

No. 66566-9

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL EDWARD CONNER,

Appellant.

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

APPELLANT'S REPLY BRIEF

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COURT OF APPEALS
STATE OF WASHINGTON
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A. ARGUMENT IN REPLY

1. MR. CONNER WAS UNLAWFULLY SEIZED
WHEN DEPUTY TADDONIO ASKED HIM TO
STEP OUT OF THE CAR

The State contends neither Ms. Bosma nor Mr. Conner was seized until the deputy found the pipe in Ms. Bosma's purse because both were free to leave or end the contact at any time up until that point. SRB at 5-15. To the contrary, both Ms. Bosma and Mr. Conner were seized when the deputy asked them to exit the car so that he could search the car.¹

In determining whether a person is "seized" for constitutional purposes, the question is whether, by means of an officer's physical force or show of authority, the person's freedom of movement is restrained and a reasonable person would not believe he or she is (1) free to leave, given all the circumstances, or (2) free otherwise to decline an officer's request and terminate the encounter. State v. O'Neill, 148 Wn.2d 564, 574, 62 P.3d 489 (2003).

¹ Mr. Conner was seized at the same time Ms. Bosma was seized. When the driver of an automobile is seized by police, all of the passengers are also seized. Brendlin v. California, 551 U.S. 249, 257, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007), overruling State v. Mendez, 137 Wn.2d 208, 970 P.2d 722 (1999). That is because a reasonable person in the passenger's position when the car is stopped "would . . . underst[and] the police officers to be exercising control to the point that no one in the car [i]s free to depart without police permission." Id. at 257; see also State v. Byrd, 110 Wn. App. 259, 264, 39 P.3d 1010 (2002) ("Certainly passengers as well as the driver are 'seized' when a vehicle is stopped by police officers. Without the stop, the passengers would not be present to be subject to further police scrutiny and control.").

In O'Neill, the Washington Supreme Court held a person sitting in a parked car is seized when a police officer asks him or her to exit the car. Id. at 582. There, a police officer approached a car parked in front of a store at night and shone a flashlight in the driver's face. Id. at 572. The officer asked the driver, O'Neill, for identification and O'Neill said he had none, as his driver's license had been revoked. Id. The officer asked for registration and insurance papers, which O'Neill provided. Id. The officer then asked O'Neill to step from the car and patted him down for identification. Id. When O'Neill got out of the car, the officer saw what appeared to be a drug spoon on the floorboard. Id. A search of the car revealed apparent cocaine. Id. at 573.

The court held O'Neill was seized when the officer asked him to get out of the car, as "[a]t that point, a reasonable person in O'Neill's position would not believe himself free to leave." Id. at 582; see also State v. Cole, 73 Wn. App. 844, 846, 850, 871 P.2d 656 (1994) (passenger was seized at point trooper asked him to step out of car). The officer's preceding actions—shining his spotlight on the car, asking O'Neill to roll the window down and engaging him in conversation, and requesting identification—did not amount to a seizure. Id. at 578-81. "It is not improper for a law

enforcement officer to engage a citizen in conversation in a public place." Id. at 579 (citing State v. Young, 135 Wn.2d 498, 511, 957 P.2d 681 (1998)). Further, an officer's request for identification does not, alone, raise the encounter to an investigative detention. Id. at 580 (citing Young, 135 Wn.2d at 511; State v. Armenta, 134 Wn.2d 1, 11, 948 P.2d 1280 (1997)). But once an officer asks the occupant of a car to get out of the car, a reasonable person in his or her position would not feel free to decline the officer's subsequent requests or leave the scene. O'Neill, 148 Wn.2d at 582; Cole, 73 Wn. App. at 846.

That Ms. Bosma and Mr. Conner agreed to allow the deputy to search the car does not mean they were not "seized" for constitutional purposes when he asked them to get out of the car. Once the officer asked them to exit the car so that he could conduct the search, a reasonable person in their position would not feel free to leave the scene or refuse any subsequent requests. Thus, at that point, the interaction rose to the level of a seizure.

An illustrative case is Armenta. There, two men, Huberto Armenta and David Cruz approached a police officer at a truck stop and asked if he knew of an auto mechanic who could repair their car. 134 Wn.2d at 4-5. The officer offered to look at the car himself

and the men accepted. Id. at 5. On their way to the car, the officer asked the men for identification; Cruz provided a false name. Id. Noticing a bulge in one of Cruz's pockets, the officer asked if it was a wallet. Id. Cruz said no and took out a wad of money. Id. Armenta also voluntarily produced three bundles of money. Id. The officer called in a check of the identifications and learned Armenta's driver's license was suspended and there was no record of the name Cruz had given him. Id. at 6. The officer called for backup and placed the money the men had voluntarily given him in his patrol car "for safe keeping." Id. The officer obtained the men's consent to search the car and found drugs in the trunk. Id.

