

No. 30273-3-III

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

FILED
March 6, 2012
Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

MIGUEL ANGEL CASTANEDA,
Defendant/Appellant.

APPEAL FROM THE WALLA WALLA COUNTY SUPERIOR COURT
Honorable Donald W. Schacht, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying appellant's motion to suppress evidence obtained as a result of an unlawful search of his person.

2. To the extent they are findings of fact, the trial court erred in concluding as follows in its Letter Opinion (CP 47):

The case cited by the Plaintiff [,] State v. Mendez, 137 Wn.2d 208 (1999), sets forth the factors the police must consider in searching [sic] a vehicle passenger. Those factors are set out in Plaintiff's memorandum. Many of those factors were present in the instant case and were considered by and discussed among the officers present.

The Court adopts the reasons, rationale and arguments set forth in Plaintiff's memorandum. The State has justified the warrantless search of Defendant Castaneda for purposes of officer safety.

3. To the extent they are findings of fact, the trial court erred in entering the following:

COURT'S FINDINGS AS TO THE FACTS (2) That the court finds that the baggie of methamphetamine that fell from Mr. Castaneda's pocket was discovered during a valid pat-down search for weapons for officer safety. (CP 71)

COURT'S REASON FOR ADMISSIBILITY OF PHYSICAL EVIDENCE (1) That the baggie containing methamphetamine found at Mr. Castaneda's feet which fell from his pocket is admissible for the reason it was found during a lawful traffic stop and a valid police frisk for officer safety. (CP 71)

4. The record does not support the finding that Mr. Castaneda has the current or future ability to pay legal financial obligations.

Issues Pertaining to Assignments of Error

1. Do the Fourth Amendment and Wash. Const. art. I permit an officer to conduct a weapons search of a non-suspected, non-arrested passenger ordered out of a vehicle being seized for possibly containing illegal drugs absent specific, articulable facts supporting an objectively reasonable belief that the passenger was armed and dangerous?

2. Should the finding that Mr. Castaneda has the current or future ability to pay legal financial obligations be stricken from the Judgment and Sentence as clearly erroneous, where it is not supported in the record?

B. STATEMENT OF THE CASE

The State charged Miguel Angel Castaneda with possession of a controlled substance. CP 8–9. Following a suppression hearing the court entered ‘undisputed facts’¹, which are summarized as follows in relevant part.

Shortly after 1:00 a.m., Sheriff Deputy Boyd made a traffic stop of a car in which Mr. Castaneda was a passenger and one of five total

¹ The CrR 3.6 document is entitled “Findings, Conclusion, and Order Regarding Suppression Hearing.” CP 67. It is divided into subsections titled “Undisputed Facts”, “Disputed Facts 1) There are no disputed facts.”, “Court’s Findings as to the Facts” and “Court’s Reason for Admissibility of Physical Evidence.” CP 67, 70–71. The structure of the document thus appears to follow the information required to be filed by the trial court in support of a decision made on a CrR 3.5 motion. *See* CrR 3.5(c).

occupants, for a believed failure to transfer title and a potential window tinting violation. Dep. Boyd had followed the car after seeing it stop in an area known for gang activity and then leave a few minutes later. CP 67–68 at (1). Upon approaching the car, Dep. Boyd could see the driver and front seat passenger, and estimated there were four, maybe five total occupants. While at the front passenger door, he had limited ability to see the back seat area. CP 69 at 69 at (4). The driver was arrested for the traffic violations and several occupants other than Mr. Castaneda were arrested on active warrants, and they were removed from the car. CP 68 at (2).

Dep. Boyd then requested a K-9 drug sniff, based on information he'd heard one to two weeks earlier that this car may have possibly been involved in trafficking drugs in the local area. Officer Fulmer arrived and his K-9 alerted to the presence of drugs. Police decided to seize the car and apply for a search warrant. CP 68 at (2).

Detective Bayne had arrived on scene. He apparently had knowledge of more specific information, but told police at the scene general information that the car may have been involved in drug trafficking two weeks earlier, that the driver and some of the occupants including Mr. Castaneda were affiliated with gangs, and that some of the

occupants may have been involved in a shooting incident two years earlier. CP 68–69 at (3).

To the extent he could see inside the car, Dept. Boyd did not observe any of the occupants say or make any movements that caused him to have concern for his safety. CP 69 at (4). He also indicated he had no reason to have his weapon drawn. CP 70 at (4). A fellow officer, Deputy Martin, was standing approximately four to five feet behind the passenger side of the car. CP 70 at (4). “Dep. Boyd testified that once the decision was made to seize the vehicle and order the occupants out of the vehicle, in his opinion that was enough in and of itself to be sufficient reason to do a weapons frisk pat down even without any kind of threatening motions by any of the occupants.” CP 70 at (4).

Off. Fulmer testified that during the 15 to 20 minutes he was at the scene, he had the occupants of the car under constant observation; he later said he was not standing by the car the entire time, and was moving back and forth and not really paying attention to the car because of his other duties. Off. Fulmer testified he was not aware of any reason that ordering the occupants out of the car was required for safety reasons. CP 70 at (4).

