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OCT 10 2012

King County Prosecutor
Appellate Unit

NO. 68718-2-7-1

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

STATE OF WASHINGTON,

Respondent,

v.

CHRIS MORRIS,

Appellant.

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

The Honorable Laura Gene Middaugh, Judge

BRIEF OF APPELLANT

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DIVISION ONE
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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it concluded police had probable cause to arrest appellant.

2. The trial court erred when it denied a motion to suppress all evidence obtained as a result of appellant's unlawful arrest.¹

3. The trial court erred when it entered conclusions of law 2(c)-(e) in support of its ruling on the motion to suppress.

Issues Pertaining to Assignments of Error

1. A Seattle Police officer saw appellant engaged in what appeared to be multiple exchanges of unidentified objects. On the last such exchange, the officer claimed to see the possible exchange of money, but never saw what could be identified as a controlled substance. Although police had reasonable suspicion of criminal activity, did the court err when it concluded they had probable cause to arrest appellant?

2. In light of appellant's unlawful arrest, should all evidence gathered incident to that arrest have been suppressed?

¹ The court's written findings and conclusions on the motion to suppress are attached to this brief as an appendix.

B. STATEMENT OF THE CASE

a. Procedural Facts

The King County Prosecutor's Office charged Chris Morris with one count of possessing a controlled substance (cocaine) with intent to deliver, in violation of RCW 69.50.401(1), (2)(a). CP 1-4. Morris moved to suppress evidence of cocaine and currency found in his pockets, arguing they were the product of an unlawful search and seizure in the absence of probable cause. Supp. CP ____ (sub no. 75, Motion To Suppress Evidence). Following a CrR 3.6 hearing, the Honorable Laura Middaugh denied the motion. CP 9-12.

Morris waived jury trial, and Judge Middaugh found him guilty. CP 6-8, 13-16. Judge Middaugh imposed a residential treatment-based Drug Offender Sentencing Alternative (DOSA), and Morris timely filed his Notice of Appeal. CP 21-22, 31-39.

b. Evidence From The CrR 3.6 Hearing

The court's written findings of fact from the CrR 3.6 hearing accurately reflect the evidence from that hearing. CP 9-11. Seattle Police Officer Donald Johnson has been a law enforcement officer

for 24 years. 1RP² 6. He is trained in identifying narcotics and has witnessed hundreds of transactions involving the sale of illegal substances. 1RP 6-8. Shortly before noon on June 9, 2011, Officer Johnson used the security cameras located on the outside of the King County Courthouse to monitor activities in the area of Third Avenue and Yesler, which Johnson described as “a heavily-trafficked drug area.” 1RP 10-13.

Around 11:27 a.m., Johnson observed Chris Morris speaking with Susie Atkins, a known crack user whom Johnson has contacted many times. 1RP 13-14. Johnson watched as Morris reached into his pants pocket and appeared to make some kind of exchange with Atkins. 1RP 14. Johnson was unable to see the objects exchanged, however. Atkins examined an unidentified object in her hand. 1RP 15. Morris dropped a small object, which he picked up from the ground and placed in his right front pants pocket. 1RP 16. Officer Johnson continued to watch as Morris pulled what appeared to be money from his right front pants pocket, examined it, and then placed it back in his pocket. 1RP 17.

² This brief refers to the verbatim report of proceedings as follows: 1RP – March 5, 2012; 2RP – March 6, 2012 and April 26, 2012.

Approximately 18 minutes later, Johnson observed Mark Breithaupt,³ another known drug user, approach Morris. Morris and Breithaupt spoke briefly before separating. 1RP 17-18. At that point, Denise Sellers, who has been arrested several times for possession of crack cocaine, contacted Morris. 1RP 18-19. The two made an exchange and Sellers placed something in her mouth. 1RP 19. Breithaupt then approached Morris again. 1RP 19. An exchange was made, and Breithaupt placed a very small object in his mouth. 1RP 20-21. Based on the manner in which Breithaupt was holding the item he gave Morris, and based on its light green coloring, Johnson believed the object was folded cash. 1RP 21.

