

NO. 68005-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

D. B.-H.,

Appellant.

REC'D
MAY 25 2012
King County Prosecutor
Appellate Unit

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

The Honorable Christopher Washington, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by denying D.B.-H.'s motion to suppress evidence.

2. The trial court erred by finding "the left front pocket [of B.-H.'s coat] was sagging under the weight of a heavy object." CP 45 (Finding of Fact 10) (attached as appendix); see also CP 48 (Conclusion of Law 2) (referring to "the sagging of the heavy object inside Respondent's jacket").¹ (attached as appendix).

3. The trial court erred by concluding the officers' did not exceed the permissible scope of an investigative detention. CP 48 (Conclusion of Law 5).

4. The trial court erred by concluding B.-H. voluntarily consented to a search of his pockets. CP 48 (Conclusion of Law 6).

¹ Substantial evidence must support a trial court's finding of fact. State v. Tyler, 166 Wn. App. 202, 208, 269 P.3d 379 (2012). There is no evidence to support the trial court's finding that the weight of the object caused the jacket pocket to sag.

5. Even if the consent was voluntary, the unlawful arrest invalidated the consent and therefore did not justify the search of B.-H.'s pockets.

Issues Pertaining to Assignments of Error

1. Based on an officer's suspicion B.-H., a juvenile, was carrying a concealed handgun in his coat pocket, four police officers stormed onto a Metro bus through the back doors. The first officer pointed a gun at B.-H. and ordered him get out of his seat, put his hands on his head, and turn around. The officer then handcuffed B.-H. and escorted him off the bus. Did these actions exceed the limited scope of an investigative detention and constitute an arrest?

2. If so, was the arrest supported by probable cause, even though each of the three principle police officers testified that at the time of the seizure, he lacked probable cause to arrest?

3. If the seizure amounted to nothing more than an investigative detention, did B.-H. voluntarily consent to the seizing officer's consent to search his pockets?

4. Even if the consent was voluntary, was it vitiated by the unlawful arrest?

B. STATEMENT OF THE CASE

Police Officer Christopher Walker was patrolling downtown Kent during the city's annual summer celebration called Cornucopia Days. Walker was aware gang-related violent acts had occurred during the festival in past years, including a fight amongst gang members at the Kent Transit Center the previous year. RP 14-16.

At about 9:30 p.m., Walker was walking in the Transit Center when he observed 15-year-old D. B.-H. walking toward him. RP 18, 131. Despite the warm July weather, B.-H. was wearing a heavy black coat that was unzipped. RP 17-18. According to Walker, "the heavy clothing, big heavy coats, are used for concealing firearms." RP 14.

Walker described an ability to see "prints or outlines on clothing as a result of firearms being concealed inside clothing[,]" especially if the individual presses the fabric against the weapon. RP 12-13. B.-H. had his left arm pressed against his side as he walked, which allowed Walker to see the outline of a hard, rigid, six-inch object in the bottom of the coat pocket. RP 18. Walker believed B.-H. walked this way to prevent the weight of the object, which Walker suspected was a gun, from causing the pocket to swing. RP 19, 24, 26.

B.-H. walked "right past" Walker, who "wasn't sure it was a gun at that point." RP 19. B.-H. joined four or five other young men. But for B.-H., the men jaywalked across the street despite the presence of several officers. RP 20. B.-H. walked down the street and away from the Transit Center before using a crosswalk to cross the street and rejoin the group. RP 20. Walker surmised B.-H. did not jaywalk because he did not want police to contact him. In Walker's experience, people who carry contraband do not want to commit infractions in front of police officers. RP 20, 25-26.

B.-H. walked out of view, and Walker made no attempt to follow him. Nor did he call for other officers to follow B.-H. Instead, he remained on patrol at the Kent Transit Center. RP 20, 26.

About 20 minutes later, Walker saw B.-H. again back at the Transit Center. RP 21. B.-H. was amongst a crowd of people, which prevented Walker from seeing his pockets. B.-H. quickly got into a line of people waiting to board a bus to Renton. RP 21, 27. In the same line was an undercover officer Walker recognized as Andrew Schwab, a King County Sheriff's deputy assigned to Metro Transit. RP 21-22, 27-28, 31-32, 37-38.

Walker observed B.-H. and Schwab board the bus and sit very near each other, with B.-H. sitting in the rear corner. RP 22, 43, 61, 101. Walker then saw a King County Sheriff's supervisor standing nearby. RP 22. He described B.-H. to the supervisor and told her he believed B.-H. was carrying a gun. RP 22, 27-28, 30. Walker testified he did not have probable cause to arrest B.-H. RP 29.

The supervisor called Schwab, described B.-H.'s appearance and location on the bus, and told him a fellow officer believed B.-H. was armed with a handgun. RP 40-41, 59-60. Schwab called a colleague named Steven Johnson and discreetly conveyed what the supervisor had told him, while at the same time watching B.-H. sitting on the bus with his friends. RP 41-45, 74-76. Schwab told Johnson, who had gotten off the bus moments earlier, he had not seen a gun and did not have probable cause to arrest B.-H. RP 76.

