FILED

JAN 25 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

IN THE COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

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| STATE OF WASHINGTON, Respondent, | ) | NO. 299619 Benton County Cause No. 09-1-00253-7 |
| v. | ) | |
| JOEL CHAVEZ, Appellant. | ) | |

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# BRIEF OF APPELLANT

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APPEAL FROM BENTON COUNTY SUPERIOR COURT,
THE HONORABLE CAMERON MITCHELL

---

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## I. ASSIGNMENTS OF ERROR

1. The hearings court committed error when it found that on March 14, 2009, security personnel at the Paradise Club were not acting as agents of the Richland Police Department when they removed cocaine from the Respondent.

2. The hearings court erred in denying the Appellant's Motion to Suppress evidence seized from the Appellant after an unlawful search and seizure by security personnel at the Paradise Club in Richland, WA.

## II. ISSUES

I. Do the actions of the City of Richland in training security personnel and being involved in the day to day activity regarding the security of the club constitute state action and does the private search doctrine apply in Washington?

II. Are the actions of club security justified under the Private Security Doctrine or were the actions of the club personnel illegal under the law and should the State be allowed to benefit as a result of that illegal conduct?

## III. STATEMENT OF THE CASE

On March 14, 2009, the Appellant, Joel Chavez, entered a drinking establishment in Richland, Washington, known as the Paradise Club. (RP 62) On many occasions, law enforcement had been dispatched to the Paradise Club due to patrons being involved in criminal activity. (RP 19-20)(CP126-129). Because

of a variety of problems, i.e. fake identification, found narcotics, service issues and after-hours service problems, the owner of the club began to pay officers overtime to work in the parking lot during peak hours of criminal activity. (RP 21, CP 126-127). For several years, the City of Richland has had an on-going business relationship with the Paradise Club. Many email correspondences were presented during the 3.6 hearing on January 21, 2011 which demonstrate that relationship. (RP20-25) Off duty police officers became paid employees of the club. The business relationship also included training by the Police Department of the club's security personnel regarding the techniques of seizure and advice on what was permissible and what was not permissible when contacting individuals and seizing evidence. (RP 22-24) Security was advised if they found narcotics on individuals, they were not to seize the drugs. (RP 24, CP 126-129).

The Paradise Club posted a sign that advised everyone who entered the club that they would be searched prior to being allowed into the club. (CP 126-129). When the Appellant entered the club on March 14, 2009, he was searched by security personnel. (CP 123-125s No. 7). Security felt an object in the

Appellant's pant pockets, which was not a weapon, and told him to remove it. (CP 123-125). At that point, the Appellant declined to be searched and attempted to leave the club. (CP 123-125). Security removed the item from the Appellant's pants pocket against his will. (CP 123-125). As a result of this search, the Appellant was found to be in possession of Cocaine, a controlled substance.(CP 123-125). The Appellant was further detained, by the security personnel, on the ground while law enforcement was contacted. (CP 123-125). Security held the substance that was removed from the Appellant's pocket until law enforcement arrived. Upon their arrival, security gave the suspected controlled substance, which later field tested positive for cocaine, to law enforcement. (CP 123-125). The Appellant was taken into custody by law enforcement and placed under arrest. (CP 123-125). The white powdery substance was sent to the Washington State Crime Laboratory and on April 20, 2009 the substance was determined to be cocaine. (CP 123-125).

