

73012-6

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Court of Appeals
Division I
State of Washington

73012-6

NO. 73012-6-I

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent,

v.

BRIAN JEFFERY KEMNOW,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable Dave Needy, Judge

BRIEF OF RESPONDENT

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I. SUMMARY OF ARGUMENT

Brian Kemnow appeals his conviction for Possession of Methamphetamine for drugs found on his person upon arrest on a warrant. Kemnow was contacted at his truck without any show of force or commands by the officer. Kemnow identified himself by providing identification when asked. That led to discovery of a warrant resulting in arrest and discovery of methamphetamine on his person.

Kemnow's challenge fails because the trial court properly determined he was not seized because the officer had not restrained the liberty of Kemnow. Alternatively, there was a sufficient basis for a brief detention of Kemnow based upon information provided by citizen informant of a drug transaction in a location known by the officer for drug activity.

II. ISSUES

1. Was the defendant properly arrested on a warrant?
2. Where the officer put a light on a vehicle, but did not signal or force it to stop, was the driver of the vehicle seized?
3. Did the officer's request to have the person identify himself cause a seizure?

4. If the trial court erred in determining there was no seizure, did the citizen informant's report provide an adequate basis for a brief detention?

III. STATEMENT OF THE CASE

1. Statement of Procedural History

On July 17, 2014, Brian Kemnow was charged with Possession of Methamphetamine alleged to have occurred on May 2, 2014. CP 1-2. Methamphetamine was found upon Kemnow upon his arrest on a warrant. CP 2.

On September 4, 2014, Kemnow filed a motion to suppress the drug. CP 51.

On September 23, 2014, the trial court took testimony on the suppression motion. 9/24/14 RP 5-21.¹

On November 19, 2014, the trial court orally denied the suppression. 11/19/14 RP 3-6. CP 27.

On December 1, 2014, the order denying suppression was entered. CP 27-30.

¹ The State will refer to the verbatim report of proceedings by using the date followed by "RP" and the page number. The report of proceedings in this case are as follows:

9/24/14 RP	Suppression Hearing (Officer Testimony in volume with 1/5/15)
11/19/14 RP	Suppression Ruling (in volume with 1/2/15 & 1/16/15)
1/2/15 RP	Trial Confirmation (in volume with 11/19/14 & 1/16/15)
1/5/15 RP	Jury Trial (in volume with 9/24/14)
1/16/15 RP	Sentencing (in volume with 11/19/14 & 1/2/15).

On January 5, 2015, the case proceeded to trial. 1/5/15 RP 22. Kemnow was convicted of Possession of Methamphetamine. CP 50, 1/5/15 RP 100.

On January 16, 2015, Kemnow was sentenced to a standard range sentence of ten days of jail time. CP 18, 26.

On January 16, 2015, Kemnow timely filed a notice of appeal. CP 45.

2. Statement of Facts

Officer Hannawalt testified at the suppression hearing. 9/24/14 RP 5. He had been a patrol officer since 2007. 9/24/14 RP 6. Hannawalt was familiar with the Bethlehem Lutheran Church and that the parking lot was a known location for drug activity during hours of darkness when church activities are not occurring. 9/24/14 RP 7. When Hannawalt is working patrol he typically gets identification or name of the person with whom he is dealing. 9/24/14 RP 18.

On May 2, 2014, at about 10:30 p.m., Hannawalt was dispatched to a drug problem at the church which was closed. 9/24/14 RP 7. It was reported that a pickup truck, Nissan car, and couple of bicycles had been in the parking lot. 9/24/14 RP 8. The report came from a named individual, David Mullen, whom Officer Hannawalt believed lived across the street. 9/24/14

RP 8. Hannawalt believed it was something that Mullen had observed himself given similar calls like that before in the area. 9/24/14 RP 8. Dispatch had advised that Mullen had seen the vehicles and a group of people in the lot and he had just witnessed it. 9/24/14 RP 9.

Hannawalt drove at a normal speed without any emergency lights on his vehicle. 9/24/14 RP 20.

