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King County Prosecutor
Appellate Unit

COURT OF APPEALS NO. 63236-1-4

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

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COURT OF APPEALS
DIVISION ONE
SEATTLE, WA

STATE OF WASHINGTON

v.

LEVI WILLIAMS,

Appellant.

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

The Honorable Laura C. Inveen, Judge

OPENING BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issue Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	5
THE COURT ERRED IN DENYING THE MOTION TO SUPPRESS BECAUSE WILLIAMS' CONSENT TO SEARCH WAS TAINTED BY HIS PRIOR ILLEGAL SEIZURE	5
D. <u>CONCLUSION</u>	10

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>State v. Armenta</u> , 134 Wn.2d 1, 948 P.2d 1280 (1997)	9-10
<u>State v. Davis</u> , 86 Wn. App. 414, 937 P.2d 1110 (1997).....	6
<u>State v. Kennedy</u> , 107 Wn.2d 1, 726 P.2d 445 (1986).....	6
<u>State v. Pressley</u> , 64 Wn. App. 591, 825 P.3d 749 (1992).....	7-8, 10
 <u>FEDERAL CASES</u>	
<u>Dunaway v. New York</u> , 442 U.S. 200, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979)	6
<u>Mapp v. Ohio</u> , 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961)	5
<u>Miranda v. Arizona</u> , 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)	9
<u>Terry v. Ohio</u> , 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)	6-8
<u>Wong Sun v. United States</u> , 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963)	9-10

TABLE OF AUTHORITIES (CONT.)

	Page
<u>RULES, STATUTES AND OTHERS</u>	
Const. article 1, § 7	5
CrR 3.6.....	2
Fourth Amendment	5

A. ASSIGNMENTS OF ERROR

1. Appellant's state and federal constitutional right to be free from unreasonable searches and seizures was violated.
2. The trial court erred in denying the motion to suppress evidence obtained from the illegal search and seizure.
3. The trial court erred in entering findings of fact 2 and 7, and conclusions of law 1 and 2. CP 33-37.¹

Issue Pertaining to Assignments of Error

Whether the trial court erred in denying the motion to suppress evidence where appellant's consent to search was tainted by his prior illegal seizure?

B. STATEMENT OF THE CASE

Appellant Levi Williams is appealing from his conviction for possessing cocaine. CP 39-56. He was convicted by a jury following an unsuccessful motion to suppress the cocaine. CP 32-37.

At the motion to suppress hearing, Seattle police officer Franklin Poblocki testified he and fellow officer Tad Willoughby were on bike patrol in the International District/Pioneer Square area of Seattle on May 12, 2008, when they encountered Williams. RP

¹ The court's findings and conclusions are attached as an appendix.

(2/4/09) 17-18. It was about 2:30 p.m., and the officers were in Occidental Park arresting two other people, when Williams walked up and asked for a light for his cigarette. RP 17-18.

Poblocki claimed he recognized Williams from about a half hour earlier when he and Willoughby were up in the Smith Tower watching for drug activity in the area around Second Avenue and Yesler Way. RP 11, 17. According to Poblocki, Willoughby noticed someone named Charles H. Moore, who Willoughby knew to use cocaine. RP 13. Willoughby reportedly told Poblocki to keep an eye on him for suspected drug activity.² RP 13.

Poblocki testified he watched Moore through a monocular as he approached a man standing in front of the Lazarus Center.³ RP 12. The man was wearing a baseball cap with its tag still on, a dark puffy coat and blue jeans. RP 13, 16. Poblocki claimed "there was a brief contact, short conversation" and the man wearing the cap handed Moore "some small item." RP 13. Poblocki could not see what it was, however. RP 14. According to Poblocki, Moore examined the small item in the palm of his hand before giving the

² Although it was not elicited at the CrR 3.6 hearing, Willoughby then went to the bathroom. RP (2/5/09) 51.

³ The Lazarus Center is a day shelter that provides meals to the homeless. RP 27.

man wearing the cap “paper money.” RP 14. Moore and the other man walked away in different directions. RP 15.

Based on Poblocki’s experience, he believed what he observed “was probably a narcotics transaction.” RP 16.

