

No. 25497-6-III

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

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

DUSTIN WARREN HARRINGTON,

Defendant/Appellant.

APPEAL FROM THE BENTON COUNTY SUPERIOR COURT
HONORABLE CARRIE L. RUNGE (Suppression Hearing)

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

No. 1 The trial court erred in entering Conclusion of Law 2 regarding the suppression hearing: (CP 19)

The answers given by the defendant regarding his sister were themselves suspicious, and supported Officer Reiber continuing the [social] contact.

No. 2 The trial court erred in entering Conclusion of Law 4 regarding the suppression hearing: (CP 19)

The defendant's failure to comply with th[e request to keep his hands out of his pockets], his fidgeting, and nervousness supported the request for the pat down.

No. 3 The trial court erred in entering Conclusion of Law 5 regarding the suppression hearing: (CP 20)

The request for the pat down, combined with the statement that the defendant was not under arrest and the defendant's consent, was not a seizure of the defendant.

No. 4 The trial court erred in entering Conclusion of Law 6 regarding the suppression hearing: (CP 20)

During the search, the nature of the object felt by Officer Reiber gave him the right to ask what the object was.

No. 5 The trial court erred in entering Conclusion of Law 7 regarding the suppression hearing: (CP 20)

The defendant's answer "my glass," and "my meth pipe," combined with the felt object, provided probable cause to arrest the defendant.

No. 6 The trial court erred in entering Conclusion of Law 8 regarding the suppression hearing: (CP 20)

The items seized from the defendant subsequent to his arrest are admissible in the state's case in chief.

No. 7 The trial court erred in denying the defendant's motion to suppress. (Conclusion of Law 9, at CP 20)

Issues Pertaining to Assignments of Error

1. Did a police officer seize Mr. Harrington without a reasonable articulable suspicion of crime before the officer discovered a methamphetamine pipe in Harrington's pocket?

2. Did the officer exploit the illegal seizure to obtain Harrington's confession regarding the methamphetamine pipe?

B. STATEMENT OF THE CASE

Dustin Warren Harrington was convicted after a stipulated facts bench trial of possession of a controlled substance – methamphetamine. (8/28/06 2-5; RP CP 23-25) The possession charge arose from a search incident to arrest, following a weapons frisk of Mr. Harrington made pursuant to an alleged social contact. (8/24/06 RP 2-35)

Defense counsel moved to suppress evidence based upon an unlawful seizure. (8/24/06 RP 2-29; CP 39-50) At the suppression hearing, the State presented the following evidence.

On August 13, 2005, around 11:00 p.m., Richland Police Officer Reiber was driving north on Jadwin Avenue in a fully marked police car. He saw a male later determined to be the defendant walking south. (8/24/06 RP 11, 18) When asked why he decided to stop the pedestrian, Reiber said, "That area, late at night, a gentleman walking - - social contact, " and to see what he was up to, just to talk. (8/24/06 RP 12, 19)

Without activating his lights, Reiber made a u-turn and parked 20 to 30 feet into a driveway, approximately 75 to 100 feet in front of Mr. Harrington, and walked toward him. (8/24/06 RP 12, 18) When Reiber asked, "hey, can I talk to you," or "mind if I talk to you for a minute," Mr. Harrington responded, "yeah or yes." (8/24/06 RP 13) Mr. Harrington stopped and faced Reiber. (8/24/06 RP 13) They were about five feet apart. (8/24/06 RP 5)

Reiber testified Mr. Harrington, who was standing on the sidewalk while he stood on the grass, was free to leave and the officer was not blocking his travel. (8/24/06 RP 13-14) During the two to five minutes they talked, Reiber asked Mr. Harrington things like what he was up to and where was he going. (8/24/06 RP 14)

At about the same time, Trooper Bryan, of the Washington State Patrol, was driving his marked police car in the area. (8/24/06 RP 4, 8)

Deciding to stop for officer safety, he drove by them and made a u-turn. The trooper drove back and parked to the side of the road 10 to 30 feet away from Reiber and Mr. Harrington. (8/24/06 RP 5) Although he didn't specifically recall, the trooper would usually have activated his patrol car flashing or strobe lights when parking as he did, which he believes was blocking a lane of the street. (8/24/06 RP 5-7) The trooper walked toward Reiber and Mr. Harrington, and stood a distance of 7 to 8 feet away from them. (8/24/06 RP 7-8) The trooper was in uniform, and silently observed them conversing for an estimated two to four minutes. (8/24/06 RP 7, 9)

