

No. 30757-3-III

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

FILED
JAN 17, 2013
Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON,
Plaintiff/Respondent,

v.

CARL DOUGLAS JOHNSON,
Defendant/Appellant.

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

- A. THE TRIAL COURT DID NOT ERR WHEN IT DENIED THE MOTION TO SUPPRESS EVIDENCE AS THE APPELLANT WAS NOT SEIZED BY LAW ENFORCEMENT.

- B. THE TRIAL COURT DID NOT ERR IN ITS WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW RE CrR 3.6 HEARING, IN CONCLUSIONS AS TO DISPUTED FACTS 7, WHICH STATES, IN PART, “. . . MR. JOHNSON VOLUNTARILY CONSENTED TO THE SEARCH OF HIS VEHICLE BY DETECTIVE MATHENA.”

- C. THE TRIAL COURT DID NOT ERR IN ITS WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW RE CrR 3.6 HEARING, IN DISPUTED FACTS 4, WHICH STATES, IN PART, “. . . DETECTIVE MATHENA TOLD MR. JOHNSON THAT BASED UPON MR. JOHNSON'S STATEMENT THAT THERE WAS MARIJUANA IN THE TRUCK, THAT DETECTIVE MATHENA COULD SEEK A SEARCH WARRANT TO SEARCH THE VEHICLE.”

D. THE TRIAL COURT DID NOT ERR IN ITS WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW RE CrR 3.6 HEARING, BY ENTERING CONCLUSIONS OF LAW 1-4.

II. STATEMENT OF THE CASE

On July 21, 2011, the appellant, Carl D. Johnson, was arrested for the crime of Unlawful Possession of a Controlled Substance-Methamphetamine. 1RP 26, 33-34. On August 16, 2011, the State filed an Information charging the appellant with the crime of Unlawful Possession of a Controlled Substance-Methamphetamine. CP 1-2.

On November 22, 2011, the appellant filed a Motion to Suppress Evidence based upon a claim that Mr. Johnson was unlawfully seized and his vehicle was unlawfully searched. CP 3. Attached to that motion was the appellant's Memorandum in Support of Defendant's Motion to Suppress Evidence. CP 4-14.

On December 13, 2011, the State prepared and filed the State's Memorandum in Opposition to Motion to Suppress. CP 69-72.

On December 29, 2011, the trial court held the suppression hearing. 1RP 4-67. The trial court denied the motion to suppress evidence. 1RP 61-67.

On February 10, 2012, the appellant filed a second Defendant's Motion to Suppress Evidence based upon a claim that Mr. Johnson did not voluntarily consent to the search of his vehicle. CP 15. Attached to that motion was the appellant's Memorandum in Support of Defendant's Motion to Suppress Evidence. CP 16-23.

On February 14, 2012, the trial court entered the written Findings of Fact and Conclusions of Law RE CrR 3.6 Hearing which was held on December 29, 2011. CP 24-30.

On March 1, 2012, the trial court heard and denied the Defendant's Motion to Suppress Evidence based upon a claim that Mr. Johnson did not voluntarily consent to the search of his vehicle. 2RP 2-12.

On March 21, 2012, the trial court entered an Order Denying Motion for Reconsideration. CP 34-35.

On March 21, 2012, the matter proceeded to a trial on stipulated facts. 3RP 3-7. Based upon the stipulated facts, the trial

court found Mr. Johnson guilty of Unlawful Possession of a Controlled Substance-Methamphetamine. 3RP 7.

On March 28, 2012, the appellant was sentenced. 3RP 12-28; CP 36-45.

On April 5, 2012, the appellant filed his Notice of Appeal challenging the trial courts decisions at the suppression hearings on December 29, 2011, and March 1, 2012, and the trial courts orders on the Findings of Fact and Conclusions of Law Re CrR 3.6 Hearing on February 14, 2012, and on the Order Denying Motion for Reconsideration on March 21, 2012. CP 47.

III. ARGUMENT

In reviewing a suppression hearing, an appellate court determines whether substantial evidence supports the court's findings of fact. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999). Findings of fact that are not assigned error are viewed as verities on appeal. RAP 10.3(g); State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Findings are also viewed as verities if "there is substantial evidence to support the findings." Hill, 123 Wn.2d at 644 (citing State v. Halstien, 122 Wn.2d 109, 128, 857

P.2d 270 (1993)). "Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding." Hill, 123 Wn.2d at 644 (citing Halstien at 129). Conclusions of law are reviewed de novo. Mendez, 137 Wn.2d at 214.

