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NO. 63529-8-1

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

REC'D
OCT 27 2009
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

CHEICK DIABATE,

Appellant.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 OCT 27 PM 4: 27

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

The Honorable Regina S. Cahan, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied appellant's motion to suppress under CrR 3.6.

2. In its findings of fact and conclusions of law pertaining to appellant's CrR 3.6 motion, the court erred when it entered the following conclusions of law:¹

- conclusion of law "s" – "in this case, the officer was not placed in a better position after asking the Defendant to step out of the vehicle."
- conclusion of law "v" – "the officer was not placed in a better position by the Defendant's seizure as the court assumes that a person will give their true identity."
- conclusion of law "w" – "there are no facts here to suggest that the Defendant was not going to give his true identity."
- conclusion of law "x" – "therefore the officer would have found the Defendant's identity and would have discovered the warrant for his arrest."
- conclusion of law "y" – "the inevitable discovery doctrine does apply as once the arrest warrant was discovered, the arrest and search incident to arrest would have occurred."
- conclusion of law "z" – "although the seizure was unlawful, the officer did not act unreasonably in this case and there was no offensive or improper conduct on the part of the officer."

¹ The Court's written findings and conclusions are attached to this brief as an appendix.

Issue Pertaining to Assignments of Error

Police stopped a car for expired tabs and observed appellant, a passenger, without a seat belt on. Appellant was asked for identification but told police he did not have his identification card. Although appellant made no furtive movements and police expressed no safety concerns, an officer removed appellant from the car. The State conceded, and the trial court properly found, that this was an unlawful seizure. The court nonetheless allowed admission of the evidence obtained as a result of the unlawful seizure under the inevitable discovery doctrine. Where Washington has not adopted the doctrine, and the State failed to satisfy its requirements in any event, should the evidence have been suppressed?

B. STATEMENT OF THE CASE

1. Procedural History

The King County Prosecutor's Office charged Cheick Mohamed Diabate with one count of violation of the Uniform Controlled Substances Act (possession).² CP 1-4. The trial court

² "That the defendant Cheick Mohamed Diabate in King County, Washington, on or about June 4, 2008, unlawfully and feloniously did possess with intent to manufacture or deliver marijuana, a controlled substance, and did know it was a controlled substance."

denied a defense motion to suppress all evidence of the possession. CP 10-29, 90-99. A jury found Diabate guilty. CP 69. Based on an offender score of two, Diabate was sentenced to 6 days in jail, with an additional nine to twelve months to be served on community placement. CP 71-79. Diabate timely filed his notice of appeal. CP 80-89.

2. Facts Pertaining to Charged Offense

On June 4, 2008, at approximately 8:00 p.m., Officer Amir Mousavi of the Bellevue Police Department stopped a 1985 Oldsmobile Cutlass with a punched-out trunk lock shortly after the car left the Newport Hills Community Church parking lot. RP 10-12, 22-24, 78-83. Officer Mousavi testified that while behind the car at a stop sign, he ran the license plate and discovered that the car's license plate tabs were expired. RP 12. After following the car for several more blocks, Mousavi initiated a traffic stop. RP 12-13, 83. The car's driver immediately complied. RP 13.

Upon approaching the car, Mousavi observed three occupants, later identified as Marcus Francis (owner and driver), Isaiah Francis (front passenger), and Cheick Diabate (rear passenger). RP 13, 80. Though Mousavi noticed that neither Isaiah Frances nor Diabate was wearing his seatbelt, he only

questioned Diabate about why he was not wearing his seatbelt. RP 14, 84. Diabate responded that he was not wearing his seatbelt because it didn't work. RP 14. Mousavi then asked all three people for their identification and also asked Marcus Francis for his registration and proof of insurance. RP 14, 28, 85-86. Marcus Francis and Isaiah Francis provided Mousavi with identification, but Marcus Francis did not provide Mousavi with the requested proof of insurance and registration. RP 14-15, 27-28, 85, 223-224. Diabate informed the officer that he did not have his identification with him. RP 14-15, 85.

Immediately after Diabate's response, Mousavi told Diabate to step out of the car. RP 15, 28, 87. Mousavi never witnessed any furtive movements by any of the car's occupants, and there is no evidence that Mousavi had any safety concerns during the course of the investigation. RP 26-27. Mousavi testified that his reason for ordering Diabate out of the car was to make it easier to match a physical description to the identity he anticipated Diabate would eventually provide. RP 15. After stepping out of the car, Diabate provided the officer with his license. RP 15, 87. After running Diabate's name through a records check, Mousavi learned that Diabate had an outstanding arrest warrant. RP 16.