Officer Johnson and his partner left their point of observation to arrest Morris. 1RP 22. Johnson contacted Morris on the street and placed him under arrest. 1RP 22-23. In a search incident to arrest, he discovered several rocks of cocaine in Morris' front right pants pocket (weighing 2.5 grams), \$66.00 in cash, and some change. 1RP 23-26.

Officer Johnson conceded that innocuous interactions can look like drug transactions and that he never saw any substance he

³ The verbatim report of proceedings identifies him as "Brahopt." 1RP 18.

could identify as cocaine being delivered. 2RP 11, 14. But Johnson testified that the three interactions he observed were typical of cocaine sales in downtown Seattle. 1RP 26-27. He believed he had probable cause to arrest Morris based on the location and exchanges with three known drug users. 2RP 13-14, 16.

Defense counsel argued that while officers had reasonable suspicion to investigate Morris based on Officer Johnson's observations, police did not have probable cause to arrest him without something more to confirm Johnson's suspicions. Therefore, all evidence seized incident to Morris' arrest had to be suppressed. 2RP 22-30. The State argued that Johnson had probable cause to believe Morris was guilty of unlawfully delivering cocaine or drug-traffic loitering. 2RP 30-32; Supp. CP ____ (sub no. 33A, State's Response to Defendant's Motion to Suppress).

Judge Middaugh denied the defense motion to suppress, finding that the nature of the area and Morris' interactions with three known drug users gave police probable cause to believe Morris had delivered a controlled substance and provided a lawful basis for the search incident to arrest. 2RP 35-36; CP 11.

C. ARGUMENT

THE TRIAL COURT ERRED WHEN IT DENIED THE MOTION TO SUPPRESS.

Under the Fourth Amendment to the United States Constitution and article 1, § 7 of the Washington Constitution,⁴ warrantless arrests must be supported by probable cause. State v. Bonds, 98 Wn.2d 1, 8-9, 653 P.2d 1024 (1982), cert. denied, 464 U.S. 831 (1983). The probable cause requirement applies to warrantless felony arrests in public places. State v. Solberg, 122 Wn.2d 688, 696, 861 P.2d 460 (1993). And it applies to warrantless arrests for misdemeanors committed in an officer's presence. State v. Walker, 157 Wn.2d 307, 319, 138 P.3d 113 (2006).

Probable cause exists only "when facts and circumstances within the arresting officer's knowledge are sufficient to cause a person of reasonable caution to believe that a crime has been committed." State v. Huff, 64 Wn. App. 641, 646-47, 826 P.2d 698,

⁴ The Fourth Amendment provides, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated"

Article 1, § 7 provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

review denied, 119 Wn.2d 1007 (1992). Whether the facts satisfy the probable cause requirement is a question of law this Court reviews de novo. Ornelas v. United States, 517 U.S. 690, 116 S. Ct. 1657, 1663, 134 L. Ed. 2d 911 (1996); State v. Armenta, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997); State v. Dearbone, 125 Wn.2d 173, 178, 883 P.2d 303 (1994).

Here, the suspected crimes were drug-traffic loitering, a misdemeanor, and possession of a controlled substance with intent to deliver, a felony. “A person is guilty of drug-traffic loitering if he or she remains in a public place and intentionally solicits, induces, entices, or procures another to engage in [illegal drug activity].” SMC 12A.20.050(B). The statute lists circumstances that “may be considered in determining whether the actor intends such prohibited conduct” but these circumstances do not by themselves constitute the crime. SMC 12A.20.050(C). These include whether the suspect “[r]epeatedly . . . engages passersby in conversation.” SMC 12A.20.050(C)(3). A person is guilty of possessing a controlled substance with intent to deliver when he possesses a controlled substance with that intent. RCW 69.50.401(1).