Regardless, Poblocki remained at his post:

I stayed at my post, because I hadn’t seen the actual item that Mr. Moore had in his hand that he was handed by Mr. Williams.^[4] Had I gotten a look at that and been able to identify it as suspected drugs, I would have left my post and acted upon it at that point in time. But because I didn’t see the actual item and I just saw money exchanged, I took note of the activity and stayed put.

RP 16.

Poblocki admittedly saw no justification to act at that time. RP 16. Nevertheless, he told Williams to “hold on” upon reportedly recognizing him later in Occidental Park. RP 18. When Williams asked why, Poblocki responded he thought he’d seen Williams involved in drug activity earlier. RP 18. Because Poblocki and Willoughby were in the middle of arresting other people, Poblocki directed Williams to sit down on the curb. RP 19. He was not free to leave. RP 18.

⁴ Poblocki testified he did not know Williams. RP 15. However, Poblocki testified the man who later asked for a light in Occidental Park (who turned out to be Williams) was the same man he saw earlier in front of the Lazarus Center. RP 17-18, 29. Poblocki claimed he recognized him from his clothing. RP 17-18.

Four to six minutes later, after securing the other two people, Poblocki turned his attention to Williams. RP 19. Poblocki admitted Williams sat patiently and did not appear nervous in the interim. RP 19, 22, 30. Poblocki testified he had no reason to frisk Williams for weapons. RP 20. However, Poblocki wanted to see “if he would consent to me searching him for drugs.” RP 20.

Poblocki asked if Williams had any drugs in his possession. RP 20. Williams responded, “no, of course not.” RP 21. In keeping with his plan, Poblocki asked if he could search Williams for drugs. RP 21. According to Poblocki, “[h]e stood up, because he had been sitting down on the curb, took a step towards me, held both hands up in like a submissive gesture and said, go ahead.” RP 21.

At Poblocki’s direction, Williams put his hands on his head. RP 22. Poblocki testified he was positioned off to Williams’ “rear right-hand side” and might have had his hand on the back of Williams’ right hand. RP 22-23. Poblocki claimed that when Williams put his hands on his head, Poblocki could see into the top of Williams’ puffy jacket pocket and what appeared to be two chunks of crack cocaine inside. RP 23.

After a brief struggle, Poblocki and Willoughby handcuffed Williams. RP 25. Poblocki testified Williams asked if they found something in his coat, and said it was not his coat. RP 25. At this point, Poblocki read Williams his rights. RP 26.

Defense counsel argued the initial seizure was unlawful and Williams' alleged consent tainted by the prior illegality. CP 8-15; RP 39-40. The court disagreed, however, reasoning:

One. Based upon the officer's reasonable and articulable suspicion that he had observed the defendant sell drugs, it was permissible for the officer to briefly detain the defendant to further investigate whether a crime had occurred, which included asking him to remain on the curb for up to six minutes and then asking him if he could be searched for drugs.

Two. The search of Williams was a valid, consensual search and the evidence therefrom is admissible.

RP 47.

C. ARGUMENT

THE COURT ERRED IN DENYING THE MOTION TO SUPPRESS BECAUSE WILLIAMS' CONSENT TO SEARCH WAS TAINTED BY HIS PRIOR ILLEGAL SEIZURE.

The Fourth Amendment to the United States Constitution protects citizens from unreasonable searches and seizures. Mapp v. Ohio, 367 U.S. 643, 647, 6 L. Ed. 2d 1081, 81 S. Ct. 1684 (1961). Article 1, § 7 of the Washington Constitution provides that

"[n]o person shall be disturbed in his private affairs . . . without authority of law." State v. Davis, 86 Wn. App. 414, 420, 937 P.2d 1110 (1997). Under either constitutional standard, governmental searches and seizures must be supported by probable cause, whether or not a formal arrest has been made. Dunaway v. New York, 442 U.S. 200, 208, 60 L. Ed. 2d 824, 99 S. Ct. 2248 (1979).