Mousavi arrested Diabate and conducted a search incident to arrest. RP 16-17, 30. During the search, Mousavi found a marijuana pipe containing residue and a Crown Royal bag containing marijuana. RP 17, 87. Mousavi admitted that at the time he approached the car he detected no odor associated with marijuana. RP 26-27. Following the search incident to arrest, Marcus Francis and Isaiah Francis were informed that they were free to leave. RP 30, 87. Neither Marcus Francis nor Isaiah Francis was issued a ticket. RP 28, 30, 86.

Diabate was transferred to booking, where a second search revealed marijuana in his shoes and pants. RP 17-18, 31. Diabate was then given Miranda³ warnings and interrogated by Detective Shawn Griffin of the Mercer Island Police Department and Eastside Narcotics Task Force. RP 18, 36-44. After Detective Griffin determined that Diabate could provide no useful information, Mousavi conducted a strip search on Diabate. RP 18, 3, 44. The strip search yielded no further items. RP 33. During a subsequent interrogation, Diabate told Mousavi that he had been selling marijuana for six months and planned on selling the recovered

³ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

marijuana for seven dollars per bag to whoever wanted to buy it.
RP 19-23.

3. Facts Pertaining to Motions to Suppress

Prior to trial, Diabate moved to suppress all evidence discovered as a result of the investigation, arguing that the initial traffic stop was unlawfully pretextual, that he was impermissibly seized when he was ordered out of the car without having an opportunity to verbally identify himself, and that he did not knowingly and intelligently waive his right to remain silent. CP 10-29. The State did not dispute that Diabate was seized when Mousavi ordered him out of the car. Supp. CP ____ (sub no. 33, State's Response to Defense Motion to Suppress, at 6).

Following Diabate's motions to suppress under CrR 3.5 and CrR 3.6, the trial court entered written findings of fact and conclusions of law. CP 90-99. Concluding that "[t]here was no evidence of furtive movements or any other reason to have Diabate exit the vehicle," the trial court determined that the seizure was illegal. CP 90-99; RP 121-122. Nevertheless, relying on the inevitable discovery doctrine, the trial court denied Diabate's motion to suppress, concluding that his identity would inevitably have been

discovered based on the court's assumption that Diabate eventually would have given his true name to the police. CP 90-94; RP 122.

C. ARGUMENT

THE TRIAL COURT ERRONEOUSLY DENIED DIABATE'S MOTION TO SUPPRESS UNDER CrR 3.6

When reviewing the denial of a suppression motion, this Court reviews the trial court's findings of fact under a clearly erroneous standard. They will be upheld if supported by substantial evidence. State v. Atchley, 142 Wn. App. 147, 154, 173 P.3d 323 (2007) (citing State v. Grewe, 117 Wn.2d 211, 218, 813 P.2d 1238 (1991)). Substantial evidence exists if there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding. Id. (citing State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994)). Conversely, this Court reviews challenges to the trial court's conclusions of law de novo. Atchley, 142 Wn. App. at 154 (citing Robel v. Roundup Corp., 148 Wn.2d 35, 43, 59 P.3d 611 (2002)).

"As a general rule, warrantless searches and seizures are per se unreasonable in violation of the Fourth Amendment and article 1, section 7 of the Washington State Constitution." State v. Duncan, 146 Wn.2d 166, 171, 43 P.3d 513 (2002). The State

bears the burden of proving that a warrantless search or seizure falls within a recognized exception. State v. Houser, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980). When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed. State v. Kennedy, 107 Wn.2d 1, 4, 726 P.2d 445 (1986).

An ordinary traffic stop has been analogized to an investigative detention subject to the criteria of reasonableness established in Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). State v. Ladson, 138 Wn.2d 343, 350, 979 P.2d 833 (1999). Thus, a traffic stop must be justified at its inception, and reasonably related in scope to the circumstances that justified the interference in the first place. Id. (quoting Terry, 392 U.S. at 20). Before an officer may exceed the limits of this authority, there must be reasonable, articulable grounds from which the officer can reasonably suspect criminal activity. State v. Tijerina, 61 Wn. App. 626, 629, 811 P. 2d 241 (1991), review denied, 118 Wn.2d 1007 (1991). Absent such grounds, the officer must release the individual to be on his way once the business of the traffic stop has been effected. State v. Cantrell, 70 Wn. App. 340, 344, 853 P.2d

479 (1993), overruled in part on other grounds, 124 Wn.2d 183, 875 P.2d 1208 (1994).