When Hannawalt arrived, he entered a large entrance to the parking lot on the east side which is available for two lanes of travel. 9/24/14 RP 11. Lanes are marked with arrows for entrance and exit. 9/24/14 RP 11. An exhibit showing the entrance that Hannawalt used was admitted. 9/24/14 RP 9-10, Exhibits 1-3.

Hannawalt saw a pickup truck heading toward him as he entered an entrance and stopped as a vehicle was trying to go around him. 9/24/14 RP 11-2. The truck stopped because the entrance to the parking lot was narrow, but there was room for vehicles to pass each other. 9/24/14 RP 13. When the truck was about a half to two car lengths away and stopped, Hannawalt turned his spot light on the truck because it was coming close to his vehicle. 9/24/14 RP 11, 13, 1/5/15 RP 49. Hannawalt's vehicle was a car which was lower to the ground than the raised pickup truck. 9/24/14 RP 12. Hannawalt could see the driver. 9/24/14 RP 12.

Hannawalt did not activate any other lights on his police car. 9/24/14 RP 13. Hannawalt did not block the other vehicle in the roadway. 9/24/14 RP 14. He did not display any force. 9/24/14 RP 14.

Hannawalt got out of his patrol car and contacted the driver and told the driver he was in the area because of a call about a possible drug deal. 9/24/14 RP 13-4. Hannawalt described the other vehicle and the bicycles. 9/24/14 RP 14. The driver said he had seen the bicycles and denied being involved in drugs. 9/24/14 RP 14.

Hannawalt asked the driver “can I get some ID?” 9/24/14 RP 14. The driver pulled out his identification card and handed it to Hannawalt. 9/24/14 RP 15 As he was providing his identification card he told Hannawalt he did not have a license. 9/24/14 RP 15. While standing at the truck, Hannawalt ran the name and date of birth through dispatch through a radio on his uniform. 9/24/14 RP 15.

Within a minute to a minute and a half, Hannawalt was told by dispatch that the driver had an outstanding warrant for felony eluding out of Island County. 9/24/14 RP 15.

Hannawalt identified Kemnow as the individual with the outstanding warrant. 9/24/14 RP 16,

Up to the point that Kemnow said he did not have a license, he was not told he was not free to leave. 9/24/14 RP 16. When he told he officer he

did not have a license, he was told he could not drive way because he did not have a license. 9/24/14 RP 16.

After Hannawalt was told Kemnow had the outstanding warrant, he searched Kemnow. 9/24/14 RP 17.

Kemnow did not testify at the suppression hearing. 9/24/14 RP 21.

At trial, Hannawalt testified that after finding out about the warrant for Kemnow, he placed him under arrest and searched his person finding two small bags of white crystal powder in his pockets. 1/5/15 RP 51-3.

3. Trial Court Findings

The trial court made factual findings about the contact. CP 27-30.

Those findings included that from the information he received, Hannawalt believed the civilian had witnessed the transaction. CP 27. The court also found that the driveway was of sufficient width so the vehicles could have passed. CP 28.

Regarding the contact at the truck the trial court found:

Hannawalt asked, "Can I get some i.d.?" The defendant responded by saying that he did not have a driver's license but he did have i.d. The defendant pulled out his i.d. card and handed it to Hannawalt.

Hannawalt took the i.d. card, and, remaining at the vehicle, ran the identifying information through dispatch. After a minute to a minute and a half dispatch indicated there was a warrant for the defendant's arrest.

CP 28. Up until being advised of the warrant, Hannawalt had not told the defendant he was not free to leave. CP 28.

The trial court found the officer's use of the light on the vehicle did not constitute a seizure. CP 29. The trial court also determined that the officer's contact with the vehicle was supported by an articulable suspicion of criminal activity to support a brief detention. CP 29.

IV. ARGUMENT

1. The officer did not restrain the liberty of the defendant.

Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a "seizure" has occurred.

