

FILED

FEB 25 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 287777

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

ERIC CHRISTOPHER GANTT,

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF YAKIMA COUNTY, WASHINGTON

THE HONORABLE MICHAEL G. McCARTHY, JUDGE
THE HONORABLE DAVID A. ELOFSON, JUDGE

BRIEF OF RESPONDENT

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Prosecuting Attorney

Kevin G. Eilmes
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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

1. Whether a police officer's initial contact with the Appellant, Eric Christopher Gantt, constituted an illegal seizure of Mr. Gantt's person under the Fourth Amendment or Article I, sec. 7 of the Washington State Constitution?
2. Whether a subsequent search of Mr. Gantt's vehicle constituted a warrantless unconstitutional search?
3. Whether the prohibition of the possession or consumption of alcohol in the judgment and sentence was valid?

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. The officer's initial contact was a permissible social contact; the activation of the officer's emergency lights was not such a show of authority that the encounter escalated into a seizure.
2. As the social contact was permissible, and the officer contemporaneously noticed an expired trip permit on Gantt's vehicle, the plain view observation of stolen property in Gantt's vehicle was not an unconstitutional search.
3. The sentencing court had the authority to prohibit the possession or consumption of alcohol.

II. STATEMENT OF THE CASE

The State adopts the Statement of the Case contained in Gantt's opening brief. RAP 10.3(b). That narrative will be supplemented herein.

III. ARGUMENT

1. **The initial contact between Gantt and Officer Valencia was a social contact, not a seizure.**

A person has been "seized" for purposes of Const. Art. I, sect. 7, only if, in view of all of the surrounding circumstances, a reasonable person would not believe they were free to leave or terminate an encounter with a police officer. State v. Young, 135 Wn.2d 498, 510, 957 P.2d 681 (1998), citing State v. Stroud, 30 Wn. App. 392, 394-95, 634 P.2d 316 (1981). A person is seized only when (1) a police officer uses physical force or a show of authority to restrain the person's freedom of movement, and (2) a reasonable person would not have believed he was free to leave, and thus free to terminate the contact with the officer. State v. O'Neill, 148 Wn.2d 564, 574, 62 P.3d 489 (2003). A defendant asserting a seizure under article I, section 7, bears the burden of proving a disturbance of his private affairs. Young, 135 Wn.2d at 510; State v. Thorn, 129 Wn.2d 347, 354, 917 P.2d 108 (1996). Whether a law enforcement officer has seized a person is a mixed question of law and fact. State v. Harrington, 167 Wn.2d 656, 662, 222 P.3d 92 (2009). An objective standard is employed

to examine the police officer's actions, and the fact that the officer subjectively suspects the possibility of criminal activity, but does not have an articulable suspicion, does not raise the encounter to a seizure. O'Neill, 148 Wn.2d at 574.

Not every encounter between a law enforcement officer and an individual amounts to a seizure. State v. Armenta, 134 Wn.2d 1, 10, 948 P.2d 1280 (1997). Indeed, Article I, section 7 permits social contacts between police and citizens, and engaging a defendant in conversation in a public place and asking for identification does not raise the encounter to an investigative detention. State v. Johnson, 156 Wn. App. 82, 90, 231 P.3d 225 (2010), *citing* Young, 135 Wn.2d at 511. This is so because “effective law enforcement techniques not only require passive police observation, but also necessitate interaction with citizens on the streets.” Harrington, 167 Wn.2d at 665.

The Washington Supreme Court adopted a nonexclusive list of police actions which likely result in a seizure: “ ‘ the 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.’” Young, 135 Wn.2d at 512, *quoting* United States v.

Mendenhall, 446 U.S. 544, 554-55, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980).

In Harrington, the Supreme Court found that an initial conversation with the defendant was a social contact, and that in applying the purely objective standard, a reasonable person would not have thought that the officer's actions restrained that person's freedom of movement.

Harrington, 167 Wn.2d at 665. However, the court held that (1) the arrival of a second officer, (2) a request for the defendant to remove his hands from his pockets, and a (3) request to frisk the defendant for weapons dispelled the social contact and progressively escalated the encounter to a seizure. Id., 666-70.

In Young, the Washington Supreme Court also applied the objective test described above to a case in which a deputy, after a brief conversation during which he asked for and obtained Mr. Young's name, illuminated Young with a spotlight. The court held that there was no seizure of Mr. Young's person, observing that: "[t]he illumination by the spotlight did not amount to such a show of authority a reasonable person would have believed he or she was not free to leave, not free simply to keep on walking or continue with whatever activity he or she was then engaged in . . ." Young, 135 Wn.2d at 513-14.

On appeal, Gantt argues that he was subject to a warrantless seizure for which no exception applies, and that the court's finding that the initial contact was social is negated by the officer's activation of his patrol car's emergency lights. The cases cited do not support his argument.

State v. DeArman, 54 Wn. App. 621, 624, 774 P.2d 1247 (1989) is easily distinguished. There, the encounter was a result of a traffic stop, where the officer first observed the defendant's vehicle stopped for an unusual length of time at a stop sign in the absence of any other traffic. Thinking the vehicle was disabled, the officer activated his emergency lights, after which the defendant's vehicle proceeded through the intersection and stopped. Id., at 622-23. Finding that the officer had no reason to stop the vehicle after determining that it was not disabled, the court held that there was an unconstitutional seizure, as the officer did not have an articulable suspicion sufficient to support a *Terry* stop. Id., at 624.

