

NO. 68718-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

CHRIS MORRIS,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LAURA GENE MIDDAUGH

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**BRIEF OF RESPONDENT**

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A. ISSUE PRESENTED

1. An officer has probable cause to arrest if the information known to him is sufficient to warrant a reasonable belief that a crime has been committed. In this case, Officer Johnson, a Seattle Police Officer, who has seen hundreds, if not thousands, of drug transactions over his twenty-four-year career in law enforcement, arrested Morris because Morris: (1) was in a high narcotics trafficking area; (2) had been approached by three known crack cocaine users; (3) made quick hand exchanges with the three known crack cocaine users; (4) appeared to provide a small object in each exchange; and (5) appeared in at least one exchange to receive money. Did the trial court properly deny Morris' motion to suppress for lack of probable cause to arrest for possession with intent to deliver cocaine?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

On August 22, 2011, the State charged Christopher Lavon Morris with violation of the uniform controlled substances act, possession with intent to deliver cocaine (VUCSA PWI), in violation of RCW 69.50.401(1), (2)(a). CP 1. The case was assigned to

Judge Middaugh for trial. CP 9-15. At trial, Morris filed a 3.6 motion to suppress the cocaine that was found on his person following his arrest for possession with intent to deliver cocaine. CP 9-12. Judge Middaugh heard the 3.6 motion on March 5 and 6, 2012. CP 9-12. At the motion hearing, Judge Middaugh considered the evidence that was submitted by the parties, to wit: the security camera video, the testimony of the arresting officer, and argument from the parties. CP 9. Judge Middaugh denied the defense motion to suppress the cocaine.

Morris waived his right to a jury trial and a bench trial was held before Judge Middaugh on March 6, 2012. CP 8, 15. Judge Middaugh found beyond a reasonable doubt that Morris was guilty of VUCSA PWI. One month later on, April 26, 2012, Judge Middaugh sentenced Morris to serve three to six months in a residential chemical dependency center.

## 2. FACTS OF THE CRIME.

At around 11:30 am, on June 9, 2011, Officer Donald Johnson of the Seattle Police Department was using a King County Courthouse security camera to conduct surveillance of the 500 block of Third Avenue in downtown Seattle. This is an area that

Officer Johnson knows is a high crime area. CP 9. Officer Johnson has over twenty-four years of experience in law enforcement. His experience includes observing hundreds, if not thousands, of drug transactions. 1RP<sup>1</sup> 8.

At 11:27 am, Officer Johnson observed Morris walking and talking with Susie Atkins, a woman who Officer Johnson knew from previous contacts to be a known crack cocaine user. CP 9-10. After Morris and Atkins spoke, Atkins walked south a short ways where Morris joined her. CP 10. Morris removed something from his right front pants pocket, put it in Atkins' right hand, and received something in return. CP10. The position of their bodies prevented Officer Johnson from seeing exactly what was exchanged. CP 10.

Immediately after the exchange, Atkins peered closely at her open right hand, as if examining an object too small for the camera to detect. CP 10. Morris placed whatever he received from Atkins in his right pants pocket. CP 10. At the same time, Morris appeared to have dropped something too small for the camera to detect on the ground. CP 10. Morris picked up the item and placed it in his right front pants pocket. CP 10.

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<sup>1</sup> This brief refers to the verbatim report of the proceedings as follows—1 RP- March 5, 2012; 2RP- March 6, 2012 and April 26, 2012.

Approximately 18 minutes later, Officer Johnson observed that Morris was approached by Mark Breithaupt; a man whom Officer Johnson knew from previous contacts was a known crack cocaine user. CP 10. Officer Johnson saw Morris and Breithaupt speak briefly, and then Breithaupt walked south a short distance. CP 10.

A few seconds later, Morris also walked south a short distance. CP 10. At this point, he was approached by Denise Sellers, who Officer Johnson had arrested on previous occasions for crack possession. CP 10; 1RP 19. Sellers had also told Officer Johnson that she is a crack user. 1RP 19. Officer Johnson observed Morris take something out of his right front pants pocket and put it in Sellers' hand. CP 10. Sellers' body blocked Officer Johnson's view of what had been exchanged. CP 10. After the exchange, Sellers appeared to toss an object too small to be seen by the camera from her right hand into her mouth. CP 10.

