

71321-3

71321-3

No. 71321-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

BENEDICTO BAEZ ACEVEDO,

Appellant.

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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by denying Mr. Baez Acevedo's motion to suppress cocaine found on his person. Conclusion of Law 3 (CP 56).

2. The trial court erred by concluding that Trooper Axtman had articulable concerns for his own safety based upon his training and prior experience. Conclusion of Law 1 (CP 55).

3. The trial court erred by concluding that, based upon concerns for his own safety, it was reasonable for the Trooper Axtman to order Mr. Baez Acevedo to show him his hand. Conclusion of Law 2 (CP 55).

4. Appellant assigns error to Finding of Fact 14. (CP 54)

5. Appellant assigns error to Finding of Fact 15. (CP 54)

6. Appellant assigns error to Finding of Fact 16. (CP 54)

7. Appellant assigns error to Finding of Fact 17. (CP 54)

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. When a law enforcement officer lawfully stops a vehicle for a traffic infraction, a vehicle passenger retains his article I, section 7 right to privacy. The officer may control a passenger's movement only if the officer can articulate an objective rationale based upon concerns for the safety of the officer, the vehicle occupants, or other citizens.

Benedicto Baez Acevedo was the passenger in a car stopped by a state trooper for minor traffic infractions. The trooper asked Mr. Baez Acevedo to move his hand because it was under his leg. Did the trooper violate Mr. Baez Acevedo's state constitutional right to privacy where the officer justified his command based only upon his knowledge that a small handgun can be concealed in a person's hand? (Assignments of Error 1-3)

2. A trial court's factual finding in support of the denial of a suppression motion must be supported by substantial evidence. The trial court found that Trooper Axtman observed Mr. Baez Acevedo holding his hand in a fist "tucked under his knees by the passenger side floorboard." Finding of Fact 14. The trooper testified that Mr. Baez Acevedo's hand was in a fist under his leg but did not state the hand was near the floorboard. Is Finding of Fact 14 supported by substantial evidence? (Assignment of Error 4)

3. The trial court found that Trooper Axtman "is aware through training and experience of small weapons people can hold in their hand, including very small firearms." Finding of Fact 15. The trooper testified that his wife owned a handgun that was so small that he could hold it in the palm of his hand, but did not mention any other small

weapons he learned about in his law enforcement training or experience. Is Finding of Fact 15 supported by substantial evidence? (Assignment of Error 5)

4. The trial court found that “Trooper Axtman has experience with occupants in vehicles concealing firearms during vehicle stops by sitting on them.” Finding of Fact 16. The trooper described one incident where he stopped a vehicle and one passenger was sitting on two weapons. Is Finding of Fact 16 supported by substantial evidence? (Assignment of Error 6)

5. The trial court found that “Trooper Axtman had concerns about his safety based on the way the defendant was sitting, holding his hand in a fist, leaning towards the front passenger floorboard.” Finding of Fact 17. The trooper did not testify that Mr. Baez Acevedo was leaning towards the vehicle’s floorboard. Is Finding of Fact 17 supported by substantial evidence? (Assignment of Error 7)

C. STATEMENT OF THE CASE

Benedicto Baez Acevedo was a passenger in a car driving on Highway 2 on the evening of October 26, 2012.¹ CP 24; 1RP 5, 10.² Washington State Patrol Trooper John Axtman pulled the car over because the center brake light did not activate when the car stopped at a traffic light and the car stopped three feet beyond the intersection's stop line. 1RP 5-6. The driver pulled over at a Buzz Inn parking lot. 1RP 17.

When the trooper asked the driver for identification, car registration, and proof of insurance, he noticed the smell of marijuana coming from inside the car. 1RP 7. The trooper also observed that Mr. Baez Acevedo's hand was in a fist tucked under his leg. 1RP 7-8. Trooper Axtman told Mr. Baez Acevedo to pull out his hand and place it in his lap. 1RP 9. Mr. Baez Acevedo removed his hand, reached into his front pocket, and handed the trooper a baggie of what appeared to be marijuana. CP 24; 1RP 9.

¹ The incident apparently occurred in Monroe, Washington. CP 53 (Finding of Fact 1).