Although there are exceptions that authorize seizure on lesser cause, these are narrowly drawn and carefully circumscribed. Terry v. Ohio, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968). One such exception is a Terry stop -- where police conduct a brief investigative detention. Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

To satisfy constitutional requirements, a Terry stop must be based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Terry, 392 U.S. at 21. The level of articulable suspicion required is "a substantial possibility that criminal conduct has occurred or is about to occur." State v. Kennedy, 107 Wn.2d 1, 726 P.2d 445 (1986). An important safeguard to individual liberty in Terry stop analysis is the principle that the circumstances justifying a Terry stop must be more consistent with criminal conduct than

with innocent conduct. State v. Pressley, 64 Wn. App. 591, 596, 825 P.2d 749 (1992).

Pressley is instructive. In Pressley, an experienced narcotics officer saw the defendant in an area well known for narcotics transactions standing next to a building beside another female. Id., at 593. The two women had their hands chest high and the defendant appeared to be pointing at something in her hand or counting objects in her hand. Id., at 594. The observing officer believed that these actions represented a narcotics transaction. Id.

Upon making this determination, the officer approached the two individuals with his marked police car. Id. One of them looked up at the approaching police car and said "Oh Shit" and closed the objects in her hand. The two women then separated and walked in different directions. The defendant then placed a hand, which had something yellow sticking out of it, into her coat pocket. The officer confronted her and motioned to her to give the officer what was in her hand. Id.

This Court ruled that there was a "reasonable articulable suspicion" for a valid Terry stop. Id., at 597. But, in its reasoning, this Court stated that the actions of the two women prior to the

defendant's statement of "Oh Shit" were susceptible to a number of innocent explanations and therefore were an insufficient basis for a valid Terry stop. Id.

The circumstances of the present case are analogous to those in Pressley with the exception of one critical fact – Williams did nothing to indicate a consciousness of guilt. Williams' supposed exchange with Moore was indicative of both innocent and criminal interpretation. It could have been candy or a cigarette that was exchanged. Maybe an aspirin. Poblocki did not see what was exchanged and acknowledged he did not feel further action was justified at that point. These facts are no different than those in Pressley prior to the defendant's expletive in that case.

Unlike the facts in Pressley, however, where the defendant said, "Oh, shit," Williams did nothing to indicate his actions were more consistent with criminal – as opposed to innocent – conduct. He innocently asked for a light and patiently waited on the curb, as Poblocki directed. And as Poblocki acknowledged, Williams did not appear nervous. Therefore, under these facts, there was not a valid Terry stop. The trial court's finding to the contrary is in error.

The next question is whether the illegal detention vitiated Williams' consent to search. Several factors are relevant in

determining whether consent to a search is tainted by a prior illegal seizure: "(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^[5] warnings." State v. Armenta, 134 Wn.2d 1, 17, 948 P.2d 1280 (1997).

Here, Williams consented to the search within four to six minutes after Poblocki directed him to "hold on" and sit on the curb. Furthermore, there were no intervening circumstances, and Williams was not read his Miranda rights. Nor did Poblocki inform Williams of his right to refuse consent. Whether Poblocki was acting maliciously, it was clear he was fishing for evidence. He testified he stopped Williams to see if he could get him to consent to a search for drugs. Poblocki also admitted that, despite what he had seen earlier, he did not believe further action was justified at the time. Under these circumstances, Williams' consent, whether voluntary, was tainted by the prior illegal detention. See Armenta, 134 Wn.2d at 17. The cocaine Poblocki found should have been suppressed as "fruit of the poisonous tree." Wong Sun v. United

⁵ Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

States, 371 U.S. 471, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963);
Pressley, 64 Wn. App. at 596.

D. CONCLUSION

Because the only evidence supporting Williams' conviction was illegally obtained, his conviction for possessing cocaine should be reversed and dismissed. State v. Armenta, 134 Wn.2d 1, 9, 18, 948 P.2d 1280 (1997).

Dated this 31st day of August, 2009.

Respectfully submitted

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1 After considering the evidence submitted by the parties and hearing argument, the court
2 makes the following findings of fact and conclusions of law as required by CrR 3.5 and 3.6:

3 **A. Findings of Fact**

4 1. Franklin Poblocki has been a Seattle Police officer since 1999. Prior to that he served as
5 an officer for 5 years in Tucson, Arizona. He has training in the field of narcotics
6 enforcement in both Arizona and Washington. In addition, he has substantial on-the-job
7 training. His assignments have involved pro-active work which included active narcotic
8 enforcement, including undercover work and buy-bust operations. Narcotics
9 enforcement on the street level is a large part of his job. He has been involved in over
10 2000 narcotic arrests.