Both officers were in uniform and armed with weapons. (8/24/06 RP 8)

When Reiber asked where he was coming from, Mr. Harrington said, "his sister's." When asked where his sister lived, Mr. Harrington said he didn't know. (8/24/06 RP 13-14)

Reiber thought these two answers were a "little suspicious." (8/24/06 RP 13-14) While talking, the officer saw a couple of bulges in Mr. Harrington's pockets and noticed he was acting quite nervous and pretty fidgety. When Mr. Harrington put his hands in his pockets, Reiber asked him to take them out, wanting to control his actions and testifying this was for "officer safety purposes. I hadn't patted him down, so he

could potentially have a weapon in his pocket.” (8/24/06 RP 15, 21) Mr. Harrington complied, but several times he quickly put his hands in and then took them out of his pockets. (8/24/06 RP 15)

Trooper Bryan arrived some time before the pat down. (8/24/06 RP 18, 20) Reiber saw the trooper go by, make a u-turn and come back, and walk up behind them. (8/24/06 RP 18, 20)

Reiber asked to pat Mr. Harrington down for officer safety, and told him he was not under arrest. Mr. Harrington said, “Yeah.” (8/24/06 RP 15-16)

As he started the pat down, Reiber felt a hard, cylindrical-type object in the front right pocket. When asked, Mr. Harrington said it was “my glass.” When asked what he meant, Mr. Harrington said it was “my meth pipe.” (8/24/06 RP 16-17) Reiber told him he was going to be arrested and to place his hands behind his back. (8/24/06 RP 17) Mr. Harrington ran off and was thereafter caught and arrested. (8/24/06 RP 7, 17) A pipe later determined to contain methamphetamine and a baggie containing methamphetamine were found during the search incident to arrest. (8/24/06 RP 17, CP 24)

Reiber and the trooper didn't talk to or acknowledge each other prior to Mr. Harrington running off. (8/24/06 RP 8, 18) The trooper didn't talk to Mr. Harrington during the encounter. (8/24/06 RP , 7-8, 18)

The trial court denied the suppression motion. (8/24/06 RP 35; CP 20) Written findings of fact and conclusions of law were entered regarding the suppression hearing. (CP 15-20)

On August 28, 2006, Mr. Harrington was found guilty, after a stipulated facts trial, of possession of methamphetamine. (8/28/06 2-5; RP CP 23-25)

C. ARGUMENT

All evidence must be suppressed because the continued detention of Mr. Harrington was a seizure prior to arrest, in violation of his constitutional rights under U.S. Const., amend. 4 and WA Const., art. 1, § 7.¹

a. Standard of review. In reviewing a trial court's findings of fact following a suppression hearing, the reviewing court makes an independent review of all the evidence. State v. Apodaca, 67 Wn.App. 736, 739, 839 P.2d 352 (1992), (citing State v. Mennegar, 114 Wn.2d 304, 310, 787 P.2d 1347 (1990)). Findings of fact on a motion to suppress are reviewed under the substantial evidence standard. Substantial evidence is

¹ Assignment of Error Nos. 1, 2, 3, 4, 5, 6 and 7.

evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. Conclusions of law in an order pertaining to suppression of evidence are reviewed *de novo*. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

The protections afforded by the Fourth Amendment do not come into play until a seizure has occurred. State v. Thorn, 129 Wn.2d 347, 350, 917 P.2d 108 (1996). The determination of whether a seizure has occurred is a mixed question of law and fact. Id. at 350-51. The trial court's conclusion as to whether the facts gave rise to a seizure is reviewed *de novo*. State v. Thomas, 91 Wn.App. 195, 200, 955 P.2d 420, rev. denied, 136 Wn.2d 1030, 972 P.2d 467 (1998).

b. Applicable law and argument. Warrantless seizures are *per se* unreasonable under the Fourth Amendment of the United States Constitution and article I, section 7 of the Washington Constitution, subject to a few "jealously and carefully drawn" exceptions. State v. Kinzy, 141 Wn.2d 373, 384, 5 P.3d 668 (2000), cert. denied, 531 U.S. 1104, 121 S.Ct. 843, 148 L.Ed.2d 723 (2001). The State bears the burden of proving a warrantless seizure falls within an exception. Kinzy, 141 Wn.2d at 384; State v. Armenta, 134 Wn.2d 1, 10, 948 P.2d 1280 (1997).