² The verbatim report of proceedings contains two volumes. 1RP refers to the transcript of the November 14, 2013, CrR 3.6 and CrR 3.5 hearing. 2RP refers to the transcript of the December 23, 2013, stipulated bench trial and sentencing hearing.

Mr. Baez Acevedo was arrested for possession of marijuana.³ 1RP 10. The trooper searched Mr. Baez Acevedo and found six baggies containing a white substance in his front pocket. CP 24, 50; 1RP 15-16. Later testing by the Washington State Patrol Crime Lab revealed that the white substance was cocaine. CP 50, 52.

The Snohomish County Prosecutor charged Mr. Baez Acevedo with possession of cocaine. CP 73-74. Mr. Baez Acevedo's pre-trial motion to suppress the evidence seized by the trooper was denied by the Honorable Marybeth Dingley.⁴ CP 53-56; 1RP 25-28.

Mr. Baez Acevedo later waived his right to a jury trial and agreed that the court could decide his case based upon documents including the police and crime laboratory reports. CP 15-52. The Honorable George F.B. Appel found Mr. Baez Acevedo guilty of possession of cocaine. 2RP 9.

The court sentenced Mr. Baez Acevedo to 90 days in jail, plus a \$1,000 fine and other monetary penalties. CP 7-10; 1RP 13. Mr. Baez Acevedo appealed, and the State filed a cross-appeal. CP 1-3.

³ The arrest occurred six weeks prior to the effective date of Initiative 502 which decriminalized the possession of small amounts of marijuana. Laws of 2013, ch. 3 § 19 (effective December 6, 2012). The decision to arrest was not based upon the odor of marijuana. See *State v. Grande*, 164 Wn.2d 135, 187 P.3d 248 (2008).

⁴ Judge Dingley also ruled that Mr. Baez Acevedo's custodial statements to the trooper were not admissible. CP 55-56; 1RP 29-30.

D. ARGUMENT

Mr. Baez Acevedo’s article I, section 7 right to privacy as the passenger in a stopped vehicle was violated when a law enforcement officer required him to move his hand in the absence of a threat to the officer’s safety.

As a passenger in a vehicle stopped for a traffic infraction, Mr. Baez Acevedo retained his privacy rights under article I, section 7 of the Washington Constitution. The trooper who stopped the vehicle ordered Mr. Baez Acevedo to move his hand from under his leg based on the officer’s belief that a small firearm could be concealed in a man’s hand. In the absence of a rationale based upon the circumstances of this stop, the trooper’s command violated Mr. Baez Acevedo’s state constitutional right to privacy, and the evidence obtained by the trooper should have been suppressed.

a. Washington’s constitution provides broad privacy protections.

Article I, section 7 of the Washington Constitution provides, “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” This provision “clearly recognizes an individual’s right to privacy with no express limitations.” State v. Parker, 139 Wn.2d 486, 493, 987 P.2d 73 (1999) (quoting State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982)). Article 1, section 7’s

broad privacy right “protects citizens from government intrusion into their private affairs without the authority of law.” State v. Hinton, 179 Wn.2d 862, 868, 319 P.3d 9 (2014) (quoting State v. Chacon Arreoloa, 176 Wn.2d 284, 291, 290 P.3d 983 (2012)). Washington’s right to privacy extends to automobiles and their contents. State v. Snapp, 174 Wn.2d 177, 187, 275 P.3d 289 (2012); Parker, 139 Wn.2d at 494.

It is well-settled that the Washington Constitution provides greater protection against warrantless searches and seizures than the federal constitution. Hinton, 179 Wn.2d at 868; Snapp, 174 Wn.2d at 187-88; Parker, 139 Wn.2d at 493. No Gunwall analysis is necessary before the appellate court will consider an article I, section 7 claim.⁵ Snapp, 174 Wn.2d at 193 n.9; State v. Jackson, 150 Wn.2d 251, 259, 76 P.3d 217 (2003). Warrantless searches are per se unreasonable under article I, section 7, subject to a limited number of carefully-crafted exceptions. Snapp, 176 Wn.2d at 187-88. The State must establish that an exception to the warrant requirement applies. Id. at 188.

