

66139-6

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NO. 66139-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

Gregory Bianchi,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The arrest of Mr. Bianchi was unconstitutional because it was not based on probable cause to believe he committed a crime.

2. The trial court erred in concluding that the police had probable cause to arrest Mr. Bianchi and denying his motion to dismiss.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Probable cause to arrest exists only when the arresting officer is aware of facts and circumstances sufficient to cause a reasonable officer to believe a crime has been committed. Here, officers arrested Mr. Bianchi without having witnessed any crime. Was the arrest of Mr. Bianchi unconstitutional, requiring reversal of his theft conviction?

C. STATEMENT OF THE CASE

On the night of June 26, 2009, Seattle Police Officer Kerry Zieger was on bike patrol in downtown Seattle. RP 33-34.¹ He saw Gregory Bianchi run out into traffic, apparently being chased by a gentleman in plain clothes carrying a white handbag. RP 34-35. The man chasing Mr. Bianchi told Officer Zieger he was a loss

¹ The consecutively paginated transcripts of the trial dated September 7 and 8, 2010 are referred to as "RP." The other transcripts are not cited for purposes of Mr. Bianchi's opening brief.

prevention officer at Nordstrom and asked for Officer Zieger's assistance. RP 36. Officer Zieger believed a shoplift had just occurred. RP 38.

Officer Zieger chased and apprehended Mr. Bianchi within moments and called for assistance. RP 39, 75. Fellow police officer Raul Vaca arrived at the scene and questioned the Nordstrom loss prevention officer, who identified himself as Zachary Pritchett. RP 39.

Mr. Pritchett subsequently told Officer Vaca that he was working at the Nordstrom store in downtown Seattle when he saw Mr. Bianchi enter the store, select a designer handbag, conceal the handbag in a plastic bag, and exit the store without paying for the handbag. RP 75, 80-81. Mr. Bianchi was arrested. RP 40, 71-72.

The police never saw Mr. Bianchi in possession of the handbag. RP 48, 53, 66. No crime was being committed or about to be committed at the time of the arrest. RP 50. Nonetheless, Mr. Bianchi was seized and subsequently charged with one count of theft in the second degree. CP1.

Mr. Bianchi moved to dismiss the charge for lack of probable cause. RP 23-24, 28, 103-04. After a hearing, the trial court denied his motion. RP 124.

D. ARGUMENT

THE TRIAL COURT SHOULD HAVE DISMISSED THE CASE BECAUSE THE POLICE LACKED PROBABLE CAUSE TO ARREST MR. BIANCHI.

1. Under the federal and state constitutions, police officers must have probable cause and authority of law when arresting someone without a warrant. Under the Fourth Amendment, a lawful custodial arrest must be based on either an arrest warrant or probable cause. U.S. Const. amend IV; Graham v. Connor, 490 U.S. 386, 388, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989); Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). Under Article I, section 7, an arrest must be predicated on a valid warrant or upon authority of law, which is not established simply by an officer's possession of probable cause. Const. art I, § 7; State v. O'Neill, 148 Wn.2d 564, 585, 62 P.2d 489 (2003) ("authority of law" mandatory prerequisite for arrest under Washington Constitution); State v. Barker, 143 Wn.2d 915, 921, 25 P.3d 423 (2001) ("probable cause alone does not establish the authority of law for an officer outside his jurisdiction to effect a warrantless arrest."). Statute permits the police to effect warrantless arrests if the officer has probable cause to believe the person has committed a felony. RCW 10.31.100. Article I, section

7 “is a jealous protector of privacy.” State v. Valdez, 167 Wn.2d 761, 777, 224 P.3d 751 (2009); accord State v. Rankin, 151 Wn.2d 689, 694, 76 P.3d 217 (2003) (“well-settled” that the Washington Constitution, Article I, section 7, provides greater protection to individual privacy than the Fourth Amendment).

The burden is on the State to show that a police officer had probable cause to arrest. State v. Grande, 164 Wn.2d 135, 141, 187 P.3d 248 (2008). This Court reviews the constitutional question of whether probable cause existed *de novo*. Id. at 140.

2. The police lacked probable cause to arrest Mr. Bianchi. Probable cause requires the existence of reasonable grounds for suspicion supported by circumstances sufficiently strong to warrant a person of ordinary caution to believe the accused is guilty of the indicated crime. State v. Clark, 143 Wn.2d 731, 748, 24 P.2d 1006 (2001). Probable cause requires more than “mere suspicion or personal belief that evidence of a crime will be found.” State v. Neth, 165 Wn.2d 177, 183, 196 P.3d 658 (2008). Probable cause is distinguished from the less stringent standard of “reasonable suspicion” by its requirement that the officer not only reasonably believe criminal activity may be occurring, but that this belief is grounded in circumstances showing the probability that the person

has in fact committed a crime. State v. Lee, 147 Wn. App. 912, 916, 199 P.3d 455 (2008).