A person stopped for a traffic infraction may be detained only for the time reasonably necessary “to identify the person, check the status of the person’s license, insurance identification card, and the vehicle’s registration, and complete and issue a notice of traffic infraction.” RCW 46.61.021(2). An officer may seize a passenger for a reasonable time for the purpose of ascertaining his true identity when under the totality of the circumstances an officer can provide specific and articulable facts which, taken together with rational inferences from those facts, would lead an officer to believe that the passenger was trying to hide his identity and would likely provide a false name. See State v. Chelly, 94 Wn. App. 254, 260-261, 970 P.2d 376 (1999), review denied, 138 Wn.2d 1009 (1999). “Vehicle passengers are not required to carry driver’s licenses or other identification.” State v. Cole, 73 Wn. App. 844, 848, 871 P.2d 656 (1994), review denied, 125 Wash.2d 1003 (1994). “A passenger stopped for an infraction need only identify himself, give his current address, and sign the notice of infraction.” Id. at 849 (citing RCW 46.61.021(3)).

In this case, Officer Mousavi ordered Diabate out of the car immediately after he informed Mousavi he did not have identification. Diabate was not afforded an opportunity to verbally identify himself before being ordered out of the car. Accordingly, given that “[t]here was no evidence of furtive movements or any other reason to have Diabate exit the vehicle,” the trial court correctly determined that the seizure was illegal. The trial court erred, however, in denying Diabate’s motion to suppress by concluding that his identity would inevitably have been discovered based on the assumption that Diabate would have given his true identity to the police.

The Supreme Court has not yet decided whether the inevitable discovery doctrine applies under article I, section 7 of the Washington State Constitution under any set of circumstances. State v. O’Neill, 148 Wn.2d 564, 592 n.11, 62 P.3d 489 (2003) (inevitable discovery rule inapplicable because there would be no incentive for the State to comply with article I, section 7’s requirement that the arrest precede a search incident to arrest). The Court of Appeals has held the inevitable discovery doctrine is compatible with article I, section 7 protections under certain limited

circumstances. State v. Richman, 85 Wn. App. 568, 577-78, 933 P.2d 1088 (1997).

Under the rule adopted by the Court of Appeals, “[e]vidence obtained through illegal means is admissible under the inevitable discovery doctrine if the State can prove by a preponderance of the evidence that the police did not act unreasonably or in an attempt to accelerate discovery, and the evidence would have been inevitably discovered under proper and predictable investigatory procedures.” State v. Avila-Avina, 99 Wn. App. 9, 17, 991 P.2d 720 (2000). To ensure the inevitable discovery doctrine does not undermine the purposes of the exclusionary rule, the State must show the legal means of obtaining evidence would have been “truly independent” from any unlawful action. Id. at 18. In this regard, the doctrine “allows neither speculation as to whether the evidence would have been discovered, nor speculation as to how it would have been discovered.” Id. If these requirements are strictly enforced, “post hoc suggestions of alternate legal means will not be accepted as a basis for application of the inevitable discovery exception.” Id.

Even assuming the doctrine is acceptable under article 1, section 7 (the State has never convinced the Supreme Court of this

proposition), it is not satisfied in this case. The trial court's conclusion that Diabate's identity would inevitably be discovered rests entirely on the assumption that Diabate would ultimately have given his true identity to police. RP 121-122; CP 90-94. There is no evidence in the record to support this assumption, however.

That Diabate initially told officers that he did not have his identification, despite later evidence to the contrary, demonstrates that Diabate had no intention of revealing his true identity to police while seated in the car. Given this initial deception, it is highly likely Diabate would have given a false name if asked his name while still seated in the car. Indeed, only after Mousavi displayed his position of authority by ordering Diabate out of the car did Diabate acquiesce, locate his identification, and reveal his true identity. Diabate admitted during the motion to suppress hearing that when he feels intimidated he sometimes just complies with whatever is asked of him. RP 71. Thus, absent Mousavi's intimidating show of authority in illegally seizing Diabate, it is far from certain – in fact highly speculative – whether Diabate would have revealed his true identity, and therefore whether police would have discovered the warrant for his arrest.