Johnson devised a plan that involved boarding the bus through the rear doors with three colleagues at an agreed-upon bus stop, quickly contacting B.-H., and removing him from the bus. RP 76-78, 80, 99, 115-16. And this is what happened. Johnson boarded first, with his gun pointed at B.-H. RP 82, 101. Although he could not say whether his colleagues also displayed their guns, Johnson said, "I would hope they had

their guns drawn, yes." RP 108. Johnson immediately approached and ordered B.-H. to put his hands on his head, stand up, and face away. B.-H. complied, and Johnson handcuffed him and backed him off the bus. RP 82-84, 101. Johnson did not believe he had probable cause to arrest B.-H. at that point. RP 106-07.

A second police officer joined Johnson and B.-H. outside the bus. RP 84. Johnson informed B.-H. he was contacted "because somebody at the Kent Transit Center believed that he may have a firearm on his person." RP 85. B.-H. said he did not have a gun. Johnson asked B.-H. if he could search his pockets, and B.-H. said something like, "Go ahead, you're going to do it anyway." CP 47 (Finding of Fact 30); RP 85-86, 101, 140. Johnson clarified he wanted to reach inside the pockets and B.-H. said, "Go ahead." B.-H. remained handcuffed during this time. RP 85-87. Johnson found a handgun in a pocket of a pair of basketball shorts B.-H. wore under his pants. RP 87-88, 103-04. He then arrested B.-H. and read him his rights. RP 90-92. B.-H. waived his rights and in a tape-recorded statement, told the officer how old he was and admitted he possessed the gun unlawfully after having been convicted of felonies. RP 94-95, 105.

The State charged B.-H. with first degree unlawful possession of a firearm. Supp. CP __ (sub. no. 5, Information, filed July 13, 2011). B.-H.

moved to suppress evidence of the gun under CrR 3.6, which the juvenile court considered at a combined suppression/adjudication hearing. CP 2-22 (Motion to Suppress Evidence); RP 127-29.

B.-H. testified for purposes of the motion to suppress only. RP 129-30. B.-H. said he was wearing a windbreaker-type jacket at Cornucopia Days because it had rained earlier in the day. RP 132-33. He was with his friend, cousin, and brother. RP 133. After leaving the festival to eat, the young men went to the Transit Center to catch a bus home. RP 134-35. They boarded the bus and sat in the back. RP 135-36.

Nothing happened during the ride until "like seven officers got on the bus with their guns out." RP 136-37, 147. One of the officers pointed his gun at him, told him to stand up, and ordered him to put his hands on his head. RP 136-37. B.-H. was scared and thought he "was about to die." RP 137, 148. The officer grabbed him and walked him off the bus backward. RP 137-38. It was dark out and B.-H. was not close to home. RP 139.

The officer asked him if he had a gun and he said no because he was scared. When the officer asked if he could search him, B.-H. said, "Yeah, go ahead, you're going to do it anyway." RP 139-40, 149-50. Contrary to Walker's testimony, B.-H. testified he never carried the gun in

his coat pocket or walked with his arm pressed against his side. RP 140-41.

B.-H. argued Johnson's seizure exceeded the scope of an investigative detention and was therefore an arrest. He contended the arrest was unlawful because it was not supported by probable cause. RP 153-54, 172-77. He argued Walker reported no suspicious activity and did not see him with a gun. Furthermore, despite claiming he suspected B.-H. was armed, Walker neither stopped nor followed him, and did not radio for assistance when B.-H. walked away. RP 156-57.

Alternatively, B.-H. argued that if the court found the seizure was only an investigatory stop, Walker's suspicion that he was carrying a gun was not reasonable. RP 162-72. Finally, B.-H. argued his consent to Johnson's search was not voluntary, especially where Johnson did not tell him he could refuse. RP 177.

The trial court rejected B.-H.'s arguments, finding Johnson's seizure was a valid investigative detention. CP 43-49 (conclusions of law 2 and 3); RP 206-210. In pertinent part, it concluded as follows:

The nature and scope of the investigative stop conducted by King County Sheriff's deputies was reasonable and justified given the nature of the suspected crime and the potential danger to both deputies and the Respondent, as well as other Metro passengers.

CP 48 (Conclusion of Law 5). The court also concluded B.-H. voluntarily consented to Johnson's search:

The State has proven by clear and convincing evidence that the Respondent freely and voluntarily consented to Detective Johnson's request to search inside the Respondent's pockets. Considering the totality of the circumstances, the Respondent's consent to search inside of his pockets was not the result of duress or coercion but rather was given freely and voluntarily.

CP 48 (Conclusion of Law 6).

The court then found B.-H. guilty as charged. CP 36-42; RP 210.

The court imposed a standard range disposition. CP 31-34.

C. ARGUMENT

B.-H.'S MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED BECAUSE OFFICERS DID NOT CONDUCT A LAWFUL INVESTIGATIVE DETENTION.

Officer Johnson exceeded the scope of a valid investigative detention when he drew his gun and pointed it at B.-H., handcuffed him, and escorted him off the bus. Johnson correctly acknowledged he did not have probable cause to believe B.-H. was engaged in criminal activity at the time. The trial court therefore erred by denying B.-H.'s motion to suppress.

1. Johnson exceeded the limited scope of an investigative detention.

The Fourth Amendment and article I, section 7 of the Washington Constitution prohibit unreasonable searches and seizures. State v. Day, 161 Wn.2d 889, 893, 168 P.3d 1265 (2007). Warrantless searches and seizures are generally per se unreasonable and the State bears the burden of demonstrating the applicability of a recognized exception to this rule. Id. at 893–94. "Exceptions to the warrant requirement are limited and narrowly drawn." State v. Parker, 139 Wn.2d 486, 496, 987 P.2d 73 (1999).