As an initial matter, the fact this area of Seattle is known for illicit drug activity is insufficient to establish probable cause. “It is

beyond dispute that many members of our society, live, work, and spend their time in high crime areas, a description that can be applied to parts of many of our cities.” State v. Larson, 93 Wn.2d 638, 645, 611 P.2d 771 (1980). Moreover, associating with individuals suspected of criminal activity (here, known drug users) does not establish probable cause, either. See State v. Broadnax, 98 Wn.2d 289, 296, 654 P.2d 96 (1982) (“Merely associating with a person suspected of criminal activity does not strip away the protections of the fourth amendment to the United States Constitution.”), overruled on other grounds, Minnesota v. Dickerson, 508 U.S. 366, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993).

The circumstances in Morris’ case fall short of those in other cases in which probable cause was properly found.

In State v. Rodriguez-Torres, 77 Wn. App. 687, 893 P.2d 650 (1995), an officer saw a man hand the defendant money and then pick a small item out of the defendant’s hand. As the officer approached, someone yelled “police.” The second man took his money back from the defendant and dropped the object on the ground. The defendant picked up the object and placed it in his pocket. He attempted to “hurry away from the scene,” looking over

his shoulder and watching the officer as he did so. The officer stopped the defendant and pulled cocaine from his pocket. Rodriguez-Torres, 77 Wn. App. at 689-90. Under these circumstances, this Court upheld the search of the defendant's pocket because the officer had quite clearly seen a drug transaction. Id. at 693-94. In contrast, Morris did not flee the scene when police arrived. Therefore, officers did not have the same confirmation of suspicion that a drug deal had taken place.

This Court has held that multiple exchanges of objects between a suspect and passersby, under suspicious circumstances, can establish probable cause for arrest, but the circumstances differed from this case. See State v. Fore, 56 Wn. App. 339, 343-345, 783 P.2d 626 (1989), review denied, 114 Wn.2d 1011 (1990). In Fore, an experienced officer watched as the defendant repeatedly exchanged a substance packaged in small plastic baggies for cash with motorists in a park. The officer also noted the suspect had a larger bag, inside of which he could see several smaller bags containing "green vegetable matter." Fore, 56 Wn. App. at 340-342. Whereas the officer in Fore had a clear view of several transactions involving baggies for cash, and could clearly see what at least appeared to be marijuana in the

suspect's car, Officer Johnson could not see what Morris exchanged with anyone beyond what appeared to be cash in the final interaction he observed. His observations concerning Morris fall well short of the officer's observations in Fore.

In successfully arguing against Morris' motion to suppress, the State relied on State v. Ortega, 159 Wn. App. 889, 248 P.3d 1062, review granted, 171 Wn.2d 1031, 257 P.3d 665 (2011). 2RP 31; Supp. CP ___ (sub no. 33A, State's Response To Motion To Suppress, at 4-5). In Ortega, police observed the defendant attempting to contact passersby through eye contact and head nods. After the defendant exchanged small items with three individuals, police arrested him and found cocaine and cash in a search incident to that arrest. Ortega, 159 Wn. App. at 892-893. Ortega is not helpful to the State in Morris' case because Ortega did not dispute that officers had probable cause to arrest him for drug-traffic loitering. Id. at 895-896. Morris disputes probable cause in his case. Moreover, the Ortega court found it unnecessary to decide whether officers had probable cause to arrest Ortega for a felony (presumably delivering a controlled substance). Id. at 899. Thus, Ortega adds little to the debate.

The absence of probable cause to arrest Morris does not mean Officer Johnson was required to simply to ignore Morris. As defense counsel conceded below, there was sufficient information to support a Terry⁵ stop, where an officer may briefly detain and question a person reasonably suspected of criminal activity. State v. Alcantara, 79 Wn. App. 362, 365, 901 P.2d 1087 (1995); State v. Watkins, 76 Wn. App. 726, 729, 887 P.2d 492 (1995). Terry also permits officers to frisk suspects, but only if they have reasonable grounds to believe a suspect is currently armed and dangerous. State v. Hudson, 124 Wn.2d 107, 112, 874 P.2d 160 (1994); Rodriguez-Torres, 77 Wn. App. at 690. There is no evidence officers viewed Morris as dangerous. And any other search (other than for weapons) would have been limited to circumstances where the “plain view” doctrine or probable cause justified it. Alcantara, 79 Wn. App. at 366; Rodriguez-Torres, 77 Wn. App. at 652.