11 2. At 2:00 p.m., May 12, 2008, Officer Poblocki was on duty on patrol. He was on the 2nd
12 floor of the Smith Tower, located at 2nd and Yesler with a 10x50 monocular observing
13 the area of 2nd between Yesler and South Washington. He was working with Officer
14 Willoughby. That area under observation is known for drug dealing. It is in a SODA
15 zone (Stay Out of Drug Areas). Officer Poblocki has participated in scores of arrests for
16 drugs there. The police receive a lot of 911 calls about drugs from there. While
17 observing, the officer saw the defendant, Levi Williams, just in front of the Lazarus Day
18 Center on 2nd between Washington and Yesler, about 50-60 yards from his observation
19 location. Williams was wearing distinctive clothing which drew his attention, including a
20 baseball cap with a commercial tag attached, a dark blue puffy coat, and blue jeans. He
21 also saw a white man, who Officer Willoughby indicated was known to him as Charles
22 H. Moore, someone Willoughby knew to be a crack cocaine user. Williams handed
23 Moore a small item, who inspected it while it was in the palm of his hand. Moore in turn

1 handed Williams paper money. Poblocki's view was unobstructed and there was natural
2 light which gave him a clear view. After the exchange between Williams and Moore,
3 Moore walked northbound and Williams walked southbound. The transaction took less
4 than minute. The totality of the circumstances supported the officer's opinion that he had
5 just observed a drug sale by Williams to Moore. He had a reasonable and articulable
6 suspicion that a crime had occurred.

7 3. About 30 minutes later, Poblocki was patrolling the Occidental Square area, about a
8 block west of the area where he initially observed Williams. While engaging in an
9 unrelated arrest, he heard Williams ask someone for a light. Due to the distinctive
10 clothing Williams was wearing, Poblocki was able to identify him as the same person he
11 observed earlier. He asked him to "hold on" and wait on a curb while the Officer
12 finished his arrest. Williams did so. This took about 3-6 minutes.

13 4. Officer Poblocki asked Williams if he could search him for drugs. Williams testified that
14 he refused the search, and the officer searched him anyway. Poblocki testified Williams
15 agreed to the search. He was not threatened or coerced.

16 5. The Court finds Officer Poblocki credible and has no motive to lie in this proceeding.
17 Mr. Williams has a motive to lie, given that he is facing a criminal prosecution. The
18 court does not find Mr. Williams credible on the issue of his refusal to consent.

19 6. Williams has a high school education, there is no evidence of a cognitive impairment, and
20 he did not appear to be under the influence or impaired in the day in question. He has
21 had multiple experiences with law enforcement from prior arrests.

22 7. After Williams agreed to the search by standing up and stretching out his hands, the
23 officer quickly looked into his pocket, where he observed what appeared to be rock

1 cocaine. The search did not exceed the scope of the consent. The officer removed the
2 item from Williams' pocket, and arrested him. The consent was voluntary.

3 8. Prior to the arrest, the officer asked Williams a few questions to which Williams
4 responded. After the arrest, Williams made a few statements which were not in response
5 to any questions. This was prior to the reading of Miranda rights.

6 9. All statements made by Williams were voluntary.

7 **B. Conclusions of Law**

8 1. Based upon the Officer's reasonable and articulable suspicion that he had observed the
9 defendant sell drugs, it was permissible for the officer to briefly detain him to further
10 investigate whether a crime had occurred, which included asking him to remain on the
11 curb for up to six minutes and then ask whether the defendant could be searched for
12 drugs.

13 2. The search of Williams was a valid consensual search, and the evidence therefrom is
14 admissible.

15 3. Upon observing what appeared to be cocaine in Williams' pocket, Officer Poblocki had
16 probable cause to arrest him, and search him incident to arrest.

17 4. The statements made by Williams prior to the arrest when he was not in custody are
18 admissible.

19 5. The statements made by Williams after the arrest are admissible since they were
20 spontaneous and not in response to any questioning.