Ultimately, Mr. Castaneda was asked to get out of the car and Off. Fulmer conducted a weapons pat-down frisk. CP 68 at (3). During the

frisk, a plastic baggie fell out of Mr. Castaneda's pocket. The contents of the baggie were later determined to be methamphetamine. Mr. Castaneda was subsequently arrested and charged. CP 70 at (5).

In its letter opinion, the court concluded the warrantless search was lawful because it was done for purposes of officer safety, and denied the defense motions to suppress and dismiss. CP 46–47. In its written order, the trial court noted there “are no disputed facts.” CP 70. Under the heading “Court’s Findings as to the Facts”, the court “finds that Deputy Boyd had a lawful basis to stop the vehicle in which Miguel Castaneda was a passenger” (CP 70 at (1)) and “that the baggie of methamphetamine that fell from Mr. Castaneda’s pocket was discovered during a valid pat-down search for weapons for officer safety” (CP 71 at (2)).

Under the heading “Court’s Reason for Admissibility of Physical Evidence”, the court stated “[t]hat the baggie containing methamphetamine found at Mr. Castaneda’s feet which fell from his pocket is admissible for the reason it was found during a lawful traffic stop and a valid police frisk for officer safety.” CP 71 at (1).

Mr. Castaneda was subsequently convicted on stipulated facts. CP 48–49, 50–51. The Stipulation was “entered into not for the purpose of the defendant's admission of guilt, but for the purpose of entering a finding

of guilt based on a stipulation as to facts sufficient to support such a finding, and with the understanding that the defendant is doing so to preserve any rights he may have to appeal the decision of the court regarding the suppression of evidence.” CP 48–49. The court imposed a standard range period of confinement, converted to partial confinement. CP 54, 58. As a condition of sentence, the court made the following finding:

¶ 2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. (RCW 9.94A.760) The court has considered the defendant's past, present, and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court specifically finds that the defendant has the ability or likely future ability to pay the financial obligations ordered herein.

CP 55 (capitalization/bolding in original).

This appeal followed. CP 72.

C. ARGUMENT

1. A weapons search that is unsupported by particular facts from which the court can reasonably infer legitimate safety concerns is unconstitutional.²

a. Standard of review. Findings of fact on a motion to suppress are reviewed under the substantial evidence standard. State v. Hill, 123

Wn.2d 641, 647, 897 P.2d. 313 (1994). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. Id. at 644. Conclusions of law in an order pertaining to suppression of evidence are reviewed *de novo*. State v. Johnson, 128 Wn.2d 431, 443, 909 P.2d 293 (1996).

b. General legal principles. Under the Fourth Amendment and article I, section 7 of the Washington Constitution, warrantless searches and seizures are per se unreasonable, and the State bears the burden of demonstrating that a challenged search falls within one of the few narrow exceptions to the general rule. State v. Williams, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984); *see also* State v. Ladson, 138 Wn.2d 343, 350–51, 979 P.2d 833 (1999). The courts have, however, recognized a number of narrow exceptions that allow the police to conduct searches and seizures without a warrant. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); State v. Crane, 105 Wn. App. 301, 312, 19 P.3d 1100 (2001), *overruled on other grounds by* State v. O’Neill, 148 Wn.2d 564, 62 P.3d 489 (2003).

One such exception allows officers to briefly detain a person when they have a reasonable suspicion that the person has committed or is about

² Assignment of Error 1, 2 at ¶ 2, 3.

to commit a crime or is a safety threat. Terry, 392 U.S. at 21; Crane, 105 Wn. App. at 312. But even such a brief detention must be justified by “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” Terry, 392 U.S. at 21.

When police order a passenger to exit or return to the car, it is an unreasonable intrusion of the passenger’s right to privacy and an illegal seizure unless police have an “articulate and objective rationale” predicated on safety concerns. State v. Mendez, 137 Wn.2d 208, 212, 970 P.2d 722 (1999) (overruled on other grounds by Brendlin v. California, ___ U.S. ___, 127 S.Ct. 2400, 168 L.Ed.2d 132 (2007)). Furthermore, if the police subsequently frisk a passenger for safety purposes, the frisk “will be justifiable only where the officer is able to point to specific, articulable facts giving rise to an objectively reasonable belief that the passenger could be armed and dangerous. State v. Horrace, 144 Wn.2d 386, 399–400, 28 P.3d 753 (2001); State v. Adams, 144 Wn. App. 100, 105, 181 P.3d 37 (2008). Equally, an officer may not conduct a limited protective frisk when the officer is aware only of potential danger but has no articulable suspicion a particular passenger is armed and dangerous. State v. Glenn, 140 Wn. App. 627, 635, 166 P.3d 1235 (2007); State v. Terrazas, 71 Wn.

