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CRIMINAL DIVISION
KING COUNTY PROSECUTORS OFFICE

NO. 63179-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

RAMAL RICHARDSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Charles Mertel, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. **Richardson was seized when Deputy Ehlers exited his vehicle and commanded the men to stop.**

A seizure occurs when a reasonable person would believe he or she was not free to leave. State v. O'Neil, 148 Wn.2d 564, 574, 62 P.3d 489 (2003). The question of whether a particular set of facts constitutes a seizure is a question of law. State v. Beito, 147 Wn. App. 504, 509, 195 P.3d 1023 (2008). In determining whether a seizure has occurred, courts do not look at the defendant's subjective belief or knowledge. Rather, "the determination is made by objectively looking at the actions of the law enforcement officer." State v. Rankin, 151 Wn.2d 689, 695, 92 P.3d 202 (2004).

This focus on the officer, rather than the suspect, represents a sharp departure from the analysis under the federal constitution. State v. Young 135 Wn.2d 498, 508, 957 P.2d 681 (1998). Under the federal constitution, a seizure has not occurred unless the suspect knows that he has been seized. California v. Hodari D., 499 U.S. 621, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991). Not so in Washington. Our state's "purely objective" examination of the officer's actions, without consideration of the defendant's actual

belief, arises from the greater protection by the Washington Constitution. State v. Harrington, 167 Wn.2d 665, 222 P.3d 92, 95 (2009).

Because the question of whether a seizure has occurred does not rest on the subjective belief of the suspect, Washington courts can better formulate rules as to what type of actions constitute a seizure. See State v. Young, 135 Wn.2d at 508 (discussing how federal approach does not provide adequate guidance for the officer in the field). For instance, a request for information, without a show of authority, is not a seizure. By contrast, there is a seizure when an officer tells a suspect, "Stop, I need to talk to you." State v. Gatewood, 163 Wn.2d 534, 539-40, 542, 182 P.3d 426 (2008).

Here, Deputy Ehlers admitted that as soon as he exited his patrol vehicle, he commanded the men "to stop where they were." RP 26. It appeared to the deputy that the men heard him, but continued to walk away. Under Gatewood, a seizure occurred at that time.

In its response brief, the State urges this Court to take the focus away from the deputy's actions and instead, focus upon whether Richardson believed he was seized. The State argues that because Richardson testified that Ehlers had his gun drawn when

he first ordered the men to stop, Richardson must not have heard Ehlers' earlier commands to stop. The State then claims that because Richardson did not subjectively believe he was seized, no seizure occurred at that time.

The State's argument is contrary to the above-cited case law. Under Young, whether Richardson was cognizant of the fact the deputy wanted him to stop is of no consequence to the inquiry. The focus is upon Ehlers' actions, not upon Richardson's perception of those actions. Accordingly, the seizure occurred when Deputy Ehlers first exited his vehicle and ordered the men to halt.

2. Richardson did not flee from the deputy, nor did the court make that finding following all of the testimony.

In Gatewood, the Supreme Court reaffirmed that walking away from the police should not be treated as "fleeing" from the police. State v. Gatewood, 163 Wn.2d at 534, 540. Richardson relied upon Gatewood in his opening brief, pointing out that the fact he was walking away as the patrol car pulled up does not give rise to a reasonable suspicion of criminal activity. In response, the State now argues that Gatewood is distinguishable, because in our case, the court made a specific oral finding that the members of the group appeared to be "fleeing the scene." Brief of Respondent at 18, fn 6

(citing to RP 66). The State is mistaken.

The cited language is from the court's initial ruling before taking testimony the next day. After the court took testimony the next day, the court no longer treated this as a "fleeing" of the scene:

We have the admission of Mr. Baker that they were walking away from the direction of the officer. The officer may well have perceived that as a situation where they were trying to avoid him. They [the men] could well easily perceive that as simply doing — just walking in the direction they were going to begin with. So that doesn't change anything.

RP 143. There is simply no way to characterize this as an "unchallenged" finding that the men were fleeing the scene.

Rather, it is consistent with the facts in Gatewood, where the man was walking away from the police, and the officer believed that to be suspicious.¹ Walking away when a police patrol vehicle approaches does not constitute fleeing and does not give rise to reasonable suspicion. Compare State v. Larson, 93 Wn.2d 638, 645, 611 P.2d 771 (1980) (no reasonable suspicion where car stopped in high crime area near a closed park suddenly attempted to drive away when the police approached) with State v. Sweet, 44

¹ Deputy Ehlers believed it suspicious that anyone would walk away from the police unless they had something to hide, RP 29, which appears to be a somewhat naive view of how many sub-cultures and communities view the police.

Wn. App. 226, 228, 721 P.2d 560 (1986) (officers observed suspect in a suspicious location, and then “fled at full run” when officers approached.)

Moreover, even taken at face value, it is clear that the trial court’s earlier comments concerning “fleeing” relating solely to the men’s actions after the deputy had ordered the men to stop. As such, that finding—even if it had been made after all of the evidence—would be completely irrelevant to the issues before this Court. A seizure must be justified at its inception. Gatewood, 163 Wn.2d 539. Conduct that occurred after the command to halt cannot be used to justify the seizure.