⁵ State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

b. Vehicle passengers retain their article I, section 7 privacy rights when the vehicle is lawfully stopped for a traffic infraction.

“Individual constitutional rights are not extinguished by mere presence in a lawfully stopped vehicle.” Parker, 139 Wn.2d at 498. Law enforcement officers are thus prohibited from asking a passenger for identification based only upon the vehicle stop. State v. Brown, 154 Wn.2d 787, 796, 117 P.3d 336 (2005); State v. Rankin, 151 Wn.2d 689, 698-99, 92 P.3d 202 (2004); see State v. Barwick, 66 Wn. App. 706, 709, 833 P.2d 421 (1992) (passengers are not required to carry identification). Similarly, an officer may not search a passenger or his belongings based upon the arrest of the driver or another occupant. Parker, 139 Wn.2d at 502-03; State v. Adams, 144 Wn. App. 100, 107, 181 P.3d 37 (violation of art. I § 7 to conduct pat down search of passenger in stolen car), rev. denied, 164 Wn.2d 1033 (2008).

The Mendez Court recognized that both the privacy rights of passengers and the safety of police officers making traffic stops must be considered in determining the scope of a passenger’s constitutional rights. State v. Mendez, 137 Wn.2d 208, 219-20, 970 P.2d 722 (1999). Under article I, section 7, a law enforcement officer may restrain a passenger’s movements by ordering him to exit or remain in the car

only when the officer can “articulate an objective rationale predicated specifically on safety concerns, for officers, vehicle occupants, or other citizens” before restricting a passenger’s movement or ordering him out of the stopped car.⁶ *Id.* at 220.

In determining whether an officer had a sufficient “objective rationale” for ordering a passenger to remain or exit the vehicle, the court must look at the totality of the circumstances surrounding the stop in light of the following non-exclusive factors:

The number of officers, the number of vehicle occupants, the behavior of the occupants, the time of day, the location of the stop, traffic at the scene, affected citizens, or officer knowledge of the occupants.

Mendez, 137 Wn.2d at 221. A review of these factors demonstrates that the trooper lacked an objective rational for ordering Mr. Baez Acevedo to show his hand.

c. The *Mendez* factors demonstrate that the there was no objective safety reason for the trooper to order Mr. Baez Acevedo to move.

Mr. Baez Acevedo was the passenger in a car that was stopped by Trooper Axton because the car was missing the center brake light

⁶ In contrast, under the Fourth Amendment, a traffic stop is a considered a seizure of vehicle passengers, and the officer may order a passenger out of the car as a precautionary measure, without a reasonable suspicion that the passenger poses a safety risk. Brendlin v. California, 551 U.S. 249, 257-58, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007).

and the driver stopped three feet beyond the intersection's stop line. 1RP 5-6, 10. The car was traveling on a state highway with light traffic. 1RP 5-6. The stop occurred at 10:14 p.m. at a safe location – the Buzz Inn parking lot. 1RP 16-17. The trooper did not know the driver or passenger. 1RP 16.

Mr. Baez Acevedo was the only passenger in the car. 1RP 7, 16. According to the trooper, Mr. Baez Acevedo's left hand was in a fist tucked under his leg. 1RP 7-8. The trooper told Mr. Baez Acevedo to pull his hand up and put it on his lap. 1RP 9. Mr. Baez Acevedo pulled his hand out, reached in his front pocket, and handed the trooper a baggie of marijuana. 1RP 9.

At the pretrial hearing, Trooper Axtman testified that he was concerned for his safety based upon Mr. Baez Acevedo's position in the car. 1RP 9. The trooper said that his wife owned a small firearm that he could fit in the palm of his hand. 1RP 8. He also related a prior traffic stop when he encountered a "carful of persons" with guns concealed in the console, behind the driver's seat, and on their bodies. In addition, one passenger was sitting on two guns. 1RP 8-9. Based upon this evidence, the trial court concluded that Trooper Axtman's demand that Mr. Baez Acevedo show his hand was based upon

reasonable safety concerns. 1RP 28-29; CP 55. The trial court's ruling was incorrect.