One recognized exception to the warrant requirement is the investigative detention. State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). An investigative detention is justified if the officer reasonably suspects the person is committing or is about to commit a crime. Id., at 250.

In B.-H.'s case, the only source for suspicion was Officer Walker, who said he saw "[a] heavy hard object" that was "about six inches long" on the bottom of B.-H.'s coat pocket. RP 18, 26. Neither Schwab nor Johnson developed any independent suspicion.

This scenario implicates the "fellow officer rule." An investigative detention under the "fellow officer rule" is justified only if the officer

conveying his knowledge has enough information to support a reasonable suspicion of criminal activity. See State v. Gaddy, 152 Wn.2d 64, 71, 93 P.3d 872 (2004) (applying fellow officer rule to standard of probable cause for arrest).

B.-H. disputes the court's conclusion that Johnson's actions did not exceed the permissible scope of an investigative detention. This Court reviews conclusions of law de novo. State v. Doughty, 170 Wn.2d 57, 61, 239 P.3d 573 (2010).

In deciding this question, courts look to the purpose of the stop, the amount of the intrusion on the suspect's freedom of movement, and the length of the detention. State v. Williams, 102 Wn.2d 733, 740, 689 P.2d 1065 (1984). Factors include the nature of the suspected crime, the degree of suspicion, the location of the stop, the time of day, and the suspect's reaction to the police to determine whether the amount of intrusion is reasonable. State v. Belieu, 112 Wn.2d 587, 600, 773 P.2d 46 (1989).

"The investigative methods must be the least intrusive means reasonably available." Belieu, 112 Wn.2d at 599. Nevertheless, an investigative detention does not automatically become an arrest when an officer points a gun at a suspect. Belieu, 112 Wn.2d at 598-99 (1989) (citing United States v. Serna-Barreto, 842 F.2d 965 (7th Cir. 1988)). An

arrest occurs if, "under the circumstances, a reasonable person would conclude that he was not free to leave after brief questioning." United States v. Del Vizo, 918 F.2d 821, 824 (9th Cir. 1990).

The Belieu court analogized the test for a protective frisk for weapons to the question whether the use of drawn guns is justified during an investigative detention. 112 Wn.2d at 602. An officer may conduct a weapons frisk when he can point to "specific and articulable facts" that support an objectively reasonable belief that a suspect is "armed and presently dangerous." State v. Collins, 121 Wn.2d 168, 173, 847 P.2d 919 (1993) (quoting Terry v. Ohio, 392 U.S. 1, 21-24, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)). A frisk is a narrow exception to warrant requirement. "The courts must be jealous guardians of the exception in order to protect the rights of citizens." State v. Setterstrom, 163 Wn.2d 621, 627, 183 P.3d 1075 (2008).

In Belieu, the Court held the use of drawn weapons did not exceed the scope of an ostensible investigative detention because officers articulated specific facts that justified an inference that the suspects were armed. Belieu, 112 Wn.2d at 597. Specifically, the police were aware weapons had been repeatedly burglarized from residences in the area; one suspect matched the description of an individual involved in the previous

burglaries; and the suspects made several furtive gestures inside a darkened car after observing police. Id. at 590, 597.

No similar set of circumstances justifies the officers' maximum show of force against B.-H.. B.-H. was seated in the rear corner of a safe, well-lit Metro bus filled with passengers. RP 41, 101. Cf. Collins, 121 Wn.2d at 175 ("[A]n individual who has been stopped may be more willing to commit violence against a police officer at a time when few people are likely to be present to witness it."). He was plainly visible to the onrushing officers and literally had nowhere to go. RP 82-83. Cf. State v. Mendez, 137 Wn.2d 208, 219 n.4, 970 P.2d 722 (1999) (particularly where officers are outnumbered, a nighttime stop in an isolated location could be "more menacing" than a downtown daytime stop), overruled in part on other grounds by Brendlin v. California, 551 U.S. 249 (2007).

B.-H. did not react suspiciously to Johnson's approach or make any furtive movements. RP 101. Cf. State v. Horrace, 144 Wn.2d 386, 395-97, 28 P.3d 753 (2001) (driver's unexplained movements consistent with an attempt to conceal weapon constituted reasonable fear for safety and justified protective frisk of passenger for weapons); State v. Chang, 147 Wn. App. 490, 496, 195 P.3d 1008 (2008) ("[I]f a suspect made a furtive

movement appearing to be concealing a weapon or contraband in the passenger compartment, a protective search is generally allowed."), review denied, 166 Wn.2d 1002 (2009). Nor had he called attention to himself while Schwab had watched him during the ride. RP 45, 61-62. Cf. State v. Harper, 33 Wn. App. 507, 511, 655 P.2d 1199 (1982) (finding a reasonable safety concern where suspect repeatedly and nervously jammed hand into pocket).

Importantly, B.-H. complied with Johnson's orders from the outset of the confrontation. Johnson described him as "[e]xtremely cooperative." RP 86. See State v. Xiong, 164 Wn.2d 506, 514, 191 P.3d 1278 (2008) (officers had no basis for searching suspect's pants pocket; suspect "was cooperative with the police, he made no effort to flee, and he did not make any moves that suggested he could reach into his pants pocket."); cf., United States v. Taylor, 716 F.2d 701, 709 (9th Cr. 1983) (using handcuffs did not convert investigative detention into arrest where suspect had twice disobeyed order to raise his hands and made furtive movements inside truck where his hands could not be seen).