Based on his training and experience, Officer Johnson knew that crack cocaine users often place cocaine in their mouths after purchasing it as a way of both concealing it and testing its authenticity. CP 10; 1RP 9.

Seconds after Morris made the exchange with Sellers, he was again approached by Breithaupt. CP 10. Officer Johnson observed Breithaupt and Morris exchange an item that was consistent with the color and shape of folded paper currency. CP 10. At the same time, Morris gave Breithaupt an object too small to be seen on camera, which Breithaupt then pinched between his thumb and his fingers and placed in his mouth. CP 10.

Based on his training and experience, Officer Johnson knew that Morris' actions with three known crack users was typical of street level narcotics trafficking in downtown Seattle, so Officer Johnson directed Officer Franklin Poblocki to assist him in arresting Morris. CP 11. Once Officer Johnson arrived at Morris' location, he immediately arrested him for VUCSA PWI. CP 11.

After Morris was arrested, Officer Johnson searched Morris' pockets. In Morris' right front pants pocket, Officer Johnson found suspected crack cocaine and \$66 of paper currency. CP 11. The crack cocaine was later tested by the Washington State Patrol Crime Lab and was determined to weigh 2.3 grams and contained cocaine. CP 15.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION TO SUPPRESS FOR LACK OF PROBABLE CAUSE TO ARREST.

The sole issue on this appeal is whether Officer Johnson had probable cause to arrest Morris for possession with intent to deliver cocaine.<sup>2</sup> Whether the pertinent facts and circumstance of this case amount to probable cause to arrest is a matter that is reviewed de novo. In re Det. of Petersen, 145 Wn.2d 789, 800, 42 P.3d 952 (2002); State v. Louthan, 158 Wn. App. 732, 740-41, 242 P.3d 954 (2010).

Morris claims that the trial court erred when it concluded that Seattle Police Officer Johnson had probable cause to arrest him for possession with intent to deliver cocaine. Morris' argument should be rejected. Morris was lawfully arrested because Officer Johnson had probable cause after he observed Morris make three exchanges with known crack cocaine users in a high narcotics trafficking area. Because Officer Johnson had probable cause to

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<sup>2</sup> The defense has also noted that the court erred when it denied the defense motion to suppress evidence obtained as a result of Morris' arrest. The State's response will not address this issue because if the officer had probable cause to arrest Morris then the subsequent search of Morris was lawful. Therefore, the sole issue on appeal is whether the officer had probable cause to arrest.

arrest Morris for possession with intent to deliver cocaine, the subsequent seizure of the cocaine in Morris' pockets was lawful.

- a. The Trial Court Correctly Concluded That The Observations Made By Officer Johnson Would Lead A Reasonable Officer To Conclude That A Crime Had Been Committed.

The elements of probable cause to arrest are well settled.

State v. Knighten, 109 Wn.2d 896, 899, 748 P.2d 1118, 1120 (1988). "Probable cause exists when the facts and circumstances within the arresting officer's knowledge and of which the officer has reasonably trustworthy information are sufficient in themselves to warrant a person of reasonable caution in a belief that an offense has been committed." State v. Terrovona, 105 Wn.2d 632, 643, 716 P.2d 295 (1986). Courts have repeatedly affirmed that probable cause to arrest should be "examined in the light of the arresting officer's special experience, and that the standard should be, not what might appear to be probable cause to a passerby, but what would be probable cause to a reasonable, cautious, and prudent officer." State v. Todd, 78 Wn.2d 362, 367, 474 P.2d 542 (1970).

In this case, Officer Johnson arrested Morris for possession with intent to deliver cocaine. The facts that were known to Officer Johnson at the time of the arrest are that Morris was making exchanges with known crack cocaine users in a high narcotics area. The exchanges were made in a surreptitious manner and Officer Johnson could see Morris was delivering very small objects that matched the size of rock cocaine. Officer Johnson also saw two of the known drug users place the items that they received from Morris in their mouths. Officer Johnson knew from his training and experience that crack cocaine users often transport crack in their mouths to avoid detection and to test authenticity. In at least one of the exchanges, Officer Johnson observed Morris receive money in exchange for an item that was too small to see.