In reviewing the denial of Mr. Baez Acevedo's suppression motion, this Court determines whether the challenged findings of fact are supported by substantial evidence and whether the factual findings support the conclusions of law. State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). The trial court's conclusions of law are reviewed de novo. Id.

The Court of Appeals decision in Hays is instructive. City of Spokane v. Hays, 99 Wn. App. 653, 995 P.2d 88 (2000). In that case, two police officers had made an arrest at a building they knew as a gang hangout with criminal activity. Hays, 99 Wn. App. at 655. Later that evening the officers watched the area, saw someone leave the building and get into a car, and pulled the car over a few blocks later for not signaling. Id. According to the officers, they could see the driver and front passenger "'manipulating an article of clothing' on the bench-style seat between them," and the officers were concerned that the clothing might contain a gun. Id.

When the officers approached the car, Hays, who was in the front passenger seat, locked the car door and refused to roll down the

window. Hays, 99 Wn. App. at 655. Eventually, Hays opened the window a crack, and the officers ordered him out of car, warning him that he could be arrested for obstruction if he did not comply. Id. at 655-56. Hay disagreed that the police had the power to order him out of the car, but he eventually exited the car and then refused to submit to a frisk. Id. at 656. Hays was placed in a patrol car and later issued a citation for obstructing a public servant and released. Id.

The Court of Appeals upheld the detention of Hays because the officers expressed legitimate safety concerns based upon extrinsic factors as well as Hays' conduct. Hays, 99 Wn. App. at 659. The officers were concerned that something was concealed in the clothing the driver and Hays had been manipulating. Hays was hostile and confrontational for no apparent reason. It was dark, and the stop occurred in a high-crime area, and one of the passengers had just emerged from a building notorious for crime and gang activity. Id. at 659. In addition, Hays was free to leave but instead chose to remain in the car. Id. at 660. The Court of Appeals concluded that the officers' safety concerns in this situation were reasonable. Id. at 660.

In contrast, Trooper Axtman did not testify as to legitimate safety concerns connected to the stop of the vehicle in which Mr. Baez

Acevedo was riding. While it was night time and the trooper was alone, there was only one passenger in the car. The stop occurred in the safety of a restaurant parking lot off of a state highway. The trooper was familiar with the area and did not notice anyone nearby whose presence could make the situation more dangerous. As the trial court noted, this was not a high risk location. 1RP 28. In addition, neither Mr. Baez Acevedo nor the driver made any furtive movements or engaged in suspicious behavior like the driver and passenger in Hays. 1RP 28.

The trooper's two stories about concealed weapons do not tip the scale in favor of violating Mr. Baez Acevedo's constitutional rights. The trooper testified that his wife owned a small hand gun that he could fit in the palm of hand and therefore could be hidden. 1RP 8. The trooper, however, did not explain how a small weapon could be held in the fist of a man the size of the defendant. The trooper also related one time when he stopped a car with several passenger where many weapons were concealed, but none of those weapons were concealed in a man's fist. 1RP 8. He did not relate how this information was similar to Mr. Baez Acevedo or the circumstances of the traffic stop.

In reviewing the trial court's denial of the suppression order, this Court must determine if substantial evidence supports the contested

findings of fact. Garvin, 166 Wn.2d at 249. Evidence is substantial when it is sufficient to “persuade a fair-minded person of the truth of the stated premise.” Id. (quoting State v. Reid, 98 Wn. App. 152, 156, 988 P.2d 1038 (1999)). Four of the trial court’s fact findings are not supported by substantial evidence.

The trial court found that “Trooper Axtman is aware through training and experience of small weapons people can hold in their hand, including very small firearms.” CP 54 (Finding of Act 15). Trooper Axtman’s brief description of his training, however, did not mention learning about small firearms. 1RP 4-5. The trooper related that he was aware of only one gun that could fit in the palm of a hand – his wife’s. His knowledge of that gun was not based upon his law enforcement experience or training.

The trial court also found that the trooper had “experience with occupants in vehicles concealing firearms during vehicle stops by sitting on them.” CP 54 (Finding of Fact 16). Trooper Axtman, however testified about only one stop with one man sitting on two weapons. 1RP 8.