Johnson nevertheless handcuffed B.-H. while they were on the bus. RP 83. "[H]andcuffing substantially aggravates the intrusiveness of an otherwise routine investigatory detention and is not part of a typical Terry

stop." United States v. Bautista, 684 F.2d 1286, 1289 (9th Cir. 1982), cert. denied, 459 U.S. 1211 (1983).

The intrusive nature of the use of handcuffs is illustrated by this Court's opinion in State v. Smith, 67 Wn. App. 81, 834 P.2d 26 (1992), aff'd., 123 Wn.2d 51 (1993), reversed on other grounds, State v. Hughes, 154 Wn.2d 118, 140, 110 P.3d 192 (2005) (sentencing error). In Smith, two police officers responded to a dispatch informing them two burglaries had occurred in the same area within the previous hour. One of the officers stopped a car driven by Smith, who met the description of the burglary suspect. Smith, 67 Wn. App. at 83. That officer got out of his car with his gun drawn. As he approached, he could see two television sets, a stereo speaker and a VCR inside Smith's car. The second officer also pulled up and approached Smith's car with his gun drawn, ordering Smith to lean against his car. Briefly looking inside the car, the second officer could see some boxes and a television set. He then handcuffed Smith, placed him on the ground and read him his rights. Id. at 84.

This Court held that, given the circumstances, the officers' did not exceed the scope of an investigative stop by approaching Smith with their guns drawn. Critically, however, this Court held that "by the time Smith

was lying handcuffed on the ground and being read his Miranda rights, an arrest had occurred." Id. at 88.

In B.-H.'s case, Johnson not only pointed his gun, but also directed B.-H. to get out of his seat, put his hands on his head and turn around. In addition, three colleagues, all wearing vests and Sheriff's markings accompanied Johnson. RP 82-83. Johnson immediately handcuffed B.-H. and backed him off the bus. This is at least as intrusive a situation as the one this Court found constituted an arrest in Smith. The handcuffing and escorting of B.-H. by Johnson was not qualitatively different than the handcuffing and lying on the ground in Smith. Plainly, Johnson exceeded the scope of an investigative detention on the bus.

2. Johnson lacked probable cause to arrest B.-H. on the bus.

Officers Walker, Schwab, and Johnson testified they lacked probable cause to arrest B.-H.. RP 29, 76, 106-07. They were correct.

A lawful custodial arrest requires the officer to have probable cause to believe that a person has committed a crime. Gaddy, 152 Wn.2d at 70. Probable cause exists when the arresting officer is aware of facts and circumstances, based on reasonably trustworthy information, sufficient to cause a reasonable officer to believe a crime has been committed. State v. Potter, 156 Wn.2d 835, 840, 132 P.3d 1089 (2006). An arrest not

supported by probable cause is not made lawful by an officer's subjective belief that the suspect has committed a crime. State v. Louthan, 158 Wn. App. 732, 742, 242 P.3d 954 (2010). If police unlawfully seize an individual before arrest, the exclusionary rule calls for suppression of evidence obtained via the government's illegality. State v. Harrington, 167 Wn.2d 656, 664, 222 P.3d 92, 95 (2009).

In B.-H.'s case, Walker testified B.-H. appeared to be under age 21. RP 19. A person must be at least 21 to obtain a concealed pistol license. RCW 9.41.070(1)(c). But Walker acknowledged that even though B.-H. walked right past him with his arm pressed against his coat to cause an outline, he wasn't sure the heavy object in B.-H.'s pocket was a gun. RP 19, 26. Walker did not testify – contrary to the trial court's Finding of Fact 10 and Conclusion of Law 2 – that the weight of the object caused the coat pocket to sag. CP 45.

Walker wanted to get closer to B.-H. when he returned to the Transit Center, but B.-H. walked away from him before getting in line and boarding a bus. RP 21, 27. Walker thus could not confirm his suspicions. Furthermore, neither Schwab nor Johnson observed any corroborating conduct.

As far as other purported suspicious conduct, Walker believed B.-H. did not jaywalk because he did not want police to contact him. Walker said that in his experience, B.-H.'s behavior was consistent with individuals carrying contraband. The trial court concluded B.-H.'s "suspicious behavior" provided Walker with further reason to suspect B.-H. had a gun. CP 48 (Conclusion of Law 3).

As a federal district judge aptly wrote, "Of course the officers' experience is not a talisman before which the Fourth Amendment requirements of reasonableness disappear." Willowby v. City of Philadelphia, 946 F.Supp. 369, 375 (E.D. Pa. 1996). Walker's logic creates an unreasonable Catch-22: by not breaking the law in front of an officer, it was more likely B.-H. was breaking the law. To the extent the trial court relied on this testimony, this Court should find such reliance misplaced.

Walker lacked probable cause to arrest B.-H., as demonstrated by his continued attempts to confirm his suspicion B.-H. had a gun in his pocket. Therefore, the information upon which Johnson relied to seize B.-H. did not support his arrest. The unlawful seizure thus requires suppression of the gun.