A. THE TRIAL COURT DID NOT ERR WHEN IT DENIED THE MOTION TO SUPPRESS EVIDENCE AS THE APPELLANT WAS NOT SEIZED BY LAW ENFORCEMENT.

The appellant alleges that he was unlawfully seized by law enforcement. Pursuant to Article I, Section 7, of the Washington State Constitution, a seizure of a person occurs 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. Rankin, 151 Wn.2d 689, 695, 92 P.3d 202 (2004), citing State v. O'Neill, 148 Wn.2d 564, 574, 62 P.3d 489 (2003). The standard is "a purely objective one, looking to the actions of the law enforcement officer." State v. Young, 135 Wn.2d

498, 501, 957 P.2d 681 (1998). The relevant question is whether a reasonable person in the individual's position would feel he or she was being detained. O'Neill, 148 Wn.2d at 581. An encounter between a citizen and the police is consensual if a reasonable person under the circumstances would feel free to walk away. United States v. Mendenhall, 446 U.S. 544, 554, 100 S. Ct. 1870, 64 L.Ed.2d 497 (1980).

However, not every encounter between a citizen and a police officer constitutes a seizure. A police officer does not seize a person by simply striking up a conversation or asking questions. Florida v. Bostick, 501 U.S. 429 (1991); State v. Mennegar, 114 Wn.2d 304 (1990). Police do not necessarily effect the seizure of a person because they engaged the person in conversation. Florida v. Royer, 460 U.S. 491 (1983).

Detective Mathena did not violated Mr. Johnson's constitutional rights in this case. The trial court found that on July 21, 2011, Mr. Johnson voluntarily drove his vehicle to the location of 3104 School Street, Wenatchee, Washington, where law enforcement was executing a search warrant at the residence of Richelle and Michael Metcalfe. 1RP 26, 28, CP 25. Mr. Johnson parked his vehicle near the shop area and was unaware of the

presence of the SWAT team and other law enforcement members. 1RP 29; CP 25. Several members of the SWAT team approached Mr. Johnson's vehicle, spoke with him briefly concerning why he was at the residence, and then told him he was cleared and free to leave. 1RP 9, 29; CP 25. Mr. Johnson chose to stay on the property because he wanted to contact the owner of the orchard at that location regarding the possibility of work. 1RP 19-20, 29; CP 25. Mr. Johnson felt he was free to leave during this contact with law enforcement, but he did not wish to leave the property. CP 26.

Detective Mathena saw Mr. Johnson drive onto the property and park. 1RP 28; CP 26. Detective Mathena recognized Mr. Johnson from prior law enforcement contacts. 1RP 27-28; CP 26. Based upon those prior contacts, Detective Mathena knew that Mr. Johnson had a history of using unlawful controlled substances. CP 26. Detective Mathena knew that the confidential informant who had provided the information to the Columbia River Drug Task Force regarding the presence of illegal drug activity at 3104 School Street had also mentioned that Mr. Johnson was continuing to use methamphetamine. 1RP 30; CP 26.

Detective Mathena approached Mr. Johnson's vehicle and asked him why he was at the residence. 1RP 29; CP 26. Mr. Johnson stated that he had to meet with Richelle Metcalfe over a business deal. 1RP 29; CP 26. Detective Mathena asked Mr. Johnson if he had any drugs in the vehicle. 1RP 30; CP 26. Mr. Johnson said he could not remember for sure but may have a small amount of marijuana somewhere in the truck. 1RP 30-31; CP 26. Detective Mathena asked Mr. Johnson if he had any methamphetamine in the truck and Mr. Johnson replied that he may have a methamphetamine pipe in the truck. 1RP 31; CP 27. Detective Mathena asked Mr. Johnson to exit the vehicle. 1RP 32; CP 27. Subsequently, Detective Mathena searched the vehicle and found methamphetamine and a glass smoking pipe. 1RP 33-34.

