

FILED
Apr 17, 2012
Court of Appeals
Division III
State of Washington

NO. 299619-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

JOEL CHAVEZ, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 09-1-00253-7

BRIEF OF RESPONDENT

ANDY MILLER
Prosecuting Attorney
for Benton County

ANITA I. PETRA, Deputy
Prosecuting Attorney
BAR NO. 32535
OFFICE ID 91004

7122 West Okanogan Place
Bldg. A
Kennewick WA 99336
(509) 735-3591

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ISSUES

1. WAS SECURITY PERSONNEL WORKING AS STATE AGENTS?
2. WERE THE ACTIONS OF SECURITY PERSONNEL JUSTIFIED UNDER THE PRIVATE SEARCH DOCTRINE? IF NOT SHOULD THE STATE BENEFIT?

STATEMENT OF THE CASE

Club Paradise was an establishment in the City of Richland. (RP 19-20). In 2006, Club Paradise was the leading liquor establishment for calls for police service. (RP 20). From January through April of 2007, the club had three times more calls for service than they did during that same time in 2006. (RP 20). Richland Police were responding to all of these calls and leaving the rest of the city unprotected. (RP 20). In April of 2007, Captain Wehner approached the owners of Club Paradise in an effort to address this problem. (RP 21). The City of Richland and Club Paradise created an agreement where the club would hire off-duty officers to assist with larger events, such as music events. (RP 21).

Also, during this time the City of Richland conducted one training session on Verbal Judo techniques for the security team at Club Paradise. (RP 22). Richland Police advised the owners of Club Paradise not to seize any suspected drugs from individuals should they be found during the security pat down at the club. (CP 127; RP 24).

On March 14, 2009, Charles Reum and Christopher Boyd were employed at Club Paradise as security personal. (RP 11, 36, 49). Mr. Reum had been employed there for approximately two years. (RP 36). Mr. Boyd was head of security. (RP 49). At the suppression hearing, no testimony was elicited from Mr. Boyd regarding any classes or involvement he had with the Richland Police Department. (RP 48-59). Mr. Reum testified that during the two years that he worked at Club Paradise, his only involvement with the Richland Police Department was taking a class called Verbal Judo. (RP 36).

Upon entry to Club Paradise, there was a sign displayed informing all that entered that they would be patted down and searched prior to entry. (CP 127; RP 37). On March 14, 2009, the defendant entered the club and first showed his ID. (RP 37). The defendant was then directed to two pat down security personnel. (RP 37, 54-55). People were not allowed to bring into the club guns, knives, drugs, Visine, medication in any kind of unauthorized containers, and alcohol. (RP 59). Charles Reum observed the defendant in the "pat down" area. (RP 38, 40). Another individual did a quick pat down to check for bulky items, and saw a bulge in his pocket. (RP 40). Security asked the defendant what was in his pocket, and the defendant then put his hands back in his pockets. (RP 40). At that point, he was grabbed by security because no one knew what he had on him. (RP 40-41). The defendant did not want to show the individuals what was in his pocket, and wanted to leave. (RP 41, 62). The defendant was

restrained by club security. (RP 41, 55). It is unclear from the testimony if the drugs fell out of his pocket, or if the drugs were taken from his pocket. (RP 41, 51). The defendant was handcuffed while the police were called. (RP 41).

Officer Bickford arrived and observed the defendant, handcuffed on the floor. (RP 13). The defendant was ultimately arrested for Possession of a Controlled Substance and charged. (CP 1-2).

A CrR 3.6 hearing was held on February 21, 2011. (CP 126). The defendant was found guilty of Unlawful Possession of a Controlled Substance at a stipulated facts trial on May 13, 2011, and sentenced on May 26, 2011. (CP 126, 130-39).

ARGUMENT

1. SECURITY PERSONNEL WERE NOT WORKING AS STATE AGENTS.

The trial court's conclusions of law following a suppression hearing will be reviewed de novo. *State v. Williams*, 147 Wn. App. 678, 683, 201 P.3d 371 (2009).

Both Article I, section 7 of the Washington Constitution and the Fourth Amendment to the United States Constitution were intended as a restraint upon sovereign authority; in the absence of state action, they have no application regardless of the scope of protection which would otherwise be afforded under either provision. *State v. Ludvik*, 40 Wn. App. 257, 262, 698 P.2d 1064 (1985). Thus, the exclusionary rule does not apply to the acts of private individuals. *State v. Smith*, 110 Wn.2d 658, 666, 756 P.2d 722 (1988); accord *State v. Wolken*, 103 Wn.2d 823, 830, 700 P.2d 319 (1985) (Because the exclusionary rule is inapplicable to the actions of private person, the misconduct must be that of a government agent); *Ludvic*, 40 Wn.App. at 262 (Constitution guarantees against unreasonable searches and seizures protect only against governmental actions and do not require the application of the exclusionary rule to evidence

obtained from private citizens acting on their own initiative).