In factually similar cases, courts have held that such facts are sufficient for an officer to conclude that a crime has been committed. For example, in State v. Rodriguez-Torres, the court concluded that an officer had probable cause to arrest the defendant for possession with intent to deliver when the officer observed the defendant make only one exchange in a high narcotics area. 77 Wn. App. 687, 693-94, 893 P.2d 650, 653 (1995). In Rodríguez-Torres, an officer observed the defendant

receive money in exchange for an object that the defendant had cupped in his hand. Id. at 694. When the officer approached the defendant, someone yelled police and the defendant walked away. Id. The court concluded that based upon these facts, the officer had probable cause to arrest for possession with intent to deliver. Id.

Similarly, in State v. White, the court found that the officer had probable cause to arrest for possession with intent to deliver when the officer observed the defendant's involvement in an apparent drug transaction. 76 Wn. App. 801, 804-05, 888 P.2d 169, 171 (1995) aff'd., 129 Wn.2d 105, 915 P.2d 1099 (1996). In White, the court found that the following facts were sufficient for the officer to determine that the defendant had committed a crime.

[The officer] was on the top floor of a parking garage using binoculars to look for drug activity on the street below. At 5:20 p.m., [Officer] Magee saw White and another man, Marek Murray, walking along the sidewalk. When they reached the corner, the two men separated and stood 3 to 5 feet apart. After several minutes, a man wearing a white sweat suit approached White. The two spoke briefly, and White pointed to Murray. The man went to Murray, and they began walking slowly. White walked about 3 to 5 feet behind them. After a few steps, the man in the sweat suit took money from his pocket and counted it. Murray reached into his shorts and dropped something on the ground. The man in the sweat suit stopped, picked up the object, looked at it, put it in his mouth for a moment, and handed Murray money. When Murray and the other man stopped, White

looked behind him over both shoulders. Shortly thereafter, Murray and the man in the sweat suit separated and began walking in opposite directions. White was walking ahead of Murray, but Murray eventually caught up. Magee saw "hand movements," but could not tell what, if anything, had passed between White and Murray.

Id. at 803. The court noted that the officer was justified when he concluded that the defendant's contact with Murray and the man in the white sweat suit were consistent with a narcotics transaction. Id. at 804-05. The court held that these observations were sufficient to give the officer probable cause to arrest the defendant for possession with intent to deliver. Id.

In contrast, courts have declined to find probable cause to arrest for a drug transaction when the parties have not acted in a suspicious manner and the parties are not known to the officer. For example, in State v Poirier<sup>3</sup>, the court declined to find probable cause to arrest when the police officers observed the defendant standing in a restaurant parking lot, the officer then saw another man arrive at the parking lot and approach the defendant, and the two men exchanged items that appeared to be white envelopes or packages. 34 Wn. App. 839, 842-43, 664 P.2d 7, 9 (1983). The

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<sup>3</sup> The issue in Poirier was whether the officer had probable cause to arrest for possession of cocaine. Although Poirier does not address possession with intent to deliver, it is relevant to this case because the court discusses what circumstances could constitute narcotics trafficking.

defendants were arrested and money and narcotics were found in the envelopes. Id. In declining to find probable cause, the court noted that an officer “may be justified that he is observing criminal activity because of the particular location, the reputation of one or more of the participants, the nature of the contact, and other actions of the parties, coupled with his experience and expertise.” Id. The court declined to find probable cause in Poirier’s case because the facts did not establish that “(1) either party was known to the officer, or (2) drug sales or exchanges regularly took place in the Dynasties parking lot, or (3) the envelopes exchanged were particularly distinctive or characteristic of packaged drugs or narcotics, or (4) either party acted in a suspicious or furtive manner.” Id.