3 B.-H.'s consent to search was not voluntary.

Even if this Court decides the seizure was lawful, B.-H. did not voluntarily consent to Johnson's search. Like the investigative detention discussed above, consent is a narrowly drawn exception to the warrant requirement. State v. Morse, 156 Wn.2d 1, 15, 123 P.3d 832 (2005). The state has the burden of showing consent is voluntary by clear and convincing evidence. State v. Smith, 115 Wn.2d 775, 789, 801P.2d 975 (1990).

The test is whether under the totality of the circumstances, consent was the product of duress or coercion, express or implied. Schneckloth v. Bustamonte, 412 U.S. 218, 227, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973); State v. O'Neill, 148 Wn.2d 564, 588, 62 P.3d 489 (2003). Coercion may be "by explicit or implicit means, by implied threat or covert force" or it may be subtle. Schneckloth, 412 U.S. at 228. In examining the surrounding circumstances to determine if the consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents. Id., at 229.

Several factors to be considered in determining voluntariness are: (1) whether police give Miranda² warnings before obtaining consent; (2) the age, level of education and intelligence of the consenting person; (3) whether police inform the consenting person of his right to refuse consent; and (4) any degree of restraint. O'Neill, 148 Wn.2d at 589; Smith, 115 Wn.2d at 789; State v. Johnson, 16 Wn. App. 899, 903, 559 P.2d 1380, review denied, 89 Wn.2d 1002 (1977).

Application of these factors militates in favor of a finding of involuntariness in B.-H.'s case. B.-H. was only 15 years old at the time and had not yet started the 10th grade. RP 131. Johnson testified "[h]e appeared to be very young." RP 84. "Consent is more likely to be found effective when the individual was mature." 12 Royce A. Ferguson, Jr., Washington Practice: Criminal Practice and Procedure, § 2712 (2011); see United States v. Payne, 429 F.2d 169, 171 (9th Cir. 1970) (verbal permission to search ineffective in part because of 18-year-old's "youth").

Next, Johnson did not advise B.-H. of his Miranda rights before asking for permission to search. Nor did he tell B.-H. he had the right to refuse consent. Finally, B.-H. was handcuffed at the time and in the

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

company of Johnson as well as another police officer. RP 84-85. This was after four officers stormed the bus, Johnson pointed a gun at him, and escorted him off the bus. B.-H. was therefore under significant restraint.

For these reasons, the trial court erred by concluding the consent was voluntary.

4. If the consent was voluntary, it was vitiated by the illegal seizure.

"An illegal seizure may invalidate voluntary consent." State v. Smith, 154 Wn. App. 695, 699, 226 P.3d 195, review denied, 169 Wn.2d 1013 (2010). In determining whether an illegal seizure vitiates a later consent to search, this Court considers four factors: "(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 warnings." State v. Armenta, 134 Wn.2d 1, 17, 948 P.2d 1280 (1997) (quoting State v. Soto-Garcia, 68 Wn. App. 20, 27, 841 P.2d 1271 (1992), abrogated on other grounds by State v. Thorn, 129 Wn.2d 347, 350, 917 P.2d 108 (1996)).

Johnson's illegal arrest was followed immediately by B.-H.'s consent to the search of his pockets. There were no intervening circumstances. Nor were Miranda rights given. Finally, both Walker and Johnson admitted they did not have probable cause to arrest B.-H.

Johnson knew that without probable cause to arrest, he could go no further than a protective frisk. He testified, "I wanted to go past just a simple patdown. I actually wanted to be able to go into his pockets with a consent search and actually put my hands into his pockets." RP 86.

These circumstances indicate Johnson's unlawful arrest invalidated B.-H.'s consent. See Armenta, 134 Wn.2d 17 (defendant's voluntary consent tainted by illegal detention because consent followed immediately after illegality, there were no intervening circumstances, Miranda rights had not been given, and officer was "fishing" for evidence). B.-H.'s consent was not sufficiently attenuated from the illegal seizure. The illegality therefore vitiated the consent.

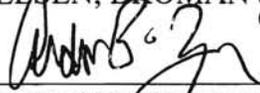
D. CONCLUSION

For the aforesaid reasons, the trial court erred by denying B.-H.'s motion to suppress evidence. The gun must be suppressed. Harrington, 167 Wn.2d at 664. Without the gun, the State lacks evidence to sustain a conviction. This Court should therefore reverse B.-H.'s conviction and remand with an order to dismiss with prejudice.

DATED this 25 day of May, 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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APPENDIX

FILED
KING COUNTY WASHINGTON
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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY
JUVENILE DIVISION

STATE OF WASHINGTON,)	
)	
)	Plaintiff,
)	No 11-8-01412-8
vs)	
)	CrR 3 5 AND 3 6 FINDINGS OF FACT
DAILONE BROOKS-HARRIS)	AND CONCLUSIONS OF LAW
DOB 10/07/1995,)	
)	
)	
)	Respondent
)	

THE ABOVE-ENTITLED CAUSE having come on for a CrR 3 6 and CrR 3 5 motion on November 28, 2011, before the Honorable Judge Chris Washington in the above-entitled court, the State of Washington having been represented by Deputy Prosecuting Attorney Kathryn E Meyers, the Respondent appearing in person and having been represented by his attorney, Twyla Carter, the court having heard sworn testimony and arguments of counsel, now makes and enters the following findings of fact and conclusions of law

At the previously mentioned hearing, the judge advised the Respond of his rights regarding his option whether or not to testify and the consequences of that decision pursuant to CrR 3 5 and CrR 3 6

FINDINGS OF FACT

1 Christopher Walker is a Federal Way Police Officer He has been a law enforcement officer for over 19 years in both Washington and Alaska Officer Walker has received specialized training in pattern behavior of persons carrying concealed firearms Over the course of his law enforcement career, ~~Officer Walker has been fired upon by armed juveniles~~ and has contacted

CrR 3 6 AND 3 5 FINDINGS OF FACT AND CONCLUSIONS OF LAW- I

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ORIGINAL

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1 numerous individuals who were later found to be illegally concealing firearms. In July of 2011,
2 Officer Walker was assigned to the Special Investigations Unit in Federal Way.