The Appellant filed a motion to suppress in Benton County Superior Court and asked the court to address the same two issues that the Appellant is currently appealing. (RP 3-116,

November 12, 2009) The Honorable Cameron Mitchell presided over that hearing (RP January 21, 2011) and on May 13, 2011 entered Findings of Fact and Conclusions of Law on 3.6 Hearing held on January 21, 2011. (CP 126-129) The court held that the Appellant did not meet the burden of establishing that the security personnel at Club Paradise were acting as state agents when they searched the Defendant on March 14, 2009. (RP 81-82, CP 126-129). The court specifically held that security personnel at Club Paradise were not acting as agents of the Richland Police Department when they removed cocaine from the defendant and that the state could use the evidence obtained by the security personnel in the prosecution of Joel Chavez. (RP 81, CP 124-129). The court further held that the unlawful imprisonment/detention and assault of the defendant did not limit the government's ability to use the seized evidence as these activities were conducted by private citizens and any remedy to the defendant lies in the civil justice system. (RP 82-83, CP 126-129). The Court denied the Appellant's Motion to Suppress. (RP 82). Stipulated facts were entered on May 13, 2011. (CP 126-129). The Appellant was found guilty by stipulated facts and a

Judgment and Sentence was entered on May 26, 2011. (CP 123-125; 130-139).

## IV. ARGUMENT

The Appellant asks this Court to review the hearings court's decision to determine if the denial of the Appellant's 3.6 Motion was erroneous and to review whether or not the actions of the City of Richland in training security personnel and being involved in day-in and day-out activity regarding the security of the club constitutes state action. Further, the Appellant asks this Court to review the hearings court's decision to allow the State to benefit from the illegal actions of the Paradise Club's security personnel and proceed with the prosecution of the Appellant by denying the Appellant's motion to suppress.

It is well settled that Article 1, Section 7 of the Washington Constitution provides greater protection to individual privacy rights than the Fourth Amendment of the United States Constitution. State v. Jones, 146 Wn. 2d 328, 332, 45 P.3d 1062(2002).

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. Map v. Ohio, 367 U.S. 643, 655, 81 S.Ct. 1684, 6 L. Ed. 2d 1081 (1961). Article 1, Section 7 reads, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." This provision provides greater protection than the Fourth Amendment, Rankin, 151 Wn. 2d at 694, so we cite Washington cases applying article 1, section 7 over federal cases applying the Fourth Amendment. State v. Setterstrom, 163 Wn 2d 621, 626 (2008).

Washington law presumes warrantless searches and seizures to be unreasonable and in violation of the Fourth Amendment unless an exception applies, State v. Duncan, 146 Wn. 2d 166, 43 P.3d 515 (2002). The California Constitution, like the Washington State constitution, provides greater protection for privacy than the federal constitution's fourth amendment. In People v. Zelinski, 155 Cal. Rptr. 575, 24 Cal. 3d 357 (1979), the California Supreme Court reviewed store security searches under the similar California constitution and reasoned as follows:

Article 1, Section 13 of the California Constitution provides in part that: "The right of the people to be secure in their persons, houses, papers and effects against unreasonable seizures and searches may not be violated...." Although the constitutional provision contains no language indicating that the "security" protected by the provision is limited to security from governmental searches or seizures, California cases have generally interpreted this provision as primarily intended as a protection of the people against such governmentally initiated or governmentally directed intrusions. The exclusionary rule, fashioned to implement the rights secured by the constitutional provision, has therefore been applied to exclude evidence illegally obtained by private citizens only where it served the purpose of the exclusionary rule in restraining abuses by the police of their statutory powers. (Stapleton v. Superior Court, supra, 70 Cal. 2d 97, 73 Cal. Rptr. 575; People v. Cahan, supra, 44 Cal. 2d 434; Mapp v. Ohio, (1961) 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081; cf. People v. Payne (1969) 1 Cal.App. 3d 361, 81 Cal.Rptr. 635; People v. Randazzo, supra, 220 Cal. App.2d 768, 34 Cal. Rptr. 65; People v. Cheatham, supra, 263 Cal. App. 3d 458, 461-462, 69 Cal. Rptr. 679; cf. People v. Mollard (1971) 15 Cal. App. 3d 759, 761-762, 93 Cal. Rptr. 402; People v. Superior Court (Smith), supra, 70 Cal. 2de 123, 74 Cal. Rptr. 294; People v. Mangiefico (1972) 25 Cal. App. 3d 1041, 1047-1048, 102 Cal. Rptr. 449.)