App. 873, 878–79, 863 P.2d 75 (1993), *rev. denied*, 123 Wn.2d 1028 (1994); *see also* State v. Sweet, 44 Wn. App. 226, 234, 721 P.2d 560, *rev. denied*, 107 Wn.2d 1001 (1986) (“ ‘generalized suspicion’ is insufficient to justify a frisk.”). Generalized suspicion and a mere invocation of an “officer safety” justification is insufficient to justify a weapons search. State v. Walker, 66 Wn. App. 622, 630, 834 P.2d 41 (1992). The suspicion must be specific to the particular suspect. State v. Galbert, 70 Wn. App. 721, 725, 855 P.2d 310 (1993).

c. The frisk was unconstitutional. Officer Fulmer acted without lawful authority by conducting a weapons frisk because police did not articulate facts to support a reasonable suspicion that Mr. Castaneda or any of the occupants of the vehicle was armed and dangerous.³ The law requires that the pat-down search permitted during an investigative stop must be predicated on legitimate safety concerns. Here, there was nothing

³ Mr. Castaneda does not assert Detective Boyd’s command that all passengers step out of the car was unconstitutional. In State v Mendez, 137 Wn.2d at 220–21, the court held an officer who lawfully stops a vehicle and arrests someone, may then order passengers in or out of the vehicle as necessary to ensure safety. Here, the remaining occupants were ordered out not to ensure safety but to allow for search of the car once the warrant was obtained and for its subsequent impoundment. But in either case, the subsequent frisk of Mr. Castaneda was not justifiable where the officers did not articulate any facts which led them to an objectively reasonable belief that he could be armed and dangerous. Horrace, 144 Wn.2d at 399–400; Adams, 144 Wn. App. at 105. Assignment of Error 2, ¶ 1: Contrary to the court’s language (and the State’s apparent argument), Mendez instead sets out factors the police *may* consider in *ordering a vehicle passenger to remain in or to get out of a vehicle in order to control the scene*. Mendez, 137 Wn.2d at 220.

to indicate that Mr. Castaneda was a threat to safety or armed. Deputy Boyd did not observe any of the occupants say or make any movements that caused him to have concern for his safety, and also indicated he had no reason to have his weapon drawn. CP 70 at (4). Officer Fulmer also observed the occupants of the car, and testified he was not aware of any reason that ordering the occupants out of the car was required for safety reasons. CP 70 at (4). CP at 78–79. There were no furtive movements as in Horrace. Horrace, 144 Wn.2d at 398–91.

The trial court did not make a factual finding that the weapons frisk was done for officer safety purposes. Nor would the testimony support such a finding. Yet the court entered conclusions of law that the weapons frisk of Mr. Castaneda was validly performed “for officer safety”. CP 71 at Court’s Findings as to the Facts (2); CP 71 at Court’s Reason for Admissibility of Physical Evidence (1). The officers' testimony affirmatively establishes the lack of any reasonable and articulable justification for searching Mr. Castaneda. State v. Abuan, 151 Wn. App. 135, 147, 257 P.3d 1 (2011). Thus, the weapons search cannot be justified on the basis of reasonable safety concerns. The search occurred outside the scope of *Terry* and the evidence therefore should have been suppressed. State v. Adams, 144 Wn. App. at 107.

2. The finding that Mr. Castaneda has the current or future ability to pay legal financial obligations is not supported in the record and must be stricken from the Judgment and Sentence.⁴

The record does not support the trial court's judgment and sentence "finding" that Mr. Castaneda has the current or future ability to pay legal financial obligations (hereinafter "LFOs"). CP 55 at ¶ 2.5. The trial court's determination "as to the defendant's resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard." State v. Bertrand, ___ Wn. App. ___, 267 P.3d 511, 2011 WL 6097718, *4 (Dec. 18, 2011), citing State v. Baldwin, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991).

"Although Baldwin does not require formal findings of fact about a defendant's present or future ability to pay LFOs, the record must be sufficient for [the appellate court] to review whether 'the trial court judge took into account the financial resources of the defendant and the nature of the burden' imposed by LFOs under the clearly erroneous standard (bracketed material added) (internal citation omitted)." Bertrand, 2011 WL 6097718, *4, citing Baldwin, 63 Wn. App. at 312.

⁴ Assignment of Error 4.

The record here does not show that the trial court took into account Mr. Castaneda's financial resources and the nature of the burden of imposing LFOs. In response to the court's questions, Mr. Castaneda said he worked at Davis Orchards in Milton –Freewater, was not working at the time of sentencing, and would return to work in two days. RP 86–87, 89. The court did not delve further into his resources, debt owed or other obligations. Thus the record contains no evidence to support the trial court's finding in ¶ 2.5 that Mr. Castaneda has the present or future ability to pay LFOs. The finding is therefore clearly erroneous and must be stricken from the Judgment and Sentence. Bertrand, 2011 WL 6097718, *5.

D. CONCLUSION

For the reasons stated, this Court should reverse the denial of the suppression motion and dismiss the conviction, or in the alternative remand the matter for resentencing to strike the finding as to ability and means to pay legal financial obligations.

Respectfully submitted on March 6, 2012.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on March 6, 2012, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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