Terry v. Ohio, 392 U.S. 1, 19 n.16, 88 S.Ct. 1868, 1879, 20 L.Ed.2d 889, 905 (1968).

i. Standards for Determining Seizure

A person is "seized" under the Fourth Amendment only if, "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980), quoted in *Aranguren*, 42 Wn. App. at 455; accord *Florida v. Bostick*, 501 U.S. 429, 439, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991) (question is "whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter"). "Whether a reasonable person would believe he was detained depends on the particular, objective facts surrounding the encounter." *State v. Ellwood*, 52 Wn. App. 70, 73, 757 P.2d 547 (1988) (citing *Mendenhall*, 446 U.S. at 554).

State v. Armenta, 134 Wn.2d 1, 10-11, 948 P.2d 1280 (1997).

“Not every encounter between an officer and an individual amounts to a seizure.” *State v. Aranguren*, 42 Wn. App. 452, 455, 711 P.2d 1096 (1985). “This determination is made by objectively looking at the actions of the law enforcement officer.” *State v. Rankin*, 151 Wn.2d 689, 695, 92 P.3d 202 (2004), citing *State v. Young*, 135 Wn.2d 498, 501, 957 P.2d 681 (1998).

The defendant has the burden of proving that the seizure occurred. *State v. Young*, 135 Wn.2d at 510.

ii. Standard of Review Regarding Seizure Claim.

Whether police have seized a person is a mixed question of law and fact. *State v. Armenta*, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997). “‘The resolution by a trial court of differing accounts of the circumstances surrounding the encounter are factual findings entitled to great deference,’ but ‘the ultimate determination of whether those facts constitute a seizure is one of law and is reviewed de novo.’” *Id.* (quoting *State v. Thorn*, 129 Wn.2d 347, 351, 917 P.2d 108 (1996), *overruled on other grounds by State v. O'Neill*, 148 Wn.2d 564, 62 P.3d 489 (2003)).

State v. Harrington, 167 Wn.2d 656, 662, 222 P.3d 92 (2009).

iii. The officer did not force Kemnow to stop.

Officer Hannawalt’s actions here were not a physical force or show of authority sufficient to cause a seizure. Officer Hannawalt was driving in his vehicle, entering an access road to the church parking lot and encountered Kemnow’s truck headed past him. 9/24/14 RP 11-2. He slowed down and activated his spotlight to let the other vehicle know he was there

and so that he could see the driver in the pickup truck which was raised above him. 9/24/14 RP 11-3, 1/5/15 RP 49. The truck stopped. Hannawalt got out and approached the truck and explained the contents of the 911 call that had occurred. 9/24/14 RP 13-4. Kemnow responded back confirming the information that the 911 caller had made about bicycles and another vehicle but denied being involved in drugs. 9/24/14 RP 14.

Hannawalt did not block in the truck, activate emergency lights on his police car, display any force or gun or tell Kemnow he was not free to leave. 9/24/14 RP 13-4. There was no testimony that Hannawalt's tone of voice or demeanor would cause Kemnow to believe he was being detained.² And the exchange as described by Hannawalt was conversational rather than accusatorial. 9/24/14 RP 14-5, CP 28.

These actions by Hannawalt at his vehicle did not restrain the liberty of Kemnow in his vehicle.

In *State v. O'Neill*, the officer approached a parked vehicle, shined his flashlight into the vehicle onto the driver. The court determined “[n]o seizure occurred at that point.” *State v. O'Neill*, 148 Wn.2d at 578. The driver was asked what he was doing there. The driver said he was waiting for a friend with jumper cables because his car wouldn't start. The officer asked

² Kemnow did not testify at the hearing or at trial. 9/24/14 RP 21, 1/5/15 RP 82.

the driver to start the car, but it wouldn't start. The officer asked for identification. The officer then asked the driver to step from the vehicle. In that case the Supreme Court determined that the driver was not constitutionally seized until he was asked to exit the vehicle. *State v. O'Neill*, 148 Wn.2d at 592.

Similarly here, the interaction in a public place without any display of police authority did not constitute a show of force sufficient to constitute a seizure at the point the officer asked for identification. Once his identity was validly obtained, the officer properly determined the existence of a warrant, arrested the defendant and located the methamphetamine on his person.

iv. Asking for identification did not cause a seizure.