We have recognized that private security personnel, like police, have the authority to detain suspects, conduct investigations, and make arrests. They are not police, however, and we have refused to accord them the special privileges and protections enjoyed by official police officers. (See People v. Corey, (1978) 21 Cal. 3d 738, 147 Cal.Rptr. 639.) We have excluded the fruits of their illegal investigations only when they were acting in concert with the police or when the police were standing silently by. (Stapleton, supra, 70 Cal.2d at p. 103, 73 Cal. Rptr. 575.) We are mindful, however, of the increasing reliance placed

upon private security personnel by local law enforcement authorities for the prevention of crime and enforcement of the criminal law and the increasing threat to privacy rights posed thereby. Since Stapleton was decided, the private security industry has grown tremendously, and, from all indications, the number of private security personnel continues to increase today. A recent report prepared by the Private Security Advisory Council to the United States Department of Justice describes this phenomenon in the following terms: "A vast army of workers are employed in local, state and federal government to prevent crime and to deal with criminal activity. Generally thought of as the country's major crime prevention force are the more than 40,000 public law enforcement agencies with their 475,000 employees. While they constitute the....most visible component of the criminal justice system, another group has been fast rising in both numbers and responsibility in the area of crime prevention. With a rate of increase exceeding even that of the public police, the private security sector has become the largest single group in the country engaged in the prevention of crime." (Private Security Adv. Coun. to U.S. Dept. of Justice, LEAA, Report on the Regulation of Private Security Services. (1976) p.1.)

Realistically, therefore, we recognize that in our state today illegal conduct of privately employed security personnel poses a threat to privacy rights of Californians that is comparable to that which may be posed by the unlawful conduct of police officers. (See generally, Private Police in California A Legislative Proposal, supra, 5 Golden Gate L. Rev. 115; Bassiouni, Citizen's Arrest: The Law of Arrest, Search and Seizure for Private Citizens and Private Police. (1977), p. 72.) Moreover, the application of the exclusionary rule can be expected to have a deterrent effect on such unlawful search and seizure practices since private security personnel, unlike ordinary private citizens, may regularly perform such quasi-law enforcement activities in the course of their employment. (See Seizures by Private

Parties, Exclusion in Criminal Cases (1967) 19 Stan. L. Rev. 608, 614-615.)

In the instant case, however, we need not, and do not, decide whether the constitutional constraints of article 1, section 13, apply to all of the varied activities of private security personnel, for here the store security forces did not act in a purely private capacity but rather were fulfilling a public function in bringing violators of the law to public justice. For reasons, hereinafter expressed, we conclude that under such circumstances, i.e., when private security personnel conduct an illegal search or seizure while engaged in a statutorily-authorized citizen's arrest and detention of a person in aid of law enforcement authorities, the constitutional proscriptions of article 1, section 13 are applicable.

Although past cases have not applied the constitutional restrictions to purely private searches, we have recognized that some minimal official participation or encouragement may bring private action within the constitutional constraints on state action. (Stapleton v. Superior Court, supra, 70 Cal. 2d 97, 101, 73 Cal. Rptr. 575.) As noted by the United States Supreme Court in United States v. Price (1965) 383 U.S. 787, 86 S. Ct. 1152, 16 L.Ed.2d 267, a person does not need to be an officer of the state to act under color of law and therefore be responsible, along with such officers, for actions prohibited to state officials when such actions are engaged in under color of law. (Id., p. 794, and fn. 7, 86 S.Ct. 1152 thereunder; cf.Burton v. Wilminton Pkg. Auth. (1961) 365 U.S. 715, 725, 81 S. Ct. 856, 6 L.Ed.2d.45; Weeks v. U.S. (1914) 232 U.S. 383, 398, 34 S.Ct. 341, 5 L.Ed.652; Marsh v. Alabama, (1946) 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265).