Even assuming arguendo that Diabate would have given Mousavi his true identity without the unlawful seizure, there is no evidence that Mousavi would have discovered the warrant for Diabate's arrest. In State v. Reyes, 98 Wn. App. 923, 993 P.2d 921 (2000), the Court held that cocaine seized from Reyes during a Terry stop in which officers exceeded the permissible scope of the stop by failing to limit their search to weapons did not fall within the inevitable discovery exception to the exclusionary rule, and thus was inadmissible. Id. at 924. The court found that the State failed to show by a preponderance of the evidence that police officers used proper and predictable police procedures, or that those procedures would have inevitably led to the evidence, since there was no testimony at the suppression hearing as to what the officers would have done absent the illegal search. Id. at 933-34.

As with Reyes, no evidence was presented at Diabate's suppression hearing regarding what action Mousavi would have taken absent the illegal seizure. Mousavi made no assertion that it is his common practice to check names for outstanding warrants. Accordingly, there is no evidence to suggest that Mousavi would have checked Diabate's name for warrants absent the illegal seizure. Indeed, although warrant checks are considered routine

police procedures, see State v. Rife, 133 Wn.2d 140, 157-158, 943 P.2d 266 (1997), no evidence was presented that Mousavi ever checked Marcus Francis' or Isaiah Francis' names for warrants despite the fact that Marcus Francis failed to provide Mousavi with the proof of insurance and registration that he requested.

The issuance of citations for traffic violations also is considered a routine police procedure. RP 8-9, 14, 136; IRLJ 2.2(b)(1); Cole, 73 Wn. App. at 848. Yet, Mousavi did not issue Marcus Francis a citation for expired tabs and/or failure to provide proof of insurance or registration. This is further evidence that he does not always abide by established police procedures. Absent evidence proving that Mousavi would have checked Diabate's name for warrants in the absence of the illegal seizure, the State cannot demonstrate that events would have inevitably led to the discovery of Diabate's warrant and therefore discovery of the controlled substance.

The postulation that Diabate would have revealed his true identity even if allowed to remain in the car is purely speculative and clearly prohibited by the doctrine. Similarly, there is no evidence that police would have discovered Diabate's warrant for arrest even if police had been provided with his true identity. The

court's contrary conclusions, therefore, are nothing more than a speculative post hoc suggestion of an alternate legal means of obtaining the evidence. Accordingly, while the trial court properly found that Diabate was illegally seized when he was ordered out of the car, the court erred in denying the motion to suppress. Because the seizure was unconstitutional, all subsequently uncovered evidence is fruit of the poisonous tree and must be suppressed.

D. CONCLUSION

For the above reasons, Diabate's conviction should be reversed and the case dismissed.

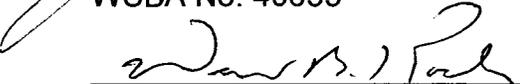
DATED this 27th day of October, 2009.

Respectfully submitted,

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Attorneys for Appellant

APPENDIX

- 1 j. He approached the vehicle on the passenger side.
k. The Defendant was seated in the backseat.
2 l. Officer Mousavi noticed that both passengers, including the Defendant, were not
wearing their seatbelts.
3 m. He asked the Defendant why he was not wearing a seatbelt.
n. The Defendant responded that he wasn't wearing it because it didn't work.
4 o. Officer Mousavi asked the driver to see his license, registration, and proof of
insurance.
5 p. The driver provided his driver's license and was identified as Marcus Francis.
q. Officer Mousavi also asked both passengers for identification.
6 r. The front passenger was identified from his Washington State identification card
as Isaiah Francis.
7 s. The Defendant told Officer Mousavi that he did not have his identification card.
t. Officer Mousavi ordered the Defendant to exit the vehicle.
8 u. The Defendant then found his identification card and gave it to the officer.
v. Officer Mousavi identified him as Cheick Diabate.
9 w. He then found that the Defendant had an unconfirmed warrant.
x. Officer Mousavi confirmed the warrant and placed the Defendant under arrest.
10 y. Officer Mousavi searched the Defendant incident to arrest and found a marijuana
pipe and a purple Crown Royal bag containing a green leafy substance he
11 recognized as marijuana in the right outside pocket of his brown sleeveless
jacket.
12 z. As he continued to search the Defendant, Officer Mousavi found a colored plastic
baggie containing a green leafy substance that also appeared to be marijuana in
13 the right inside pocket of the brown vest.
14 aa. At the station, additional suspected marijuana was found in various locations in
the Defendant's clothing.