3 2 Officer Walker is a certified Firearms Instructor for the Federal Way Police Department. As
4 such, he trains other officers regarding firearm safety and concealment. Officer Walker has a
5 concealed weapons permit and has carried a firearm daily, both on and off duty, for the past 19
6 years. When he is off duty, Officer Walker conceals his firearm on his person. He has carried
7 firearms strapped into holsters as well as loose inside his pockets. Officer Walker is very
8 familiar with how a firearm appears beneath clothing and knows that firearms that are placed
9 loose inside pockets or under certain types of clothing often leave "prints" on the outside of
10 clothing.

11 3 Cornucopia Days is an annual festival hosted by the City of Kent. The festival features a street
12 fair comprised of booths that are set up adjacent to the Kent Transit Center. Cornucopia Days
13 attracts large crowds. It has been the scene of significant gang violence, including fights,
14 weapons offenses, and a gang related homicide two years ago at the Arby's Restaurant located
15 one block east of the Kent Transit Center.

16 4 In recent years, some of the violence and criminal activity that has taken place at Kent
17 Cornucopia Days has spilled over to the Kent Transit Center. ~~King County Metro Route #169,~~
18 which runs from the Kent Transit Center to the Renton Transit Center, is one of the worst transit
19 routes in terms of violence- there have been a number of fights and shootings involving
20 juveniles on #169 buses and at #169 bus stops.

21 5 On July 8, 2011, Officer Walker was working extra duty in Kent, Washington assisting the Kent
22 Police Department during Cornucopia Days. Officer Walker was aware of the violence
associated with that event and attended a law enforcement briefing addressing that issue earlier
in the day. On July 8, 2011, Officer Walker was in full uniform. He was assigned to patrol an
area in downtown Kent that included the Kent Transit Center.

6 July 8, 2011 was a warm summer day. The outside air was approximately 70 degrees. Officer
Walker observed people at the festival wearing shorts and t-shirts.

7 As the festival began winding down that evening, Officer Walker saw people flooding the Kent
Transit Center. Officer Walker conducted foot patrol of that area.

8 At approximately 9:30pm, Officer Walker observed a juvenile male (later identified as the
Respondent, Dailone Brooks-Harris) walking through the transit center. The Respondent was
with a group of other juvenile males, but the Respondent stood out to Officer Walker because he
was wearing a heavy black coat and grey-knit cap despite the warm weather. Officer Walker
knows from his training and experience that subjects who are illegally carrying firearms often
wear heavy and loose clothing in order to conceal the firearms.

- 1 9 Officer Walker also noticed that the Respondent appeared to be well under the age of 21, which
2 is the legal age to obtain a concealed weapons permit
- 3 10 Officer Walker could see that the Respondent's jacket was unzipped and the left front pocket
4 was sagging under the weight of a heavy object. In the bottom of the pocket, Officer Walker
5 could see the outline of a rigid object that was approximately six inches in length. The object
6 was lying at the bottom of the pocket, parallel to the ground, causing the pocket to sag and
7 creating a print on the outside of the jacket. The Respondent's right arm was swinging freely as
8 he walked, but his left forearm was pressed up against the side of his coat. It appeared to Officer
9 Walker as if the Respondent was holding the object in place. This action caused the fabric of
10 the Respondent's coat to press up against the object inside his pocket, making the print more
11 visible. *It appear to be an approximately six inch long rigid object CW*
- 12 11 Based on his training and experience, Officer Walker believed that the Respondent was
13 concealing a firearm inside his clothing
- 14 12 Officer Walker attempted to get closer to the Respondent. The Respondent made eye contact
15 with Officer Walker and then rejoined his friends and left the transit center. The other males that
16 the Respondent was with jaywalked across the street. The Respondent took one step into the
17 street where the other males had crossed but then stepped back on to the curb. The Respondent
18 then turned and walked approximately 75 feet to the nearest crosswalk and lawfully crossed
19 there. Upon reaching the other side of the street, the Respondent rejoined the group of juvenile
20 males and continued walking, eventually disappearing from Officer Walker's sight
- 21 13 Approximately 20 minutes later, Officer Walker saw the Respondent return to the Transit
22 Center, still wearing the heavy, black coat. Officer Walker attempted to get closer to the
Respondent but as Officer Walker drew near to him, the Respondent made eye contact with
Officer Walker and moved away. Officer Walker followed the Respondent through the crowd
and around a nearby bus shelter
- 14 The Respondent's behavior *set out above CW* reinforced Officer Walker's belief that the Respondent *may have been*
15 carrying a concealed firearm *CW*
- 16 Before Officer Walker could make contact with him, the Respondent boarded the #169 Metro
17 bus bound for the Renton Transit Center. Officer Walker observed an undercover King County
18 Sherriff's Deputy, Detective Andrew Schwab, waiting in line to board the same bus the
19 Respondent boarded. Officer Walker watched the Respondent sit in the back U-shaped section
20 of the bus. Detective Schwabe sat approximately five feet away from the Respondent in a
center-facing seat on the passenger side of the coach. Officer Walker observed the bus depart
- 21 16 Officer Walker scanned the crowd at the Transit Center. He saw King County Sherriff's Captain
22 Lisa Mulligan nearby. Officer Walker approached Captain Mulligan, described the Respondent,
and told her that he believed that the Respondent was illegally carrying a concealed firearm