The Supreme Court held the men were seized when the officer put their money in the patrol car. Id. at 12. At that point, a reasonable person would not have felt free to leave. Id. Thus, even though the men had given the officer permission to take their money, once the officer took possession of it and placed it in his car, a reasonable person would not feel free to ask for the money back and end the encounter and leave.

Similarly, a person is "seized" when a police officer takes possession of his or her identification or driver's license, even if the identification is given voluntarily. "If the officer retains the suspect's

driver's license while asking him other questions, a seizure has occurred since the suspect is effectively immobilized without the license." State v. Crespo Aranguren, 42 Wn. App. 452, 456-57, 711 P.2d 1096 (1985); see also State v. Coyne, 99 Wn. App. 566, 572, 995 P.2d 78 (2000) ("once an officer retains a suspect's identification or driver's license, and takes it with him to conduct a warrants check, a seizure within the meaning of the Fourth Amendment has occurred."); State v. Thomas, 91 Wn. App. 195, 200-01, 955 P.2d 420 (1998) (same).

Thus, Mr. Conner was "seized" for constitutional purposes once the deputy asked him to step out of the car. A reasonable person in his position would not have felt free to end the encounter at that point or refuse the deputy's subsequent requests. Because the deputy did not have a reasonable, articulable suspicion that either Mr. Conner or Ms. Bosma was engaged in criminal activity, the seizure was unlawful.² O'Neill, 148 Wn.2d at 576-77; Terry v. Ohio, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

² The State concedes the deputy did not have sufficient basis to detain Mr. Conner when he arrested Ms. Bosma after finding apparent methamphetamine in her purse. SRB at 16. Thus, the State effectively concedes the deputy did not have a sufficient basis to detain Mr. Conner earlier, when he asked him to step out of the car.

2. THE SEARCH OF THE POCKET WAS UNLAWFUL

a. The search of the pocket exceeded the proper scope of a *Terry* frisk. The State contends Deputy Taddonio was authorized to peer inside Mr. Conner's pocket because he could not determine from the pat-down search whether the item inside was a weapon. SRB at 18-19 (citing State v. Hudson, 124 Wn.2d 107, 112-13, 874 P.2d 160 (1994)). The State's argument is contrary to the record. Deputy Taddonio testified, and the trial court found, that after conducting the pat-down search of the pocket the deputy concluded the item inside was *not* a weapon. He decided to peer inside the pocket in order to investigate what the item *could* be. But under Terry and subsequent cases, once an officer determines during a pat-down search that an item inside a pocket is not a weapon, he may not search the pocket further. Thus, Deputy Taddonio was not authorized to peer inside Mr. Conner's pocket.

After arresting Ms. Bosma, Deputy Taddonio noticed Mr. Conner walking back and forth near the car with a "fairly large bulge" in his right front pocket. RP 19-20. The deputy was concerned "because a bulge of that size could be any number of weapons in a pocket." RP 20. The deputy patted down the pocket and could not tell what the item was. RP 20. It was "fairly large"

RP 20, and an "odd size," RP 48, but "was not a hard compact" [sic], RP 20. The deputy asked Mr. Conner what it was and Mr. Conner said it was "a large amount of money." RP 20. Indeed, the item felt like "a big pack, stack of something," like "a large fold of paper in a pocket." RP 48.

Although the deputy could not tell what the item was, he testified he knew it was *not* a weapon. At the CrR 3.6 hearing, defense counsel asked,

Q. And when you felt that bulge in his pocket, you knew at that time it wasn't a weapon; is that right?

A. Correct.

RP 47-48. The item was not "hard" like a weapon. RP 20. Mr. Conner's explanation that it was \$3,000 in cash was "quite plausible." RP 49.

The trial court similarly found Deputy Taddonio concluded from the pat-down search that the item inside the pocket was not a weapon:

The deputy determined that the bulge in the pats pocket was fairly firm, but not of the degree associated with a weapon. The deputy inquired into the identity of the object. Mr. Conner stated it was a large amount of currency. This explanation was consistent with the feel of the object from the pat-down. . . .

CP 48. The trial court erroneously concluded the deputy was permitted to peer inside the pocket in order to verify what the item was, even though he knew it was *not* a weapon. CP 48-50.

As argued in the opening brief, State v. Garvin, 166 Wn.2d 242, 207 P.3d 1266 (2009), and the cases on which it relies, make clear that an officer authorized to conduct a Terry frisk of a person's pocket must cease the search once he determines the pocket does not contain a weapon. If the officer ascertains the object is not a weapon, the permissible scope of the search ends and the officer needs probable cause to search further. Id. at 254 (citing State v. Hobart, 94 Wn.2d 437, 446, 617 P.2d 429 (1980)). "To approve the use of evidence of some offense unrelated to weapons would be to invite the use of weapons[] searches as a pretext for unwarranted searches, and thus to severely erode the protection of the Fourth Amendment." Id. (quoting Hobart, 94 Wn.2d at 446). The officer may not continue searching in order find out if the suspect is carrying drugs or other contraband. "[I]f that were permissible, there would be little to distinguish a frisk incident to a Terry stop from a general search for contraband, and we strongly disapprove of such legal fiction." Id. at 255.