15 2. CONCLUSIONS OF LAW:

- 16 a. The stop was not pretextual.
17 b. The objective evidence shows that the tabs were expired.
18 c. It is routine for officers to run vehicle plates.
19 d. The fact that the officer followed the vehicle for a couple of blocks is not
20 evidence of pretextual intention but rather is consistent with waiting for a
21 response from the patrol car computer on the vehicle plate and status of the
22 expired tabs.
23

- 1 e. Approaching the vehicle from the passenger side is not evidence of pretext nor
2 causes suspicion but is rather a routine procedure for officer safety when a
3 vehicle is still in the lane of traffic.
- 4 f. The inquiry by the officer into whether and why the passengers did not have their
5 seatbelts fastened was not unreasonable and is not evidence of pretext.
- 6 g. There was sufficient probable cause to stop the vehicle for a traffic infraction.
- 7 h. The officer approached the vehicle for the expired tabs not for the seatbelt
8 violations.
- 9 i. The officer had the necessary probable cause when he was approaching the
10 vehicle.
- 11 j. The officer observed the seatbelt violation in plain view.
- 12 k. At that point, the officer had probable cause to inquire about the seatbelt
13 violations.
- 14 l. There are no grounds for suppression of evidence based on probable cause to stop
15 the vehicle.
- 16 m. The officer illegally seized the Defendant when he asked the Defendant to step
17 out of the vehicle.
- 18 n. The officer should not have asked the Defendant to step out of the vehicle during
19 an inquiry about a seatbelt violation.
- 20 o. There was no evidence of furtive movements or any other reason to have the
21 Defendant exit the vehicle.
- 22 p. Under State v. Cole, 73 Wn.App. 844 (1994), this was an unlawful seizure.
- 23 q. The doctrine of inevitable discovery does apply in this case.

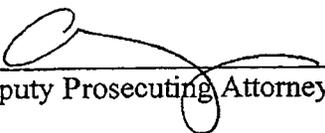
- 1 r. The question is whether the officer was placed in a better or worse position after
2 the unlawful seizure.
- 3 s. In this case, the officer was not placed in a better position after asking the
4 Defendant to step out of the vehicle.
- 5 t. As much as the Defendant did not have to give his true name, he did not have to
6 voluntarily produce his identification card.
- 7 u. The Defendant did give the officer his identification card instead of waiting for
8 the officer to inquire further about his identity.
- 9 v. The officer was not placed in a better position by the Defendant's seizure as the
10 court assumes that a person will give their true identity to the police.
- 11 w. There are no facts here to suggest that the Defendant was not going to give his
12 true identity.
- 13 x. Therefore, the officer would have found the Defendant's identity and would have
14 discovered the warrant for his arrest.
- 15 y. The inevitable discovery doctrine does apply as once the arrest warrant was
16 discovered, the arrest and search incident to arrest would have occurred.
- 17 z. Although the seizure was unlawful, the officer did not act unreasonably in this
18 case and there was no offensive or improper conduct on the part of the officer.
- 19 aa. The suppression motion is denied.
- 20
21
22
23

1 In addition to the above written findings and conclusions, the court incorporates by
2 reference its oral findings and conclusions.
3
4

5 Signed this 25 day of May, 2009.
6

7 
8 JUDGE Regina Cahan

9 Presented by:

10 
11 Deputy Prosecuting Attorney #36624

12 
13 Attorney for Defendant 35773

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

STATE OF WASHINGTON,)
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 Respondent,)
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 v.)
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 CHEICK DIABATE,)
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 Appellant.)

COA NO. 63529-8-1

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2009 OCT 27 PM 4:27

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 27TH DAY OF OCTOBER, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] CHEICK DIABATE
 11732 SE 233RD PLACE
 KENT, WA 98031

SIGNED IN SEATTLE WASHINGTON, THIS 27TH DAY OF OCTOBER, 2009.

x Patrick Mayovsky