In the instant case, the store employees arrested defendant pursuant to the authorization contained in Penal Code section 837, and the search which yielded the narcotics was conducted incident to that arrest. Their acts, engaged in

pursuant to the statutes, were no those of a private citizen acting in a purely private capacity. Although the search exceeded lawful authority, it was nevertheless an integral part of the exercise of sovereignty allowed by the state to private citizens. In arresting the offender, the store employees were utilizing the coercive power the state to further a state interest. Had the security guards sought only the vindication of the merchant's private interest they would have simply exercised self-help and demanded the return of stolen merchandise. Upon satisfaction of the merchant's interests, the offender would have been released. By holding defendant for criminal process and searching her, they went beyond their employer's private interests.

Persons so acting should be subject to the constitutional proscriptions that secure and individual's right to privacy, for their actions are taken pursuant to statutory authority to promote a state interest in bringing offenders to public accounting. Unrestrained, such action would subvert state authority in defiance its established limits. It would destroy the protection those carefully defined limits were intended to afford to everyone, the guilty and innocent alike. It would afford de facto authorizations for searches and seizures incident to arrests or detentions made by private individuals that even peace officers are not authorized to make. Accordingly, we hold that in any case where private security personnel assert the power of the state to make an arrest or to detain another person for transfer to custody of the state, the state involvement is sufficient for the court to enforce the proper exercise of that power (cf. People v. Haydel (1974) 12 Cal.3d 190, 194, 115 Cal. Rptr. 394) by excluding the fruits of illegal abuse therefore. We hold that exclusion of the illegally seized evidence is required by article 1, section 13 of the California Constitution.

In the case before this Court, there was clearly an on-going

business relationship between the City of Richland and the Paradise Club. The Paradise Club sought out advice from the Police Department in an effort to reduce the crime that was occurring at their business. They sought out training for their security personnel regarding the techniques of seizure and advice on what was permissible and what was not when contacting individuals and seizing evidence. The City of Richland provided both training and advice. They also provided Richland police officers, as employees of the club, as security details during functions at the club. This level of involvement by the City of Richland creates state action wherein the state cannot benefit by the actions of independent parties. Furthermore, the State of Washington should not be able to benefit from the illegal activities of private citizens of the State of Washington in the pursuit of law enforcement. The Appellant was detained and searched without reasonable, articulable suspicion of criminal activity, there certainly wasn't probable cause, and he was held against his will, after requesting to leave, and assaulted by security personnel. Further, the club personnel illegally possessed a controlled substance from the time it was taken from

the Appellant's pants pocket until the time that law enforcement arrived and took the substance. This is not only against the protocol of the club, it is contrary to the law in the State of Washington. However, security agents were never charged with any crimes.

Unlike the Fourth Amendment, Constitution Article 1, Section 7 of the Washington Constitution recognizes that individuals have a right to privacy with no express limitations. There are no exceptions that would have allowed law enforcement to detain and search the Appellant under these circumstances.

In State v. Eisfeldt, 185 P.3d 580, the Court held that the private search doctrine is contrary to the Washington Constitution. Under the private search doctrine, a warrantless search by a state actor does not offend the Fourth Amendment if the search does not expand the scope of the private search. The doctrine was first espoused in Walter v. United States, 447 U.S. 649, 100 S.Ct. 2395, 65 L.2d 410 (1980). Underlying this doctrine is the rationale that an individual's reasonable expectation of privacy is destroyed when the private actor

conducts his search or the state does not violate an individual's reasonable expectation of privacy, the Fourth Amendment is not offended. However, the Eisfeldt court held that Article I, Sec. 7 provides greater protection from state action than does the fourth Amendment. The Court further held that an individual's privacy interests protected by Article I, Sec. 7 survives the exposure that occurs when it is intruded upon by private actors. Unlike the reasonable expectation of privacy protected by the Fourth Amendment, an individual's privacy interest is not extinguished simply because the private actor is actually intruded upon or is likely intruded upon, that interest. Eisfeldt, 585.

