

63319-8

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ORIGINAL

NO. 63319-8

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

TAN VO,

Appellant.

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FILED:  
COURT OF APPEALS, DIVISION I  
STATE OF WASHINGTON  
2009 SEP 28 PM 2:45

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JULE SPECTOR

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**BRIEF OF RESPONDENT**

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**A. ISSUE PRESENTED**

Probable cause to arrest exists where the totality of the facts and circumstances known to the officer at the time of arrest, in light of the officer's training and experience, would warrant a reasonably cautious person to believe an offense had been committed. Officer Lee had more than 12 years of law enforcement experience, the last seven of which he spent with a narcotics emphasis. He observed Vo contact several known drug users in the area, make quick hand-to-hand transactions with them, and on the final exchange he saw the rocks of cocaine that Vo exchanged for currency. Did the trial court correctly rule that the officer had probable cause to arrest Vo?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The State charged Tan Van Vo with Possession with Intent to Deliver a Controlled Substance (cocaine) in violation of RCW 69.50.401(1), (2)(a). CP 1-4. Vo set his case for trial and moved to suppress all evidence of the cocaine and currency found, arguing that it was the product of an unlawful arrest. CP 5-9. After hearing testimony from Vo and the officers, the court found that

the officers had probable cause to arrest Vo and denied Vo's motion to suppress. CP 57-62. A jury found Vo guilty as charged and the trial court imposed a standard range sentence. CP 13; CP 38-46. Vo timely appealed. CP 63-73.

## 2. **SUBSTANTIVE FACTS**

Vo does not challenge the trial court's findings of fact. The State, therefore, incorporates the trial court's findings of fact by reference.

## C. **ARGUMENT**

### 1. **Standard of Review**

Unchallenged findings of fact are verities on appeal. State v. Acrey, 148 Wn.2d 738, 745, 64 P.3d 594 (2003). Whether a trial court's findings of fact support its conclusions of law regarding probable cause for an arrest presents a legal question reviewed de novo. State v. Vasquez, 109 Wn. App. 310, 318, 34 P.3d 1255 (2001).

Here, Vo does not challenge the trial court's findings of fact. Thus, the trial court's findings are verities on appeal and the inquiry focuses on whether the trial court's findings support its conclusion of law that the officers had probable cause to arrest Vo. The trial

court's probable cause conclusion is reviewed de novo by this court.

**2. The Trial Court Properly Found that the Officers had Probable Cause to Arrest Vo.**

Probable cause exists where the facts and circumstances within the arresting officer's knowledge and of which the officer has reasonably trustworthy information are sufficient to warrant a person of reasonable caution in a belief that an offense has been committed. State v. Terranova, 105 Wn.2d 632, 643, 716 P.2d 295 (1986). This determination rests on the totality of facts and circumstances within the officer's knowledge at the time of the arrest. State v. Fore, 56 Wn. App. 339, 343, 783 P.2d 626 (1989). In making this determination, reviewing courts must give consideration to an arresting officer's special expertise in identifying criminal behavior. State v. Scott, 93 Wn.2d 7, 11, 604 P.2d 943 (1980). Factors that might appear to an ordinary citizen to be innocent conduct, if found by the suppression court, could provide probable cause to arrest a person. State v. Poirier, 34 Wn. App. 839, 842, 664 P.2d 7 (1983). These factors include whether (1) either party is known to the officer; (2) drug sales or exchanges regularly take place in the area; (3) the items exchanged were

particularly distinctive or characteristic of drugs or narcotics; and (4) either party acted in a suspicious or furtive manner. Id. at 843. Probable cause to arrest requires more than "a bare suspicion of criminal activity," Terravona, 105 Wn.2d at 643, but does not require facts that would establish guilt beyond a reasonable doubt. State v. Conner, 58 Wn. App. 90, 98, 791 P.2d 261 (1990).

According to Seattle Municipal Code 12A.20.050(B),<sup>1</sup> "[a] person is guilty of drug-traffic loitering if he or she remains in a public place and intentionally solicits, induces, entices, or procures another to engage in [illegal drug activity]." The code provision provides a non-exclusive list of circumstances that an officer may consider in determining whether probable cause exists including whether an individual "[r]epeatedly beckons to, stops or attempts to stop passersby, or engages passersby in conversation..." SMC 12A.20.050(C).

Here, Officer Lee was conducting surveillance of the 100 to 300 block area of Bell Street, a known high narcotics area. CP 57-8. Officer Lee had more than 12 years of law enforcement experience, made 20-50 narcotics arrests per month in the seven

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<sup>1</sup> Seattle Municipal Code ("Drug-traffic loitering") 12A.20.050 is attached in its entirety as Appendix A.

years preceding this incident, purchased narcotics undercover more than 25 times, and had conducted narcotics surveillance more than 100 times. CP 57-8. Based on his experience, Officer Lee was familiar with the packaging and appearance of various narcotics, including crack cocaine. CP 57-8.