The trial court’s broad findings about Trooper Axtman’s experience and training concerning small firearms and experience with

multiple people concealing weapons by sitting on them are not supported by substantial evidence in the record. And, the trooper never explained if a small gun could be concealed in the fist of a man the size of Mr. Baez Acevedo.

The trial court also found that Trooper Axtman saw Mr. Baez Acevedo “holding his hand in a fist, tucked under his knees by the passenger side floorboard.” CP 54 (Finding of Fact 14). The trial court further found that the trooper’s concerns for his safety were based upon the way Mr. Baez Acevedo was sitting “holding his hand in a fist, leaning towards the front passenger floorboard.” CP 54 (Finding of Fact 17).

Trooper Axtman, however, did not testify that Mr. Baez Acevedo’s hands were near the floorboard. Instead, the trooper testified Mr. Baez Acevedo’s left hand was “tucked down in his lap under his leg.”⁷ 1RP 7. He added that the hand was in a fist. 1RP 8. No evidence supports the court’s conclusion that Mr. Baez Acevedo’s lap or his hand was near the floorboard, which would have required him to be out of his seat.

⁷ The trooper demonstrated how Mr. Baez Acevedo was sitting, but the demonstration was not described for the record. 1RP 7-8.

De novo review of the circumstances of this traffic stop in light of the Mendez factors demonstrates the lack of an objective rationale predicated on specific safety concerns to justify Trooper Axtman's command to Mr. Baez Acevedo. The stop occurred in a safe location, and the driver and passenger did not make furtive movements or otherwise appear dangerous.

The trial court's findings of fact inaccurately describe the trooper's knowledge and experience with concealed weapons. The trooper's description of small weapons was not tied to the circumstances of this stop. The trial court's finding that Mr. Baez Acevedo's hand was near the floorboard is also not supported by the evidence. Moreover, it is unclear how the trooper knew Mr. Baez Acevedo's hand was in a fist if his hand was under his under.

The trooper's knowledge of small weapons was not relevant to the circumstances of this stop, and it does not justify asking every vehicle passenger the trooper encounters to show his hands. The placement of Mr. Baez Acevedo's hand under his leg is not a sufficient reason to justify invading his privacy. See State v. Terrazas, 71 Wn. App. 873, 863 P.2d 75 (1993) (no articulable suspicion that backseat

passenger was armed or dangerous because his hands were underneath a blanket), rev. denied, 123 Wn.2d 1028 (1994).

Thus, looking at all of the facts of the case, there is not sufficient evidence to support four of the trial court's findings of fact, and the remaining factual findings do not support the court's conclusion that the trooper articulated legitimate concerns for his safety based upon his training and experience.

d. Mr. Baez Acevedo's conviction must be reversed.

The exclusionary rule serves to protect individual's privacy rights, deter law enforcement from violating those rights by illegally gathering evidence, and preserve the dignity of the courts. State v. Rife, 133 Wn.2d 140, 148, 943 P.2d 266 (1997). "The exclusionary rule mandates the suppression of evidence gathered through unconstitutional means." Garvin, 166 Wn.2d at 254 (quoting State v. Duncan, 146 Wn.3d 166, 176, 43 P.3d 513 (2002)). When an unconstitutional search or seizure occurs, "all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed." State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999).

The trooper found cocaine on Mr. Baez Acevedo's person as a result of his unconstitutional command that Mr. Baez-Acevedo, a

passenger in a stopped car, move his hand. The order denying Mr. Baez Acevedo's motion to suppress and his conviction of possession of cocaine based must be reversed. Adams, 144 Wn. App. at 107.

E. CONCLUSION

The state trooper violated Mr. Baez Acevedo's article I, section 7 right to privacy by ordering him to show his hand during a traffic stop where Mr. Baez Acevedo was a mere passenger. Absent the evidence obtained as a result of the unconstitutional command, no evidence supports his conviction for possession of cocaine. The conviction must be reversed.

DATED this 11th day of June 2014.

Respectfully submitted,



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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 71321-3-I
)	
BENEDICTO BAEZ ACEVEDO,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 11TH DAY OF JUNE, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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