The general rule is that a seizure 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)). This is an objective standard, and the officer's subjective suspicions and intents are irrelevant unless reflected in his or her actions. O'Neill, 148 Wn.2d at 574-77.

An encounter between a citizen and the police is consensual or permissive if a reasonable person under the totality of 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); State v. Mennegar, 114 Wash.2d at 310. A uniformed armed police officer with an official car does not necessarily seize someone by merely approaching, asking questions, and requesting identification. State v. O'Neill, 148 Wn.2d at 574.

When a citizen freely converses with a police officer, the encounter is permissive. It is not a seizure; and therefore the Fourth Amendment is not implicated. Id. If a person does freely consent to stop and talk, the officer's merely asking questions or requesting identification does not

necessarily elevate a consensual encounter into a seizure. Id. Neither does directing the person to remove his hands from his pockets, by itself, convert the encounter into a seizure. State v. Nettles, 70 Wn.App. 706, 710 n. 6, 855 P.2d 699 (1993) (citing Duhart v. United States, 589 A.2d 895, 898 (D.C.App.1991)), rev. denied, 123 Wn.2d 1010, 869 P.2d 1085 (1994).

The objective circumstances surrounding the encounter must be looked at to determine what a reasonable person would believe. State v. Ellwood, 52 Wn.App. 70, 73, 757 P.2d 547 (1988). The question is whether a reasonable person would have felt free to decline the officer's request and terminate the encounter. Armenta, 134 Wn.2d at 10-11, (citing Florida v. Bostick, 501 U.S. 429, 439, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991)). A permissive encounter may ripen into a prohibited seizure. See, e.g., State v. Ellwood, *supra*; State v. O'Day, 91 Wn.App. 244, 955 P.2d 860 (1998); State v. Coyne, 99 Wn.App. 566, 995 P.2d 78 (2000); State v. Soto-Garcia, 68 Wn.App. 20, 841 P.2d 1271 (1992).

Herein, Reiber was on patrol duty at night. Seeing a lone male walking, he decided to see what the person was up to. He made a u-turn, drove 70-100 feet past Mr. Harrington, parked his marked police car, and walked back towards Mr. Harrington. He initiated a social contact with

Mr. Harrington, who agreed to talk with him. Reiber asked questions about where Mr. Harrington had been and where he was going.

Within a minute or so after Reiber began talking to Mr. Harrington, a trooper drove by (8/24/06 RP 7, 9, 14) and immediately made a u-turn, parking in the street a little distance behind them with his lights flashing. While the officers did not acknowledge each other, the trooper stood silently observing within a short distance of seven to eight feet from Reiber and Mr. Harrington. This arrival of a second uniformed officer amid blazing lights and the officer's continued hovering presence constituted a first seizure of Mr. Harrington. See, State v. Markgraf, 59 Wn.App. 509, 511, 798 P.2d 1180 (1990).

At this point, a reasonable person such as Mr. Harrington would not have felt free to leave. Reiber's subjective belief that Mr. Barnes was free to walk away is immaterial on the issue of whether a reasonable person would feel free to leave, unless Reiber had communicated that information to Mr. Harrington. State v. Richardson, 64 Wn.App. 693, 697 n.1, 825 P.2d 754 (1992); State v. Ellwood, 52 Wn.App. at 73. At no time during the entire five minute encounter did Reiber tell Mr. Harrington he was free to leave or to decline to talk to him.

Reiber then became suspicious because although he had just come from his sister's house, Mr. Harrington said he didn't know where the sister lived. (8/24/06 RP 13-14) The trial court herein concluded that the answers themselves were suspicious and supported Reiber continuing the social contact. (CP 19 at para. 2) However, failure to recall a street address is not indicative of criminal activity, and Reiber had no justification for continuing the encounter. This was a second prohibited seizure of Mr. Harrington.²

Reiber asked Mr. Harrington several times to refrain from putting his hands quickly in and then out of his pockets. Reiber then asked if he could search Mr. Harrington for weapons. At this point, the permissive encounter had unquestionably changed into a prohibited seizure for several reasons.