Because Eisfeldt determined that the private search doctrine is contrary to Article I, Sec. 7 and is inapplicable to warrantless searches in Washington, the illegal seizure and search of the Appellant is not protected under Article I, Sec. 7. The security personnel did not have the authority to conduct a search and seizure of the Appellant. As argued to the hearings court, even under the private search doctrine where the Appellant can establish close ties between law enforcement and the private party, that the distinction between public and private activities

becomes blurred and thus is not protected. The exclusionary rule is inapplicable to private persons unless it is shown that the State in some way instigated, encouraged, counseled, directed or controlled the conduct of the private person. State v.Wolken, 103 Wn. 2d 823, 830, 700 P.2d 319 (1985). Although there is no per se rule that can determine whether a private citizen's action as a governmental authorities and each case must be determined by its own circumstances, the fact that there was a close working relationship with authorities may make a person an agent of the State. This principle is recognized in State v. Birdwell, 6 Wn. App. 284, 288, 492 P.2d 249.

In this case, there clearly was a very close working relationship between the City of Richland Police Department and the training of the Paradise Club's security personnel. In addition, there was a police influence on the policies of the Paradise Club. Police Officers were employed by the Paradise Club as security, they provided training and expertise on what was constitutionally protected behavior. The activities of the Paradise Club security personnel mirror the training provided by the Richland Police Department. When the Paradise Club performed searches of

individuals without probable cause and then detained them, unlawfully, until such time that law enforcement could be called and respond, they were acting as agents of the State of Washington. Thus their behavior is not protected and the evidence obtained as a result of a warrantless search and seizure and without reasonable, articulable suspicion should have been suppressed.

The Appellant's final argument centers on whether or not the illegal activities of the security personnel, specifically unlawfully detaining him, assaulting him and then illegally possessing controlled substances in violation not only of the club's policy but the law was reasonable. On the one hand, the State argues that the security personnel is a private citizen and not acting as an agent of the State, therefore the exclusionary rule doesn't apply. But when that same private citizen commits three offenses, unlawful detention, assault and possession of a controlled substance, the State declines to file criminal charges.

The Appellant argues that is simply because they are not acting as private citizens but as agents of the State, specifically the Richland Police Department. The lack of charges against the

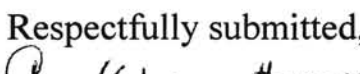
Paradise Club personnel would certainly support that position. If that is not the case, the government is in fact encouraging private citizens to engage in illegal activities for their benefit. It is inconceivable that State would be allowed to ignore the protections provided to citizens by the Washington and federal constitutions and be allowed to use illegally obtained evidence to promote prosecutions. For this reason alone, the evidence should have been suppressed and the case ultimately dismissed.

## V. CONCLUSION

The Appellant respectfully asks this court to reverse and dismiss this case as a result of the illegal detention and search by a third party private citizen acting as a state agent. There are no exceptions to the warrant requirement that would justify the search and seizure of the Appellant under these circumstances. Furthermore, the State should not be allowed to benefit as a result of the illegal actions of the Paradise Club security personnel and their close relationship with the Richland Police Department. This Court should adopt the reasoning in California's case of Zelinski if it has not already done so under Eisfeldt.

DATED this 23rd day of January, 2012.

Respectfully submitted,



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| | ) | DECLARATION OF SERVICE |
| JOEL CHAVEZ, | ) | |
| | ) | |
| Appellant. | ) | |

I, SUE S. ORSAG, hereby declare that the following statement is true:

That I am a citizen of the United States of America, over the age of 18 years and not a party to this action; that on the 24th day of January, 2012, a full, true and correct copy of the Brief of Appellant was placed with Inter-City Legal Messenger Service for delivery upon **ANDREW MILLER**, Benton County Prosecutor, Kennewick, WA, and a copy of same was **personally given to Appellant**.

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

DATED at Pasco, WA this 24th day of January, 2012.

Sue S. Orsag

SUE S. ORSAG