- 1 17 Detective Andrew Schwab and Detective Stephen Johnson are undercover Metro Detectives
2 employed by the King County Sherriff's Office Detective Schwabe has been a law enforcement
3 officer for 13 years Detective Johnson has been a law enforcement officer for 15 years Both
4 are currently plain clothes Detectives with the Metro Street Crimes Unit Their primary duties
5 involve riding Metro buses in an undercover capacity to detect criminal activity on and around
6 Metro coaches and provide safety and security for Metro transit drivers
- 7 18 Detective Schwab and Detective Johnson were working undercover Metro duty on July 8, 2011
8 They were working as a three-person team together with Deputy Paul Schwenn, conducting
9 covert rides of buses coming in and out of the Kent Transit Center
- 10 19 On July 8, 2011, at approximately 9 30pm, Detective Schwab, who was in plain clothes,
11 boarded the #169 Metro bus at the Kent Transit Center He sat down in the back of the bus
12 Detective Johnson, boarded the same bus separately and sat near the front Their plan was to
13 ride the coach partially down the Benson Highway then de-board Deputy Schwenn followed
14 the bus as it departed in an undercover vehicle and was to pick them up when they de-boarded
- 15 20 Within five minutes of boarding, Detective Schwab received a cellular phone call from Captain
16 Mulligan Captain Mulligan relayed Officer Walker's belief that the black male passenger
17 sitting four persons from Detective Schwab was armed with a firearm Captain Mulligan stated
18 that the suspect was a young black male, 18-20 years old, wearing a black coat and grey beanie
19 Detective Schwab looked over and observed the Respondent, matching Captain Mulligan's
20 description, seated nearby
- 21 21 Detective Schwab noticed that the Respondent was seated with multiple associates He also
22 noted that the bus was crowded with other passengers who were leaving Cornucopia Days
- 23 22 When the #169 coach reached the top of the East Hill in Kent, Detective Johnson stood to de-
24 board He made eye contact with Detective Schwab, expecting him to follow, but Detective
25 Schwab remained seated
- 26 23 After exiting the coach, Detective Johnson was picked up by Deputy Schwenn in the follow car
27 He then contacted Detective Schwab and Sgt Flanagan via Nextel radio to ascertain why
28 Detective Schwab had not de-boarded with him as previously planned
- 29 24 Back on the #169 coach, Detective Schwab decided that the bus was too crowded for him to
30 independently contact the Respondent to investigate Officer Walker's suspicions Detective
31 Schwab had concerns about his own safety as well as that of the other passengers The
32 allegation involved a potentially armed juvenile, the individual in question had numerous
33 associates with him, and Detective Schwab was alone on the coach, in plain clothes, without a
34 protective vest
- 35 25 Detective Schwab spoke briefly to Detective Johnson on his cell phone The conversation
36 consisted primarily of improvised code as the Respondent was within ear shot of Detective

- 1 Schwab Detective Schwab told Detective Johnson that he had gotten a call from "Lisa"
 2 (referring to Captain Lisa Mulligan) Detective Schwab also mentioned the number 9 41
 (referring to the Washington firearms statute RCW 9 41)
- 3 26 After speaking to Detective Schwab and Sgt Flanagan, Detective Johnson devised a tactical
 4 plan for safely removing the Respondent from the bus to investigate the firearms allegation
- 5 27 At the next stop, Detective Jason Escobar boarded the #169 in a plain clothes capacity to
 6 provide back up to Detective Schwab who was the lone deputy on the bus Upon boarding,
 Detective Escobar sat near the front of the bus He made contact with the bus driver and
 discreetly asked him to hold the bus at the next stop and to open only the rear doors
- 7 28 In the meantime, Detective Johnson called for reinforcements Sgt Flanagan, Detective
 8 Garrison, and Deputy Schewenn arrived All of the deputies had put on protective vests clearly
 marked with KCSO insignia They then entered the bus through the rear doors at 192nd Street
 and Benson Road
- 9 29 Detective Johnson was first on to the bus He had his gun drawn and looked to Detective
 10 Schwab for direction Detective Schwab pointed out the Respondent Detective Johnson turned
 to the Respondent and told him to place his hands on his head The Respondent complied
 11 Detective Johnson re-holstered his gun and placed the Respondent in handcuffs Detective
 Johnson then walked the Respondent off of the bus The other deputies remained on the bus to
 12 contain the crowd, several of whom had become angry and were yelling at officers
- 13 30 Once the Respondent had been safely removed from the bus, Detective Johnson introduced
 14 himself and told the Respondent that he was being contacted because someone at the Kent
 Transit Center believed that the Respondent was carrying a concealed firearm Detective
 Johnson asked the Respondent if he was carrying a gun, and the Respondent replied that he was
 15 not Detective Johnson then asked the Respondent if he could search his pockets ,and the
 Respondent replied that he could Detective Johnson then clarified that he wanted to do a full
 16 search *inside* the pockets of the Respondent's clothing, as opposed to merely a pat down The
 Respondent agreed to the search stating, "go ahead" *you're going to do it anyway (AD) cmw*
- 17 31 Detective Johnson patted down the Respondent's arms and torso He then searched the
 18 Respondent's jacket and pants pockets Detective Johnson felt a hard object *inside the* *the area of*
 Respondent's right, front pants pocket The object felt as though it were inside a hidden pocket
 19 The Respondent told Detective Johnson that he was wearing basketball shorts underneath his
 jeans Detective Johnson unbuckled the Respondent's pants and reached inside of his basketball
 20 shorts Inside the Respondent's right front pocket, he located a dark-colored, semi-automatic
 pistol with a seated magazine The gun was fully loaded
- 21 32 Detective Johnson removed the gun Respondent's pocket As he did so, the Respondent
 22 spontaneously stated "that's not my gun " Detective Johnson held the gun up in the air for the
 deputies on the bus to see Those deputies then proceeded to pat down the Respondent's