In Soto-Garcia, a social encounter between a policeman and Soto-Garcia turned into a seizure when the officer asked Soto-Garcia if he would consent to a search of his person for cocaine. State v. Soto-Garcia, 68 Wn.App. at 25. The court held that Soto-Garcia was seized when the officer asked to search for cocaine because a reasonable person would not have felt free to decline the police officer's request. Id.

² Assignment of Error No. 1.

If the stop was at this time still merely a social contact, the request to search Mr. Harrington for weapons turned the encounter into a seizure, just as the request to search for cocaine created a seizure in Soto-Garcia. Reiber wanted to take control of the encounter that he had initiated, and intended to investigate further.

An investigative stop is a seizure and is constitutional only if the officer has an articulable and well-founded suspicion, based on objective facts, that the seized person has committed, is committing, or is about to commit a crime. *E.g.*, State v. Duncan, 146 Wn.2d 166, 172, 43 P.3d 513 (2002); State v. Kennedy, 107 Wn.2d 1, 4, 6-7, 726 P.2d 445 (1986); State v. Sieler, 95 Wn.2d 43, 46, 621 P.2d 1272 (1980). Here, Reiber had no reasonable articulable suspicion of crime to justify a seizure of Mr. Harrington. Fidgeting and nervousness exhibited by quickly putting one's hands in a pocket and just as quickly removing them do not suggest a crime is afoot.³

More importantly, because there was no valid investigatory stop, Reiber had no derivative right to conduct a protective frisk. *See*, State v. Collins, 121 Wn.2d 168, 173, 847 P.2d 919 (1993) (quoting Terry v. Ohio,

³ Assignment of Error No. 2.

392 U.S. 1, 21-24, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)); accord State v. Hudson, 124 Wn.2d 107, 112, 874 P.2d 160 (1994).

Contrary to the trial court's conclusion, Reiber's statement to Mr. Harrington that he was not under arrest at this time is not germane.⁴ (CP 20) The issue is whether a reasonable person would feel free to leave in the face of a request to search his person. Reiber's subjective belief that Mr. Harrington *was* free to decline the search is immaterial because Reiber never communicated that information to Mr. Harrington. State v. Richardson, 64 Wn.App. at 697 n.1; State v. Ellwood, 52 Wn.App. at 73.

Finally, the trial court's conclusion that Mr. Harrington validly consented to the search is erroneous.⁵ (CP 20, para. 5) Reiber's unlawful seizure tainted Mr. Harrington's consent to a pat down search of his person under Soto-Garcia. The Soto-Garcia court gave several non-exclusive factors for considering the legitimacy of a grant of consent: (1) temporal proximity of the illegality and the subsequent consent; (2) the presence of significant intervening circumstances; (3) the purpose and flagrancy of the official misconduct; and (4) the giving of Miranda warnings. Soto-Garcia, 68 Wn.App. at 27; Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974 (1966).

⁴ Assignment of Error No. 3.

⁵ Assignment of Error No. 3.

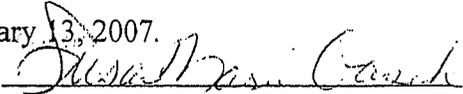
Here, the illegal seizures – with the arrival and nearby presence of a second officer, the continued detention without a reasonable suspicion of criminal activity, and the unjustified request to search his person - vitiated Mr. Harrington's later given consent. Mr. Harrington was not advised of his Miranda rights. Furthermore, the unlawful seizure was intrusive because there was no other indication or suspicion of criminal activity. The officer asked to search Mr. Harrington only minutes after a second trooper arrived to supervise the encounter. Once asked the question and “when considering all the circumstances, [Mr. Harrington]'s freedom of movement [was] restrained and [Mr. Harrington] would not believe he [was] free to leave or decline [the] request” to be searched. See, State v. Rankin, 151 Wn.2d at 695 (citing State v. O'Neill, 148 Wn.2d at 574).

In summation, Mr. Harrington was illegally seized and therefore all evidence taken from him and his confession should be suppressed.⁶

D. CONCLUSION

For the reasons stated, this Court should vacate the conviction and dismiss the charge with prejudice.

Respectfully submitted February 13, 2007.


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⁶ Assignment of Error Nos. 4, 5, 6 and 7.