Prior to Mr. Johnson's admissions to having marijuana and a methamphetamine pipe in the vehicle, he had not been seized by law enforcement. Judge Small concluded that Detective Mathena made no threats toward Mr. Johnson, that no guns were drawn, and that no one blocked Mr. Johnson's vehicle. Mr. Johnson could have left the location at any time, but he chose to park his vehicle and remain there at the location. And, further, that Mr. Johnson

chose to voluntarily answer the questions asked by Detective Mathena. 1RP 62-67; CP 28-29.

Once Mr. Johnson admitted to having marijuana and a methamphetamine pipe in the vehicle, Detective Mathena had sufficient cause to detain Mr. Johnson, had he chosen to do so, under Terry stop criteria. Pursuant to a Terry stop, an officer must be able to “point to specific and articulable facts which taken together with rational inferences from those facts, reasonably warrant that intrusion.” Mendez, 137 Wn.2d at 223; Terry v. Ohio, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L.Ed.2d 889 (1968); State v. Armenta, 134 Wn.2d 1, 20, 948 P.2d 1280 (1997).

Thus, the trial court correctly concluded that the appellant’s motion to suppress should be denied as there was no unlawful seizure of the appellant. 1RP 62-67; CP 29. The appellant voluntarily remained at the location where he had parked his vehicle and engaged in non coercive contact and conversation with law enforcement. 1RP 62-67; CP 29. Any reasonable person in the appellant’s position would not have felt that he or she was being detained by law enforcement; but rather, that they were free to leave if they chose to do so.

B. THE TRIAL COURT DID NOT ERR IN ITS WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW RE CrR 3.6 HEARING, IN CONCLUSIONS AS TO DISPUTED FACTS 7, WHICH STATES, IN PART, “. . . MR. JOHNSON VOLUNTARILY CONSENTED TO THE SEARCH OF HIS VEHICLE BY DETECTIVE MATHENA.”

The appellant asserts that the trial court erred when it entered a conclusion as to disputed fact 7, finding that Mr. Johnson voluntarily consented to the search of his vehicle by Detective Mathena.

The State has the burden of demonstrating that Smith's [Mr. Johnson's] consent to the search was voluntarily given. State v. Shoemaker, 85 Wn.2d 207, 210, 533 P.2d 123 (1975); State v. Nelson, 47 Wn. App. 157, 163, 734 P.2d 516 (1987) (prosecution must show consent was voluntary 'by clear and convincing evidence'). '[T]he voluntariness of a consent to search is a question of fact to be determined by considering the totality of circumstances surrounding the alleged consent.' Shoemaker at 211-12 (discussing Schneckloth v. Bustamonte, 412 U.S. 218, 36 L. Ed. 2d 854, 93 S. Ct. 2041 (1973)). Several factors that should be considered in making a determination of voluntariness are: '(1) whether Miranda warnings had been given prior to obtaining consent; (2) the

degree of education and intelligence of the consenting person; and (3) whether the consenting person had been advised of his right not to consent.’ Shoemaker at 212. The various relevant factors are weighed against one another and no one factor is determinative. Shoemaker at 212; Nelson at 163 (‘Although knowledge of the right to refuse consent is relevant, it is not absolutely necessary. Miranda warnings are not a prerequisite to a voluntary consent. Merely because an individual is in . . . custody . . . does not mean that consent is coerced.’ (Citations omitted).))”

State v. Smith, 115 Wn.2d 775, 789, 801 P.2d 975 (1990).

In this case, the trial court considered an additional factor that weighed in favor of a voluntary search—that Detective Mathena read Mr. Johnson his Ferrier warnings before searching his vehicle, even though Ferrier warnings were not required. 1RP 32, 43, 67, CP 27, 29. Ferrier warnings are only required for the search of a home and, under some circumstances, a hotel room. State v. Tagas, 121 Wn. App. 872 (2004); State v. Ferrier, 136 Wn.2d 103, 118, 960 P.2d 927 (1998). The Ferrier warnings given to Mr. Johnson were: (1) You have the right to refuse to consent. (2) If you consent to the search you have the right to withdraw the consent at any time. (3) You have the right to limit the scope of the consent to certain areas of the premises or vehicle. (4) Evidence

found during the search may be used in court against you or any other person. 1RP 32-33.

The trial court properly found and concluded that: (1) Mr. Johnson was not seized and was free to leave, (2) he was provided with the Ferrier warnings before consenting to a vehicle search, (3) he voluntarily allowed Detective Mathena to search his vehicle, and (4) he was a person who has had prior experience with the criminal justice system. 1RP 62-67; CP 29. Thus, Mr. Johnson was well aware of his right to refuse the search of the vehicle, yet he voluntarily consented to its search. 1RP 62-67; CP 29.