On August 13, 2008 at about 8:00 p.m., Officer Lee watched Vo as he was approached by several drug users loitering in the area. On each occasion, Officer Lee saw Vo engage the drug user in a brief conversation before walking with them and performing a hand-to-hand transaction with them. CP 58. In the final transaction, Officer Lee saw the same pattern described above but also saw Vo handle what appeared to him based on his training and experience to be a bindle of crack cocaine. CP 58. He saw Vo remove rocks of suspected cocaine from the bindle, drop them into the palm of the buyer, saw the buyer examine the rocks, and saw the buyer hand Vo currency in exchange for the rocks. CP 58. Based upon the officer's training and experience, he had probable cause to believe Vo had just conducted multiple hand-to-hand drug transactions. The officers thus had probable cause to arrest Vo for Drug Traffic Loitering.

Likewise, the officers had probable cause to arrest Vo for Possession with Intent to Deliver Cocaine. According to RCW 69.50.401(1), (2)(a), a person commits the crime of Possession with Intent to Deliver a Controlled Substance when he possesses a controlled substance with the intent to deliver the controlled substance. In light of Officer Lee's training and experience, there were facts sufficient for a reasonably cautious person to believe that the small white rocks Vo carried and displayed from the plastic bindle were rock cocaine. Vo's actions prior to his arrest, involving quick hand-to-hand exchanges with known drug users, where Officer Lee saw small white rocks exchanged for currency in one transaction, provided sufficient evidence of Vo's intent. There was probable cause to arrest Vo for Possession with Intent to Deliver Cocaine.

Similarly, there was probable cause to arrest Vo for Delivery of a Controlled Substance. Under RCW 69.50.401(1), (2)(a), a person commits the crime of Delivery of a Controlled Substance when he unlawfully and feloniously delivers a controlled substance to another knowing it was a controlled substance. Delivery is the actual or constructive transfer of a controlled substance from one person to another. RCW 69.50.101(f). For the reasons listed

above, Officer Lee's observations provided a sufficient basis for a reasonably cautious person to believe that Vo was delivering a controlled substance. Vo's knowledge that the small white rocks he delivered were a controlled substance (cocaine) can be inferred from his ability to determine the amount of money he would accept for a given amount of the substance he delivered. The officers had probable cause to arrest Vo for Delivery of Cocaine.

Nonetheless, Vo cites to State v. Poirier, 34 Wn. App. 839, 664 P.2d 7 (1983) to support his contention that the officers lacked probable cause to arrest him. But Vo's reliance on Poirier is misplaced as the officers' observations present here, certainly surpass the minimal factual findings entered by the Poirier court to support its denial of suppression.

In Poirier, the factual findings, in their entirety, were as follows:

I.

On or about the 13th day of September, 1980, officers Scott and Bennett of the Tacoma Police Department were working as security officers for a restaurant known as the Dynasty. [ sic ]

II.

That on that date, the officers were standing in a position outside the business near an open door and observed defendant Poirier standing in the parking lot.

III.

The officers then observed defendant Dimercurio arrive at the location of the restaurant in the parking lot. The defendant exited the vehicle and approached Mr. Poirier.

IV.

The officers then observed Mr. Poirier and Mr. Dimercurio exchange items that appeared to be white envelopes or packages. Both defendants were then arrested and searched, and during said search a package of suspected cocaine and a package of money were removed from the defendants.

Id. at 841-42. The court noted that although the testimony would have supported different and stronger findings, specifically regarding the officers' training and experience and the appearance of the objects exchanged, it was bound by the written findings prepared by the prosecutor and entered by the court. Id. at 840-42. The court concluded that the written factual findings failed to establish (1) the officer's familiarity with either party; (2) that this area was known for drug sales; or (3) that the envelopes exchanged had any distinctive characteristics making them recognizable as packages of drugs. Id. at 843. The court thus held that the findings did not support the conclusion that the officer had probable cause to arrest and suppressed the subsequently discovered evidence. Id.

In contrast, here, we have evidence of the factors lacking in the Poirier court's findings. This particular area is known to the

officers based upon their experience as a high narcotics area. CP 57-8. Further, the description of items exchanged in this case is far more detailed than the "white envelopes or packages" described in the Poirier findings. CP 57-8. Here, Officer Lee actually saw the drugs and cash involved in the exchange. CP 57-8. Based upon Officer Lee's training, experience, and detailed observations of illegal activity, there was probable cause to arrest Vo.

**D. CONCLUSION**

For the foregoing reasons, the State respectfully requests this Court find that the trial court properly denied Vo's motion to suppress as the officers had probable cause to arrest him. This Court should therefore affirm Vo's conviction.

DATED this 28<sup>th</sup> day of September, 2009.

RESPECTFULLY submitted,

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# Appendix A



## City of Seattle Legislative Information Service

### Seattle Municipal Code

Information retrieved September 28, 2009 8:01 AM

Title 12A - CRIMINAL CODE

Subtitle I Criminal Code

Chapter 12A.20 - Controlled Substances

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#### SMC 12A.20.050 Drug-traffic loitering.<sup>1</sup>

A. As used in this section:

1. "Conviction" means an adjudication of guilt pursuant to Titles 10 or 13 RCW, or the equivalent provisions of any federal statute, state statute or ordinance of any political subdivision of this state, and includes a verdict of guilty, a finding of guilty and an acceptance of a plea of guilty.