In Neth, the court noted a number of odd and suspicious circumstances used to obtain a search warrant for a car, including the presence plastic baggies typically used to sell drugs, the driver's extreme nervousness, thousands of dollars in cash in the car, no proof of car ownership, no driver's license or identification, and three "hits" by a K-9 dog trained in detecting illegal narcotics. 165 Wn.2d at 184. The driver also had a prior heroin conviction. Id.

Despite these suspicious circumstances, the Supreme Court ruled there was insufficient evidence of specific illicit activity to support a finding of probable cause. Id. at 185. The police did not see narcotics residue in the plastic baggies or witness transactions involving the baggies, and without such concrete evidence of drug activity, the suspicious but potentially innocuous circumstances did not amount to probable cause. Id. at 185 n.3.

Mr. Bianchi argues that like Neth, the police did not see Mr. Bianchi commit any acts of theft. The police did not see Mr. Bianchi enter or leave Nordstrom, take a handbag from the shelves, carry the handbag, or drop the handbag in the middle of downtown.

See e.g., RP 48, 50, 53, 66, 84. At best the evidence leading up to his arrest was tenuous: the police saw Mr. Bianchi running in downtown Seattle; a man identifying himself as a loss prevention officer for Nordstrom was holding a white woman's handbag in the vicinity; and subsequent to Mr. Bianchi's detention the man reported witnessing Mr. Bianchi's removal of the handbag from Nordstrom. Like Neth, these potentially innocuous circumstances do not amount to probable cause of specific illicit activity.

On the other hand, probable cause for arrest was found in State v. Williams, 50 Wn. App. 696, 700, 750 P.2d 278 (1988). In that case, the police received an anonymous call reporting an accident in which motorcycles fell off the trailer attached to a van and describing the van. Id. at 697. The police came upon a van that matched the caller's description traveling near the scene and upon stopping the vehicle the driver responded he had been in an accident. Id. at 698. The driver was arrested for an outstanding warrant and provided his address to the police. Id. The police also found the motorcycles, which were brand new and of the same make and model. The police discovered a nearby motorcycle dealership had been burglarized and motorcycles were missing. Id. Police officers reported to the address provided by the van driver

where they met and questioned the codefendants. Id. After being advised of their rights, each made written confessions to theft of the motorcycles. Id.

After deciding the stop of the van and warrant check were constitutionally permissible, the Williams court examined whether there was probable cause to arrest the codefendants. Williams, 50 Wn. App. at 700. The court recited the extensive evidence before the police at the time of arrest: “[t]he police had information about the burglary of the motorcycle dealership, Williams’ lawful confession to the burglary identifying and implicating [codefendant] Sharpe, and Sharpe’s physical description. The officer lawfully obtained the Goodwin Road address through conversation with Williams regarding directions for Sharpe to drive to the courthouse to post bail.” Id. at 700-01. Based on all the facts before the police, the court found “enough information to support probable cause to arrest Sharpe.” Id. at 701.

The basis for suspicion here does not rise to the level of evidence in Williams. Instead, this case is more like Neth. Accordingly, Mr. Bianchi contends the police lacked probable cause to arrest him.

3. The resulting identity evidence must be suppressed and Mr. Bianchi's conviction reversed. "The exclusionary rule mandates the suppression of evidence gathered through unconstitutional means." State v. Garvin, 166 Wn.2d 242, 254, 207 P.3d 1266 (2009); Wong Sun, 371 U.S. at 485. Absent the illegal seizure, the police would not have learned Mr. Bianchi's identity. Hayes v Florida, 470 U.S. 811, 814-18, 105 S. Ct. 1643, 84 L. Ed. 2d 705 (1985); Davis v Mississippi, 394 U.S. 721, 724, 89 S. Ct. 1394, 22 L. Ed. 2d 676 (1969) (the fruit of the poisonous tree doctrine extends to all illegally seized evidence, "however relevant and trustworthy the seized evidence may be as an item of proof"). The Nordstrom loss prevention officer identified Mr. Bianchi, and the police learned his identity as a product of unlawful arrest. Mr. Bianchi's identity as the perpetrator of the theft must be suppressed and, thus, his conviction reversed. See id.; People v. Gethers, 86 N.Y.2d 159, 162 (1995).

E. CONCLUSION

Because his arrest was unconstitutional, Mr. Bianchi's conviction should be reversed.

DATED this 26th day of April, 2011.

Respectfully submitted,



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DIVISION ONE**

STATE OF WASHINGTON,)	
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v.)	NO. 66139-6-I
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GREGORY BIANCHI,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, JOSEPH ALVARADO, STATE THAT ON THE 26th DAY OF APRIL, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
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SIGNED IN SEATTLE, WASHINGTON THIS 26th DAY OF APRIL, 2011.

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