Further, the trial court's conclusion that Mr. Johnson voluntarily consented to the search of his vehicle should not be disturbed on appeal. Given the totality of the circumstances, there was substantial evidence in the record supporting this finding of fact and a sufficient quantity of credible evidence in the record to persuade a fair-minded, rational person of the truth of this finding.

C. THE TRIAL COURT DID NOT ERR IN ITS WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW RE CrR 3.6 HEARING, IN DISPUTED FACTS 4, WHICH STATES, IN PART, “. . . DETECTIVE MATHENA TOLD MR. JOHNSON THAT BASED UPON MR. JOHNSON’S STATEMENT THAT THERE WAS MARIJUANA IN THE TRUCK, THAT DETECTIVE MATHENA COULD SEEK A SEARCH WARRANT TO SEARCH THE VEHICLE.”

The appellant contends that Detective Mathena told Mr. Johnson that based upon his admission that there was marijuana in the truck, that Detective Mathena could seek a search warrant for the vehicle, and that statement tainted Mr. Johnson’s ability to consent to a search of the vehicle. However, the trial court concluded that the search of the appellant’s vehicle was based upon voluntary consent given by Mr. Johnson. 1RP 62-67; CP 29.

Detective Mathena asked Mr. Johnson if he had any drugs in the vehicle. 1RP 30; CP 26. Mr. Johnson said he could not remember for sure but may have a small amount of marijuana somewhere in the truck. 1RP 30-31; CP 26. Detective Mathena asked Mr. Johnson whether he had any methamphetamine in the

truck and Mr. Johnson replied that he may have a methamphetamine pipe in the truck. 1RP 30-31; CP 27. Detective Mathena asked Mr. Johnson to exit the vehicle. 1RP 30-32; CP 27. Detective Mathena asked Mr. Johnson for permission to search his truck and read to Mr. Johnson the Ferrier warnings. 1RP 32; CP 27. Mr. Johnson asked if he had to let Detective Mathena search his truck and Detective Mathena told him he did not. 1RP 32; CP27. Detective Mathena told Mr. Johnson that based upon his statement that there was marijuana and a methamphetamine pipe in the truck, that Detective Mathena “felt that I had enough probable cause, at that point, to obtain a search warrant for his vehicle. But the consent portion was entirely up to him. He could decide whatever he wanted to do, at that point.” 1RP 33, 45; CP 27. Mr. Johnson agreed to allow Detective Mathena to search the vehicle. 1RP 33; CP 5. No threats or promises were made to Mr. Johnson in order to obtain consent to search the vehicle. 1RP 33; CP 28.

Simply informing a defendant, that if he refuses consent to search a vehicle, the law enforcement officer could attempt to obtain a search warrant based upon probable cause does not automatically vitiate consent. O’Neill, 148 Wn.2d at 599 (citing

Commonwealth v. Mack, 568 Pa. 329, 796 A.2d 967 (2002)); see also, State v. Smith, 115 Wn.2d at 790 (holding that merely informing a suspect that a warrant would be requested did not coerce consent).

The trial court reviewed the Court Bench Book and in particular the facts in the Smith case before entering the Order Denying Motion for Reconsideration. 2RP 9-12; CP 34-35. In the Smith case, the defendant was told that the officers would request a search warrant if Smith did not consent to the search. He was never told that the officers had a warrant. He adequately understood what he was doing by giving consent. Nothing in the record indicated that Smith was coerced into consenting to the search. And, as a result, the court concluded Smith voluntarily acquiesced to having the vehicle searched. Smith, 115 Wn.2d at 790.

Similarly, the trial court concluded that Mr. Johnson was told by Detective Mathena that he felt he had enough probable cause to obtain a search warrant for the vehicle. Mr. Johnson was never told that the officers had a search warrant for the vehicle. Mr. Johnson was not coerced into consenting to a search of the vehicle. And, as a result, the trial court correctly concluded that Mr.

Johnson voluntarily consented to a search of the vehicle. 2RP 11-12.

D. THE TRIAL COURT DID NOT ERR IN ITS WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW RE CrR 3.6 HEARING, BY ENTERING CONCLUSIONS OF LAW 1-4.

