RP 20. But like the officer in *Mendez*, the officer here was not alone. Five police officers responded to the emergency 911 call and arrived at the house approximately the same time.

12/10/09 RP 12; 12/10/09 RP 20.

The officer and another officer approached the car, even though the emergency 911 caller did not mention a vehicle. 12/10/09 RP 23; 12/10/09 RP 13. By the time the officer ordered E.Q. out of the car, several other officers were at the car trying to determine its involvement in the anonymous

emergency 911 call. 12/10/09 RP 24; 12/10/09 RP 26. Like the officers in Mendez, the officers here seemed to have control of the situation.

Unlike the defendant in Mendez, E.Q. did not attempt to get out of the car before the officer ordered her to do so and did not make any furtive movements. In fact, E.Q. was very cooperative. 12/10/09 RP 29. Also, unlike the officers in Mendez, the officer here pat searched E.Q. and felt several items that did not feel like dangerous weapons. 12/10/09 RP 14. Despite the fact E.Q. was unarmed, the officer still placed her in handcuffs. 12/10/09 RP 14. Under those circumstances, the officer could not have reasonably feared E.Q. posed a threat to her safety or to the safety of others.

Furthermore, as is required under State v. Rankin, the officer here did not have an articulable suspicion E.Q. was in any way involved in criminal activity. The officer handcuffed E.Q. not knowing who she was, who was in the house, or whether she was somehow involved the alleged assault. 12/10/09 RP 27. The officer only knew E.Q. was sitting in a car in front of a house where five officers had been called. 12/10/09 RP 15.

Our constitution does not permit officers to seize everyone at or near an alleged crime scene. Association with a person suspected of criminal activity does not strip away constitutional protections. State v. Broadnax, 98 Wash.2d 296, 654 P.2d 96 (1982), overruled on other grounds by Minnesota v. Dickerson, 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993). Further, even a brief seizure is not justified by mere proximity to criminal activity.

State v. Cormier, 100 Wash.App. 461-62, 997 P.2d 950 (2000). Rather, there must be something more to indicate that the particular person seized may be a threat to safety or armed. State v. Horrace, 144 Wash.2d 393-96, 28 P.3d 753 (2001). Because there was nothing more here to indicate E.Q. was a threat to the officer's safety or armed with a dangerous weapon, the officer unlawfully seized E.Q. and therefore violated her constitutional right to privacy.

c. Evidence obtained from an unlawful seizure must be suppressed.

Where the initial seizure was unlawful, the subsequent search and the fruits of that search are inadmissible as fruits of the poisonous tree. State v. Brown, 154 Wash.2d 799, 117 P.3d 336 (2005); State v. Kennedy, 107 Wash.2d 4, 726 P.2d (1986). This is true under the Fourth Amendment and under article I, section 7. Nardone v. United States, 308 U.S. 341, 60 S.Ct. 266, 84 L.Ed. 307 (1939); Wong Sun v. United States, 371 U.S. 484, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); State v. White, 97 Wash.2d 111, 640 P.2d 1061 (1982).

Here, after the unlawful seizure, the officer discovered E.Q. had an outstanding warrant. The officer placed E.Q. under arrest and transported her to hospital for medical clearance. 12/10/09 RP 17. At hospital, the officer asked E.Q. to empty her pockets. 12/10/09 RP 17. E.Q. complied and removed a pack of cigarettes. The officer then noticed a small plastic baggy with a white substance. 12/10/09 RP 18. The officer believed the white substance was methamphetamine. 12/10/09 RP 18.

After the unlawful seizure, the trial court was required to suppress any evidence that stemmed therefrom. This Court should order the evidence suppressed and reverse E.Q.'s conviction.

II. THE TRIAL COURT FAILED TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW AFTER THE EVIDENTIARY HEARING.

Pursuant CrR 3.6, a trial court is required to enter written findings of fact and conclusions of law after an evidentiary hearing. CrR 3.6 (b). A trial court's late entry of written findings and conclusions after a CrR 3.6 hearing may warrant reversal of a conviction if an appellant can show prejudice from the delay or that the written findings were simply tailored to meet the issues presented in the appellant's opening brief. State v. Byrd, 83 Wash.App. 512, 922 P.2d 168 (1996), *review denied*, 130 Wash.2d 1027 (1997); State v. Smith, 76 Wn.App. 9, 882 P.2d 190 (1994), *review denied*, 126 Wash.2d 1003 (1995). Reversal is appropriate only where a defendant can show prejudice resulting from the absence of findings and conclusions or following remand. State v. Head, 136 Wash.2d 624, 964 P.2d 1187 (1998). Appellate courts will not infer prejudice; a defendant must show actual prejudice due to tailoring of the findings and conclusions entered after remand. Head, 136 Wn.2d at 625. Therefore, the appropriate remedy is remand. Head, 136 Wn.2d at 624.

Here, E.Q. moved to suppress evidence discovered as a result of the unlawful seizure. A CrR 3.6 hearing was held and the trial court denied her motion. 12/10/09 RP 47. However, to date, the trial court has not entered

written findings of fact and conclusions of law. This Court must either remand this case to the trial court for entry of findings or alternatively reverse and dismiss E.Q.'s conviction.

E. CONCLUSION

For the reasons set forth above, E.Q. respectfully asks this Court to reverse her conviction.

Respectfully submitted this 17th day of May, 2010.



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Case Name: *State of Washington v. Ethel Paula Quiroz*

I declare under penalty and perjury of the laws of the State of Washington that on **Monday, May 17, 2010** I filed an AMENDED APPELLANT'S OPENING BRIEF plus one copy with Division Three Court of Appeals and served copies of the same to the following counsel of record and/or other interested parties, by depositing in the United States of America mails an addressed postage paid envelope to the following:

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