In order to prove that a private individual was acting as a governmental agent it must be shown that the State in some way instigated, encouraged, counseled, directed, or controlled the conduct of the private person. *Smith*, 110 Wn.2d at 666. A private individual is a state actor, such that his or her search constitutes state action, where he or she functions as an agent or instrumentality of the state. *City of Pasco v. Shaw*, 161 Wn.2d 450, 460, 166 P.3d 1157 (2007). For an agency to exist, there must be a manifestation of consent by the principal (the police) that the agent (the informant) acts for the police and under their control and consent by the informant that he or she will conduct himself or herself subject to police control. *Smith*, 110 Wn.2d at 670. Stated otherwise, key considerations in making a determination of a state agency include whether the government knew

of and acquiesced in the intrusive conduct, and whether the private party intended to assist law enforcement efforts or to further his or her own ends. *City of Pasco*, 161 Wn.2d at 460. The mere fact that there are contacts between the private person and police does not make that person an agent. *State v. Walter*, 66 Wn. App. 862, 866, 833 P.2d 440 (1992).

Because "Club Paradise" is a private entity, no state action occurred - and thus, the exclusionary rule does not apply unless the security guards working for Club Paradise were acting as agents of the State. See, *Smith*, 110 Wn.2d at 666. The defendant bears the burden of establishing that state action occurred. *City of Pasco*, 161 Wn.2d at 460 (it is the party asserting the unconstitutionality of an action that bears the burden of establishing that state action is involved).

The defendant attempts to meet this burden by stating (1) there was a business relationship

between the City of Richland and the Paradise Club, (2) that the Paradise Club sought out the advice of the City of Richland in an effort to reduce the crime, (3) the Paradise Club sought out training for their security personal, and (4) that the City of Richland provided Richland Police Officers during functions at the club. The defendant did not meet its burden. Police officers were not employed as security in the club. Captain Wehner contacted the Club in an effort to provide adequate protection to all the citizens of Richland. (RP 21). The club decided to hire off duty police officers to assist with the crowds on certain events. (RP 21). In addition, one single class of Verbal Judo was given to the security personnel. (RP 22). These actions do not rise to the level of a state agency relationship. This is simply proof of a good working relationship between businesses and police in an effort to protect all citizens.

2. THE PRIVATE SEARCH DOCTRINE IS NOT APPLICABLE TO THIS CASE.

The State of Washington does not recognize the private search doctrine as an exception to the exclusionary rule. *State v. Eisfeldt*, 163 Wn.2d 628, 637-38, 185 P.3d 580 (2008). Pursuant to 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. *Eisfeldt*, 163 Wn.2d at 636.

The fact that our State does not recognize the private search doctrine as an exception to the exclusionary rule is not important to the facts of this case. The private search doctrine assumes that state action has occurred - otherwise the alleged search and seizure would have needed to be based on reasonable, articulable suspicion of criminal activity.

Here, no state action occurred; thus the controlled substance at issue was not admissible pursuant to that doctrine.

Lastly, the defendant argues that since the State elected not to charge the security personnel with a crime, the State is benefiting and encouraging private citizens to engage in illegal activities for the benefit of the State.

The prosecutor has discretion in their charging decision and certainly the intent behind the security personnel played a role in that decision.

CONCLUSION

The defendant failed to meet their burden of proving the security guards were acting as an instrument or agent of the State. Based on the foregoing, the State respectfully requests that the decision of the trial court be affirmed

RESPECTFULLY SUBMITTED this 16th day of
April 2012.

ANDY MILLER

Prosecutor

A handwritten signature in black ink, appearing to read "Anita Petra", written in a cursive style.

ANITA I. PETRA, Deputy

Prosecuting Attorney

Bar No. 32535

OFC ID No. 91004

CERTIFICATE OF SERVICE

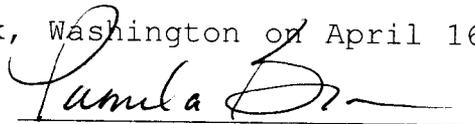
I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

Robert J. Thompson
Attorney at Law
504 W. Margaret Street
Pasco, WA 99301

U.S. Regular Mail,
Postage Prepaid

U.S. Regular Mail,
Postage Prepaid

Signed at Kennewick, Washington on April 16,
2012.



Pamela Bradshaw
Pamela Bradshaw
Legal Assistant

Benton County Prosecutor's Office
7122 W. Okanogan, Bldg. A
Kennewick, WA 99336
Telephone: (509) 735-3591