Criminal Rule 3.6(b) provides: "If an evidentiary hearing is conducted, at its conclusion the court shall enter written findings of fact and conclusions of law." In this case the trial court complied with Criminal Rule 3.6(b). CP 24-30.

The appellant claims that the trial court erred by entering Conclusions of Law 1-4. As previously stated, conclusions of law are reviewed de novo. Based upon the sufficiency of the trial court record and supporting case law, this court should uphold Conclusions of Law 1-4. There was substantial evidence supporting the court's conclusions.

In addition, the court made other enumerated conclusions to the disputed facts which are not challenged by the appellant. Those conclusions become a verity on appeal. Those conclusions

pertain to the credibility of the witnesses who testified at the suppression hearing:

1. The court concluded that Detective Mathena's testimony was more credible than Mr. Johnson's testimony with regard to the disputed facts. The court concludes that Mr. Johnson's testimony was inconsistent as to the purpose of his visit to the property. The court finds Mr. Johnson's demeanor changed during his testimony, that he was uncomfortable, hesitant and had [a] pained look on his face, while at other times his testimony was free-flowing. Some of Mr. Johnson's testimony came from leading questions, but on all the critical facts he was on a defensive posture with his arms crossed across his chest and did not appear to be candid in his testimony.

2. The court finds that Detective Mathena was forthright in his demeanor and testimony, including acknowledging what he did not remember, and including whether or not he had mentioned bringing a drug-sniffing dog for the purpose of circling the vehicle.

3. The court finds that Mr. Johnson's hesitancy, defensiveness, and the fact that he could not remember if he had any prior contact with Detective Mathena when it was pretty obvious that Detective Mathena knew him does not make him a very credible witness.

4. The court also concludes that in terms of the timing of how the disputed facts were presented, the testimony of Detective Mathena was more logical.

1RP 62-67; CP 27-28.

The trial court was in the best position to hear the testimony of the witnesses and to decide what weight to assign to their testimony. Judge Small directly observed the plausibility and credibility of the witnesses or the lack thereof. The trial court judged and interpreted the witnesses' demeanors first hand. Therefore, great deference should be given to the trial court's conclusions as to the resolution of disputed facts. Armenta, 134 Wn.2d at 9.

The Findings of Fact, both undisputed and disputed, comport with the testimony presented at the suppression hearing on December 29, 2011. The Conclusions of Law are supported by the testimony presented at the suppression hearing and in the Findings of Fact. The Conclusions of Law were correctly decided by the trial court and should not be disturbed on appeal. Conclusions of Law 1-4 should be affirmed.

IV. CONCLUSION

The evidence of methamphetamine found in the appellant's vehicle was neither the product of an unlawful seizure nor the result

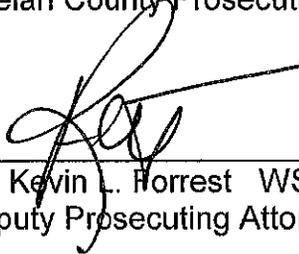
of an unlawful search. The trial court found that evidence was result of the Mr. Johnson's voluntary consent to search his vehicle.

Therefore, this court should affirm the trial court's decision that the evidence was admissible at trial, and remand the matter for further consistent proceedings.

DATED this 17th day of January, 2013.

Respectfully submitted,

Douglas J. Shae
Chelan County Prosecuting Attorney



By: Kevin L. Forrest WSBA #22552
Deputy Prosecuting Attorney

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

STATE OF WASHINGTON,)	No. 30757-3-III
Plaintiff/Respondent,)	Superior Court No. 11-1-00322-2
vs.)	DECLARATION OF SERVICE
CARL D. JOHNSON,)	
Defendant/Appellant.)	

I, Cindy Dietz, under penalty of perjury under the laws of the State of Washington, declare that on the 17th day of January, 2013, I electronically transmitted to:

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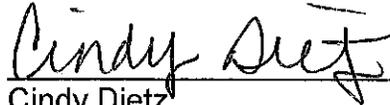
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1 said electronic transmission and envelopes containing true and correct copies of the
2 Brief of Respondent.

3 Signed at Wenatchee, Washington, this 17th day of January, 2013.

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6 Cindy Dietz
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8 Chelan County Prosecuting Attorney's Office
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