Likewise, in State v. Henry, 80 Wn. App. 544, 910 P.2d 1290 (1995), *review denied* 137 Wn.2d 1038 (1999), the Court of Appeals held that, after an initial traffic stop, the officer's continued detention of the driver, after observing nothing more than nervousness on his part, exceeded the legitimate scope of the stop. Indeed, "without sufficient justification, police officers may not use routine traffic stops as a basis for

generalized, investigative detentions or searches.” *Id.*, at 553, (citations omitted). Officers may detain persons for traffic infractions “for a reasonable time necessary to identify the person, check the status of the person’s license, insurance identification card, and the vehicle’s registration, and complete and issue a notice of traffic infraction.” RCW 46.61.021.

Here, of course, there was no traffic stop of the vehicle at all. Gantt was out of his parked vehicle, on foot, when first contacted by Officer Valencia. While the officer’s emergency lights were activated, it was, as the trial court pointed out, during the hours of darkness, and was no more invasive in that context than being illuminated by a spotlight. While the circumstances may have been suspicious, the officer’s social contact would have been independently justified in trying to determine whether Gantt was lost, or needed assistance. It was at that time that Officer Valencia noticed the expired trip permit, and on that basis alone the officer was authorized to detain Gantt long enough to identify, and possibly cite, Gantt for an infraction related to the vehicle license. And in the “fairly logical sequence” as described by the court, Officer Brumly could then see what appeared to be stolen property through Gantt’s window. **(RP 14-16)**

An officer's observation through a car window "falls squarely under the open view doctrine", and is not a search for constitutional purposes. State v. Campbell, 103 Wn.2d 1, 23, 691 P.2d 929 (1984), *cert. denied*, 471 U.S. 1094, 85 L. Ed. 2d 526, 105 S. Ct. 2169 (1985).

Applying the rest of the Young factors, as well, there was no threatening presence of several officers, any physical touching, nor was there a use of language or tone of voice compelling compliance with the officer's requests. The trial court's findings and conclusions of law were supported both by the facts and the law.

2. The court had the authority to order the alcohol prohibition.

Gantt's reliance on State v. Parramore, 53 Wn. App. 527, 531, 768 P.2d 530 (1989), and State v. Julian, 102 Wn. App. 296, 304, 9 P.3d 851 (2000), is misplaced, as their precedential value is doubtful in light of subsequent amendments to the Sentencing Reform Act, RCW 9.94A.

Indeed, this issue was addressed and disposed of in State v. Jones, 118 Wn. App. 199, 76 P.3d 258 (2003). There, the Court of Appeals examined the legislative history of those provisions of the SRA pertaining to conditions on community placement/custody, and held that the trial court had the authority to order that the defendant not consume alcohol, despite the lack of evidence that alcohol had contributed to his offenses.

Id., at 207. The Jones court criticized, in fact, the decisions in Parramore and Julian, as Parramore dealt with an offense which predated the 1988 amendments discussed below. Id., at 206.

Discretion on the part of the sentencing court to prohibit the consumption of alcohol was granted by way of amendment to the SRA in 1988. LAWS OF 1988, ch. 153, s. 2, formerly codified at RCW 9.94A.120(8)(c)(iv). The provision was again recodified at RCW 9.94A.700(5), LAWS OF 1995, ch. 108, s. 3:

As a part of any terms of community placement imposed under this section, the court may also order one or more of the following special conditions:

...

(d) The offender shall not consume alcohol;

Finally, the provision was again recodified at RCW 9.94A.703(3)(e), as a discretionary condition of community custody. LAWS OF 2008, ch. 231, s. 9.

Central to the decision reached in Jones was the fact that, within the statute, the alcohol prohibition is separate from, and unmodified by, the section pertaining to “crime-related” treatment of counseling. Former RCW 9.94A.120(8)(c)(iii). This manifested the Legislature’s intent that a trial court be permitted to prohibit the consumption of alcohol regardless

of whether alcohol had contributed to the offense. Jones, 118 Wn. App. at 206.

Here, as well, the sentencing court had the discretion to prohibit the consumption of alcohol under the current statute, RCW 9.94A.703(3)(e). It was not necessary for the court to find that the prohibition was crime-related.

IV. CONCLUSION

Based upon the foregoing arguments, this Court should affirm the convictions on all counts.

Respectfully submitted this 23 day of February, 2011.



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| STATE OF WASHINGTON, |) | NO. 287777 |
| |) | |
| Respondent, |) | SWORN STATEMENT OF SERVICE |
| |) | BY MAIL |
| vs. |) | |
| |) | |
| ERIC CHRISTOPHER GANTT, |) | |
| |) | |
| Appellant. |) | |

I, Elaine Chartrand, state that I am and was at the time of the service of the Brief Of Respondent, herein referred to, a citizen of the United States, residing at Yakima, Yakima County, Washington; that I am over the age of twenty-one years and am not a party to the within entitled action.

That on the 23rd day of February, 2011, I served upon Dennis W. Morgan, 120 West Main Avenue, Ritzville, WA 99169, Attorney for Appellant and Eric Christopher Gantt, #313510, Coyote Ridge Corrections Center, P O Box 769, Connell, WA 99326, the appellant herein, a copy of the aforementioned instrument, by putting the same, enclosed in sealed envelopes, postage paid, into the post office.

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


 Elaine Chartrand
 February 23, 2011
 at Yakima, WA