2. "Drug paraphernalia" means drug paraphernalia as the term is defined in the Uniform Controlled Substance Act, RCW 69.50.102, excluding, however, items obtained from or exchanged at any needle exchange program sponsored by the Seattle-King County Health Department, and hypodermic syringes or needles in the possession of a confirmed diabetic or a person directed by his or her physician to use such items.

3. "Illegal drug activity" means unlawful conduct contrary to any provision of RCW Chapter 69.41, 69.50 or 69.52, or the equivalent federal statute, state statute, or ordinance of any political subdivision of this state.

4. "Known drug trafficker" means a person who has, within the knowledge of the arresting officer, been convicted within the last two years in any court of any felony illegal drug activity.

5. "Public place" is an area generally visible to public view and includes, but is not limited to, streets, sidewalks, bridges, alleys, plazas, parks, driveways, parking lots, transit stations, shelters and tunnels, automobiles visible to public view (whether moving or not), and buildings, including those which serve food or drink, or provide entertainment, and the doorways and entrances to buildings or dwellings and the grounds enclosing them.

B. A person is guilty of drug-traffic loitering if he or she remains in a public place and intentionally solicits, induces, entices, or

procures another to engage in unlawful conduct contrary to Chapter 69.50, Chapter 69.41, or Chapter 69.52, Revised Code of Washington.

C. The following circumstances do not by themselves constitute the crime of drug-traffic loitering. Among the circumstances which may be considered in determining whether the actor intends such prohibited conduct are that he or she:

1. Is seen by the officer to be in possession of drug paraphernalia; or
2. Is a known drug trafficker (provided, however, that being a known drug trafficker, by itself, does not constitute the crime of drug-traffic loitering); or
3. Repeatedly beckons to, stops or attempts to stop passersby, or engages passersby in conversation; or
4. Repeatedly stops or attempts to stop motor vehicle operators by hailing, waving of arms or any other bodily gesture; or
5. Circles an area in a motor vehicle and repeatedly beckons to, contacts, or attempts to stop pedestrians; or
6. Is the subject of any court order, which directs the person to stay out of any specified area as a condition of release from custody, a condition of probation or parole or other supervision or any court order, in a criminal or civil case involving illegal drug activity; or
7. Has been evicted as the result of his or her illegal drug activity and ordered to stay out of a specified area affected by drug-related activity.

D. No person may be arrested for drug-traffic loitering unless probable cause exists to believe that he or she has remained in a public place and has intentionally solicited, induced, enticed or procured another to engage in unlawful conduct contrary to Chapter 69.50, Chapter 69.41, or Chapter 69.52 Revised Code of Washington.

E. A person convicted of drug-traffic loitering shall be guilty of a gross misdemeanor and punished in accordance with SMC Chapter 12A.02.

F. During each of the two (2) years following enactment of the ordinance codified in this section,<sup>2</sup> the Mayor of Seattle and the Chief of Police, jointly, shall conduct at least one (1) public hearing a year to ascertain the effectiveness of said ordinance in reducing drug trafficking and its attendant criminal behavior and to assure that this section is being enforced without regard to race, color, ancestry, national origin, sex, sexual orientation or disability. Within one (1) month after each hearing the Mayor and the Chief of Police shall issue a report to the City Council summarizing

the testimony at the hearing. In their report, the Mayor and Chief of Police shall also inform the Council of any changes they deem advisable.

(Ord. 116307 Sections 1, 2, 1992)

1. Editor's Note: Section 1 of Ord. 116242, passed by the City Council on June 29, 1992, concerning prosecutions under Ord. 115171, reads as follows: The expiration or repeal of Ordinance 115171 shall not affect the validity of any prosecution under that ordinance for unlawful conduct committed prior to the date of the expiration or repeal of that ordinance, and such prosecution may proceed as though Ordinance 115171 had remained in effect. Ordinance 115171 expired August 5, 1992.

2. Editor's Note: Ordinance 116307 was passed by the Council on August 17, 1992 and signed by the Mayor on August 21, 1992.

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***Search for ordinances passed since the last SMC update (ordinances codified through Ordinance 122952) that may amend Section 12A.20.050 .***

*Note: this feature is provided as an aid to users, but is not guaranteed to provide comprehensive information about related recent ordinances. See also [Recent Legislation and Council Bills and Ordinances](#).*

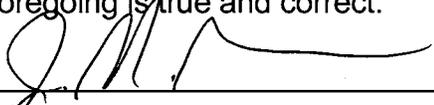
*For research assistance, contact the Seattle City Clerk's Office at 206-684-8344, or by e-mail at [clerk@seattle.gov](mailto:clerk@seattle.gov). For interpretation or explanation of a particular SMC section, please contact the relevant City department.*



Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to David B. Koch, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. TAN VO, Cause No. 63319-8-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

  
\_\_\_\_\_  
Name  
Done in Seattle, Washington

9.28.09  
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Date