The facts of this case are far more similar to the facts of Rodriguez-Torres and White than Poirier. Like the defendants in Rodriguez-Torres and White, Morris was arrested after he was seen making suspicious exchanges. However, the officer in Rodriguez-Torres and White only saw one exchange. In this case, Officer Johnson saw Morris make three exchanges with known drug users in a high narcotics area. The exchanges in this case were also done in a manner in order to avoid detection, which

increased Officer Johnson's suspicions that Morris was selling narcotics. Moreover, like the officer in White, Officer Johnson observed two of the known drug users place the item they received from Morris in their mouths, which Officer Johnson testified was a common way to conceal and test the authenticity of crack cocaine. In at least one of the exchanges, Officer Johnson observed Morris receive money for the substance that he gave to the known drug user. Furthermore, all of these exchanges were observed by an officer with over twenty-four years of experience that has witnessed hundreds, if not thousands, of drug transactions.

The facts that are present in this case are the very facts that were missing in Poirier. For example, Officer Johnson testified that the parties were known to him—he knew that the three people Morris made exchanges with were crack cocaine users. In addition, the exchanges took place in a high narcotics area. Also, the items that were exchanged were consistent with the size of crack cocaine. Lastly, the actions of the parties were very suspicious—the exchanges were done in a manner to avoid detection, which is consistent with narcotics trafficking.

In its brief, the defense argues that Officer Johnson did not have probable cause to arrest Morris because he did not see

exactly what was exchanged between Morris and the three known crack users. In support of this argument, the defense relies upon State v. Fore, 56 Wn. App. 339, 345, 783 P.2d 626, 630 (1989).

The defense's reliance on Fore is misguided because the Fore court noted that an officer is not required to see exactly what was transferred in order to have probable cause to arrest. In Fore, an officer observed the defendant make three transactions in which the defendant and another man exchanged small plastic brown bags containing brownish or greenish matter with passing motorists for folded currency. Id. at 344. The officer also saw Fore with a larger plastic bag that contained smaller packets of greenish vegetable matter. Id. The Fore court held that absolute certainty by an experienced officer as to the identity of a substance is unnecessary to establish probable cause. Id. at 345. The court noted that the "suspicious circumstances surrounding the exchanges, not the officer's ability to identify the substance, constituted the primary basis for the probable cause determination." Id.

Similarly, in this case, Officer Johnson's observations of the suspicious circumstances that surrounded the exchanges—Morris exchanging small items with three known drug users and two of

those drug users placing the item they received from Morris in their mouth—constituted the basis for concluding Morris committed a crime.

Defense counsel also attempts to distinguish Rodriguez-Torres because the defendant in Rodriguez-Torres ran from the officer when the officer approached him, but Morris did not run. While this one fact is not present in this case, this one fact is not dispositive. Rather, the proper inquiry when determining whether probable cause to arrest exists is whether, based upon the totality of the facts and circumstances, a reasonable officer could find probable cause. In this case, the totality of the facts and circumstances known to Officer Johnson—suspicious exchanges with three known crack cocaine users—would lead a reasonable officer to conclude that a crime had been committed. Moreover, the court in Rodriguez-Torres never mentioned that the basis for the probable cause finding was that the defendant ran from the officer.

Because Morris was observed by an experienced officer in a high narcotics trafficking area making three different exchanges with known crack cocaine users, Officer Johnson had probable cause to arrest Morris. Therefore, the court properly found that Officer Johnson had probable cause to arrest.

D. CONCLUSION

Because the officer had probable cause to arrest Morris, any subsequent search of his person would be a valid search incident to arrest. United States v. Robinson, 414 U.S. 218, 224, 94 S. Ct. 467, 471 (1973); State v. Smith, 119 Wn.2d 675, 835 P.2d 1025, 1028 (1992). Therefore, the cocaine that was found on Morris' person was legally seized and Morris' conviction should be affirmed.

DATED this 3 day of December, 2012.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to David B. Koch, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. CHRIS MORRIS, Cause No. 68718-2-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Sandra Atkinson  
Name Sandra Atkinson  
Done in Seattle, Washington

12/4/12  
Date

12/4/12