1 associates who were still on the bus due to safety concerns Those individuals were then
2 allowed to leave

3 33 The Respondent continued to tell Detective Johnson that the gun was not his Detective Johnson
4 then placed the Respondent under arrest and read him his Miranda warnings, including the
5 juvenile warnings He then asked the Respondent if he wanted to give a recorded statement and
6 the Respondent said that he did

7 34 Detective Johnson took the Respondent to his vehicle and took a recorded statement In that
8 statement the Respondent admitted to possessing the firearm and stated that he knew that he was
9 a convicted felon and therefore disqualified from possession firearms

10 And having made those Findings of Fact, the Court also now enters the following

11 CONCLUSIONS OF LAW

12 1 Officer Walker testified at the suppression hearing The Court found Officer Walker's
13 testimony to be credible

14 2 Based on Officer Walker's training and experience, together with his initial observations
15 regarding the print and the sagging of the heavy object inside Respondent's jacket, the
16 Respondent's clothing which was incongruous with the weather, and the Respondent's
17 youthful appearance, Officer Walker, and by extension his fellow officers, had reasonable,
18 articulable suspicion to believe that the Respondent was armed with a firearm

19 3 The Respondent's suspicious behavior later provided Officer Walker, and by extension his
20 fellow officers, with further reason to suspect that the Respondent was illegally concealing a
21 firearm

22 4 Detective Schwab, Detective Johnson, Detective Garrison, and Detective Escobar testified at
the suppression hearing The Court found their testimony to be credible

5 The nature and the scope of the investigative stop conducted by King County Sherriff's
6 deputies was reasonable and justified given the nature of the suspected crime and the
7 potential danger to both deputies and the Respondent, as well as other Metro passengers

8 6 The State has proven by clear and convincing evidence that the Respondent freely and
9 voluntarily consented to Detective Johnson's request to search inside the Respondent's
10 pockets Considering the totality of the circumstances, the Respondent's consent to search
11 inside of his pockets was not the result of duress or coercion but rather was given freely and
12 voluntarily

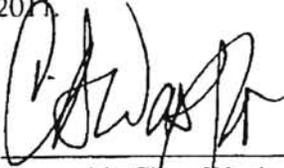
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7 The State has demonstrated by a preponderance of the evidence that the Respondent's statements were made voluntarily and were made pursuant to a knowing, intelligent, and voluntary waiver of his *Miranda* warnings

8 The Respondent's statements to Detective Johnson while inside Detective Johnson's vehicle were custodial since the respondent was under arrest and the statements were made pursuant to interrogation. However, the respondent had been read his *Miranda* Warnings and additional warnings for juveniles and the respondent voluntarily waived those rights. Detective Johnson made no promises in return for the Respondents' statements, nor did he threaten the Respondent. Therefore, the Respondent's statements were made voluntarily and after he voluntarily waived his *Miranda* rights

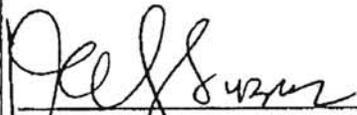
In addition to the above written findings and conclusions, the court incorporates by reference its oral findings and conclusions and the evidence and exhibits contained in the court record

Signed this 20th day of December, 2011.

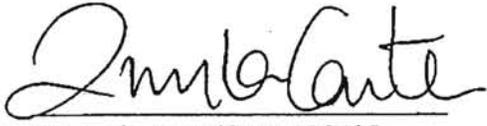


Honorable Chris Washington

Presented by



Kathryn E Meyers WSBA #43242
Deputy Prosecuting Attorney

Approved as to form


Twyla Carter WSBA #39405
Attorney for Respondent

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

STATE OF WASHINGTON)

Respondent,)

v.)

DAILONE BROOKS-HARRIS,)

Appellant.)

COA NO. 68005-6-1

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 25TH DAY OF MAY 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DAILONE BROOKS-HARRIS
6808 S. 123RD STREET #70
SEATTLE, WA 98178

SIGNED IN SEATTLE WASHINGTON, THIS 25TH DAY OF MAY 2012.

x Patrick Mayovsky

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2012 MAY 25 PM 4:10