Here, however, Officer Johnson dispensed with an investigative stop and simply decided to arrest Morris. And incident to that unlawful arrest, he discovered the cocaine and cash that ultimately led to Morris’ conviction. Under the Fourth Amendment,

⁵ Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

all fruits of an illegal seizure must be suppressed. Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963); State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999). The court erred when it refused to suppress the evidence in this case.

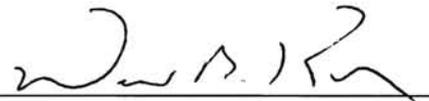
D. CONCLUSION

There was not probable cause to arrest Morris. The fruits of that arrest must be suppressed. His conviction should be reversed and dismissed.

DATED this 10th day of October, 2012.

Respectfully submitted,

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APPENDIX

FILED
KING COUNTY

APR 13 2012

SUPERIOR COURT
BY Susan Bone
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

CHRIS LAVONN MORRIS,

Defendant,

No. 11-1-07145-2 SEA

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON CrR 3.6
MOTION TO SUPPRESS PHYSICAL
EVIDENCE

A hearing on the admissibility of physical evidence was held on March 5 and March 6, 2012, before the Honorable Judge Middaugh. After considering the evidence submitted by the parties, to wit: the security camera video and the testimony of Officer Donald Johnson, and hearing argument, the court makes the following findings of fact and conclusions of law as required by CrR 3.6:

1. THE UNDISPUTED FACTS:

- a. Around 11:30am on June 9, 2011, Officer Donald Johnson of the Seattle Police Department was conducting surveillance of the 500 block of Third Avenue in downtown Seattle, an area that Officer Johnson knows to be a high narcotics trafficking area.
- b. Using a King County Courthouse security camera, Officer Johnson observed the defendant have a series of very brief interactions with various persons over a span of about twenty minutes. A recording was made of the events Officer Johnson saw through the camera.
- c. Around 11:27am, Officer Johnsons observed the defendant walking and talking with Susie Atkins, a woman whom Officer Johnson knew from previous contacts to be a

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 1

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1 crack cocaine user. After the defendant and Atkins spoke, the woman walked south a
2 short ways, where the defendant soon joined her.

3 d. The defendant removed something from his right front pants pocket, put it in Atkins'
4 right hand, and received something in return. The position of their bodies prevented
5 Officer Johnson from seeing exactly what was exchanged.

6 e. Immediately after the exchange, Atkins peered closely at her open right hand, as if
7 examining an object too small for the camera to detect.

8 f. The defendant placed whatever he had received into his right front pants pocket. At
9 the same time, the defendant appeared to have dropped something too small for the
10 camera to detect on the ground. He picked it up and put it in his right front pants
11 pocket.

12 g. Shortly thereafter, Officer Johnson observed the defendant take paper currency out of
13 his right front pants pocket, look at it as if counting it, and return it to his right front
14 pants pocket.

15 h. Approximately 18 minutes later, Officer Johnson observed the defendant be
16 approached by Mark Breithaupt, a man whom Officer Johnson knew from previous
17 contacts to be a crack cocaine user. Officer Johnson saw Breithaupt and the defendant
18 speak briefly, and then Breithaupt walked south a short distance.

19 i. A few seconds later, the defendant also walked south a short distance. He was then
20 approached by Denise Sellers, whom Officer Johnson knew from previous contacts to
21 be a crack cocaine user.