3. The informant’s call did not justify a seizure in the absence of some corroboration.

In Richardson’s opening brief, he pointed out that Valerie was neither the victim nor an eyewitness. Instead, Valerie merely reported that there was someone at the apartment “who looks like [the] guy they have on video.” There was no indication that it was Valerie, as opposed to one of her subordinates or tenants, who viewed the videotape. Nor was there any indication as to who drew the conclusion that the man on the tape looked like a man at the apartment complex. In the absence of that information, Valerie’s

trustworthiness is largely irrelevant. The State did not address this argument.

But even if it had been Valerie who watched the tape and drew those conclusions, her call would not justify the seizure without further investigation. Upon hearing that someone “looks like” someone in a video, the minimum necessary follow up for the officer would have been a call to find out how similar the person looked. Similar enough to justify a warrantless intrusion, or simply similar enough to justify further investigation? The police often receive useful information that may not justify a seizure standing alone, but which might do so when combined with other evidence. See e.g., Gatewood, at 42. Unfortunately, Ehlers flipped that on its head, believing that “it’s usually best to try to detain the individual and then work on your investigating steps.” RP 26.

In some rare circumstances, police action on more limited information might pass constitutional muster. “The seriousness of the criminal activity reported by an informant can affect the reasonableness calculus which determines whether an investigatory detention is permissible.” State v. Sieler, 95 Wn.2d 43, 50, 621 P.2d 1272 (1980). For instance, in State v. Wakeley, the court properly considered the seriousness of gunshots in a

residential neighborhood in evaluating the reasonableness of the stop. 29 Wn. App. 238, 242, 628 P.2d 835, 838 (1981), But see State v. Hopkins, 128 Wn. App. 855, 865, 117 P.3d 377 (2005) (allegation of a gun, while a serious matter, does not obviate need for reasonable suspicion).

Here, Deputy Ehlers was not responding to an emergency. This was not ongoing crime. It was not a violent crime. It was an investigation of a property crime that had occurred on an earlier date. As such, there was no imperative for Deputy Ehlers to act immediately without investigation.

The State's only real response is that there were reports of a verbal confrontation between the men. But when the deputy arrived he did not see any signs of a confrontation. He did not hear yelling. He did not see weapons. The State's argument to the contrary, there was nothing here that would have made our case similar to those cases involving serious crimes and immediate threats to the community. CF State v. Randall, 73 Wn. App. 225, 868 P.2d 207 (1994) (immediate action required where two armed robbers were escaping from scene of the crime).

Although the State points to conduct after the deputy ordered the men to halt as justification for the deputy's concern, those

subsequent actions cannot be used to justify the earlier seizure. See State v. Hopkins, 128 Wn. App. at 865 (“But the trial court erred in considering Hopkins' statement to police as justification of the investigatory stop because his statement occurred *after* the officers seized him.”)

Given all of the surrounding circumstances, it was not reasonable for the deputy to immediately seize the men without first obtaining additional information.

4. There was no individualized suspicion to justify the deputy's seizure of Mr. Richardson.

Appellant's opening brief addressed in detail the lack of individualized suspicion as to Ramal Richardson. The brief described how Richardson's clothing did not match the clothing of the suspect—particularly the long pants versus the khaki shorts—and that the rest of the description was extremely generic. Richardson's brief also examined how the Washington Constitution requires a greater degree of “individualized” suspicion than what is required by the federal constitution.

In response, the State argues that because the deputy had grounds to seize at least one of the men, the deputy could seize the rest based upon officer safety. The State's argument fails for a

number of reasons. First, as noted above, Deputy Ehlers did not have a legal justification to seize anyone without first conducting some follow-up investigation. Second, almost all of the conduct the State relies upon for “officer safety” occurred after the deputy had commanded Richardson to halt. As discussed above, the seizure must be justified from its inception.² State v. Hopkins, 128 Wn. App. at 865.

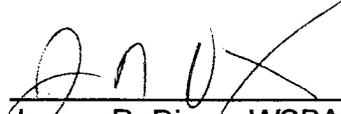
While everyone recognizes the dangers that law enforcement personnel face, “officer safety” should not become the magic phrase that permits unchecked seizures and detentions. If Deputy Ehlers truly believed it was dangerous for a single officer to conduct this investigation without seizing other people who were not suspects, then he could have simply waited for the other officers to arrive. As described above, this was not an emergency situation. There was no constitutionally sufficient justification for seizing Ramal Richardson.

² The State does take a little dramatic license in describing what the Deputy believed at the time. For instance, Ehlers did not state that he believed the men were armed with a weapon. Instead, he testified that because he saw movement and couldn't see what they were doing “they might possibly have a weapon or be dangerous, so that's why I pulled my department firearm.” (RP 29). Of significance to our discussion, Ehlers comments relating to officer safety are focused on why he pulled out his firearm, not why he decided to seize all of the men. It appears that he seized all of the men because he believed that was an appropriate first step of his investigation.

B. CONCLUSION

For the reasons set forth above and in appellant's opening brief, Ramal Richardson respectfully asks this Court to reverse his conviction for possession of a controlled substance.

Dated this 17th Day of February, 2010



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