The State relies on Hudson, but that case is readily distinguishable. In Hudson, police detectives conducted a pat-down search of a suspect wearing a jacket. 124 Wn.2d at 110. While patting down the outside of the man's jacket, one of the detectives "felt a quite substantial bulge, hard something" in the right jacket pocket, which the officer thought might be a weapon. Id. (quoting videotape recorded proceedings at 50-51). The detective reached into the pocket, felt the item, and instantly recognized it as a pager. He also felt a baggie containing a "ragged edge chunk" of substance that he suspected was a large rock of cocaine. Id. (quoting videotape recorded proceedings at 54). The officer took out the baggie and pager, confirming his suspicions. Id.

The Supreme Court held the "plain touch doctrine" authorizes an officer conducting a pat-down search to seize contraband discovered during the search only if the nature of the object as contraband is "immediately apparent" by touch. Id. at 114; see also Minnesota v. Dickerson, 508 U.S. 366, 375-76, 113 S. Ct. 2130, 124 L. Ed. 2d 334(1993) (touch alone can yield immediate knowledge sufficient to satisfy plain view doctrine where officer "feels an object whose contour or mass makes its identity

immediately apparent"). The Hudson court held the record was not adequate to decide whether the plain touch doctrine applied. The court remanded for further fact-finding to determine if the detective immediately recognized he was touching cocaine or whether he improperly continued the search after realizing there was no weapon. Id. at 119-20.

In Garvin, the Supreme Court affirmed that Hudson requires the officer "immediately recognize" the object as contraband in order for the plain touch doctrine to apply. Garvin, 166 Wn.2d at 252-53.

Here, there is no evidence that Deputy Taddonio "immediately recognized" during the pat-down search that the object in Mr. Conner's pocket was contraband. Therefore, he was not authorized under the plain touch doctrine or Hudson to seize the object. Once he determined the object was not a weapon, he was required to cease the search. He unlawfully extended the search by peering into the pocket.

b. Mr. Conner did not waive his right to object to the search because any "consent" he gave was not purged of the taint of the officer's prior unlawful conduct. The State contends that by "consenting" to the search of his pocket, Mr. Conner waived his

right to object to the search. SRB at 20 (citing State v. Morse, 156 Wn.2d 1, 123 P.3d 832 (2005)). But as argued in the opening brief, Mr. Conner's "consent" did not provide the deputy with authority to search the pocket, because the consent was not purged of the taint of the prior unlawful seizure. An officer may not extend an unlawful search or seizure by requesting and receiving consent to conduct an investigatory search.

In addition to the cases from Washington and other jurisdictions cited in the opening brief, AOB at 21-25, two other cases illustrate this principle. See State v. Chrisman, 94 Wn.2d 711, 619 P.2d 971 (1980), overruled on other grounds by Washington v. Chrisman, 455 U.S. 1, 102 S. Ct. 812, 70 L. Ed. 2d 778 (1982); State v. Avila-Avina, 99 Wn. App. 9, 991 P.2d 720 (2000), overruled on other grounds by State v. Winterstein, 167 Wn.2d 620, 220 P.3d 1226 (2009).

In Chrisman, a police officer standing outside a university dormitory room saw Chrisman along with marijuana seeds and a pipe inside the room when the door was opened. 94 Wn.2d at 713-14. Chrisman agreed to allow the officer to search the room, which yielded more marijuana and LSD. Id. at 714. The Supreme Court held the initial search was unlawful because the plain view doctrine

did not apply. Id. at 717-18. The marijuana and LSD seized after Chrisman consented to the search of the room should have been suppressed because it was obtained through exploitation of the initial illegal search. Id. at 718. The "consent" search was not purged of the primary taint because there was no significant intervening event or considerable lapse of time separating it from the initial illegal search. Id.

Similarly, in Avila-Avina, police detained defendant in a patrol car for six hours before formally arresting him and obtaining his consent to search his apartment and car. 99 Wn. App. at 11-13. The Court held the detention was unlawful and Avila-Avina's consent was obtained through exploitation of that illegality because there were no intervening circumstances separating the detention from the consent. Id. at 16. Thus, the evidence obtained in the search should have been suppressed. Id. at 21.

Here, Deputy Taddonio illegally seized Mr. Conner when he asked him to exit the car. The deputy unlawfully extended the detention when he asked and received Mr. Conner's "consent" to search his pocket and conducted a search of the pocket. There were no intervening circumstances or lapse of time between the

illegal detention and the search. Therefore, the evidence found in the search should have been suppressed.

B. CONCLUSION

For the reasons above and in the opening brief, the evidence found in the search of Mr. Conner's pocket should have been suppressed because it was obtained through exploitation of an illegal search and seizure.

Respectfully submitted this 2nd day of December 2011.


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

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 66566-9-I
)	
MICHAEL CONNER,)	
)	
APPELLANT.)	

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