22 j. The defendant appeared to take something out of his right front pants pocket and put
23 it into Sellers' right hand. Sellers' body blocked Officer Johnson's view of what was
24 exchanged. After the exchange, Sellers appeared to toss an object too small to be seen
by the camera from her right hand into her mouth.

k. Seconds later, the defendant was again approached by Mark Breithaupt. Officer
Johnson saw Breithaupt hand the defendant an item that was consistent in color and
shape with folded paper currency. At the same time, the defendant gave Breithaupt an
object too small to be seen on the camera, which Breithaupt then pinched between his
thumb and forefingers and placed in his mouth.

l. Based on his training and experience, Officer Johnson knew that crack cocaine users
often place crack cocaine in their mouths after purchasing it as a way of both
concealing it and testing its authenticity.

m. Based on his training and experience, Officer Johnson knew that timing and
appearance of the defendant's interactions for the known crack users were typical of
street level crack cocaine sales in the downtown Seattle area.

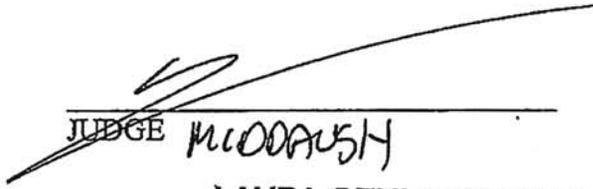
- n. Based on his training, experience, knowledge of the area, and knowledge of the individuals who had made exchanges with the defendant, Officer Johnson believed the defendant to be engaged in the sale of narcotics.
- o. Officer Johnson then directed Officer Franklin Poblocki to assist him in arresting the defendant. Once Officer Johnson arrived at the defendant's location, he immediately placed the defendant under arrest by grabbing his arms and placing him in handcuffs with Officer Poblocki's assistance.
- p. After the defendant was handcuffed, Officer Johnson searched the defendant's pockets. In the defendant's right front pants pocket, Officer Johnson found suspected crack cocaine, as well as \$66 in paper currency among multiple pockets.
- q. The Court finds Officer Johnson's testimony to be credible.

2. CONCLUSIONS OF LAW AS TO THE ADMISSIBILITY OF THE EVIDENCE SOUGHT TO BE SUPPRESSED:

- a. An officer does not necessarily have to see the object exchanged in order to have probable cause to believe that a suspect has delivered a controlled substance.
- b. When considering whether probable cause existed, the court must consider the officer's knowledge of the circumstances, including his training and experience.
- c. Based on the totality of the circumstances, including but not limited to the facts that the area was known to be a high narcotics trafficking area, the defendant had been approached by multiple known drugs users, the defendant had made quick exchanges with the known drug users, the defendant appeared to be providing a very small object in each exchange, and the defendant appeared in at least one exchange to be receiving money, Officer Johnson had probable cause to arrest the defendant.
- d. Officer Johnson's search of the defendant's pockets after arresting the defendant was a lawful search incident to a lawful arrest, and was therefore constitutional.
- e. The defendant motion to suppress is denied.

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

Signed this 13 day of April, 2012.


 JUDGE MIDDAGH

Presented by:

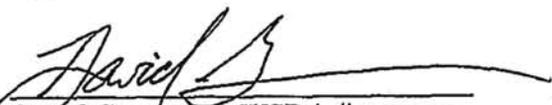
LAURA GENE MIDDAGH

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Stephanie Finn Guthrie, WSBA #43033
Deputy Prosecuting Attorney

Approved as to form:



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Attorney for Defendant

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 4

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 68718-2-1
)	
CHRIS MORRIS,)	
)	
Appellant.)	

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 10TH DAY OF OCTOBER 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] CHRIS MORRIS
 1150 SUNSET BOULEVARDE NE
 #314
 RENTON, WA 98056

SIGNED IN SEATTLE WASHINGTON, THIS 10TH DAY OF OCTOBER 2012.

x *Patrick Mayovsky*

2012 OCT 10 PM 4:20
COURT OF APPEALS
STATE OF WASHINGTON