“Article I, section 7 does not forbid social contacts between police and citizens: ‘[A] police officer's conduct in engaging a defendant in conversation in a public place and asking for identification does not, alone, raise the encounter to an investigative detention.’” *Id.* (alteration in original) (quoting *Armenta*, 134 Wn.2d at 11)...

State v. Harrington, 167 Wn.2d 656, 665, 222 P.3d 92 (2009).

Officer Hannawalt asked for identification while Kemnow was in his truck and Kemnow voluntarily provided his Washington State Identification card. 9/24/14 RP 14-5. Kemnow also volunteered that he did not have a license. 9/24/14 RP 15. Based upon the name on the identification card,

within a minute or two, Officer Hannawalt found out that Kemnow had the outstanding arrest warrant. 9/24/14 RP 15.

The request of identification here did not transform the contact into a “seizure.”

Cruz contends that he and Armenta were seized when Officer Randles asked them for identification and questioned them on the way to Armenta’s vehicle. Br. of Resp’t Cruz at 2-4. We do not agree with this assertion. Rather, we endorse the view expressed by the Court of Appeals in *Aranguren* to the effect that **"police questioning relating to one's identity, or a request for identification by the police, without more, is unlikely to result in a Fourth Amendment seizure."** *Aranguren*, 42 Wn. App. at 455 (citing *Immigration & Naturalization Serv. v. Delgado*, 466 U.S. 210, 104 S. Ct. 1758, 80 L. Ed. 2d 247 (1984))...

State v. Armenta, 134 Wn.2d 1, 11, 948 P.2d 1280 (1997) (bold emphasis added); see also *State v. Mennegar*, 114 Wn.2d 304, 310, 787 P.2d 1347 (1990)³ (“merely requesting identification, without more, does not constitute a seizure”); *State v. Ellwood*, 52 Wn. App. 70, 73, 757 P.2d 547 (1988) (merely requesting identification, does not constitute a seizure under the Fourth Amendment but “wait right here” caused a detention).

The situation did not rise to the level such that a reasonable person in Kemnow’s situation would feel they were not free to decline the officers’ requests or otherwise terminate the encounter.

³ Over-ruled in part on other grounds in *State v. Hill*, 123 Wn.2d 641, 645-47, 870 P.2d 313 (1994).

2. Alternatively, the information provided by the citizen informant provided a basis for a brief detention.

The case also presents an example of the difference between a seizure and a detention. If this Court determines that the contact here rose to the level of a seizure, this Court should uphold the trial court's decision that the brief contact before locating the warrant was a permissible *Terry* detention.

A citizen-witness's credibility is enhanced when he or she purports to be an eyewitness to the events described. *State v. Lee*, 147 Wn. App. 912, 918, 199 P.3d 445 (2008).

An informant's tip can provide police with reasonable suspicion to justify an investigatory *Terry* stop if the tip possesses sufficient "indicia of reliability." *State v. Sieler*, 95 Wn.2d 43, 47, 621 P.2d 1272 (1980) (quoting *Adams v. Williams*, 407 U.S. 143, 147, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972)). Courts employ the totality of the circumstances test to determine whether an informant's tip possessed sufficient indicia of reliability to support reasonable suspicion. *State v. Marcum*, 149 Wn. App. 894, 903, 205 P.3d 969 (2009); see *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). When deciding whether this indicia of reliability exists, the courts will generally consider several factors, primarily "(1) whether the informant is reliable, (2) whether the information was obtained in a reliable fashion, and (3) whether the officers can corroborate any details of the informant's tip." *Lee*, 147 Wn. App. at 918. "The existing standard does not require all three factors to establish indicia of reliability." *State v. Saggars*, 182 Wn. App. 832, 840 n.18, 332 P.3d 1034 (2014).

State v. Howerton, 187 Wn. App. 357, 365, 348 P.3d 781 (2015).

“Citizen informants are deemed presumptively reliable.” *State v. Gaddy*, 152 Wn.2d 64, 73, 93 P.3d 872 (2004).

The totality of the circumstances would have permitted Officer Hannawalt to engage in a brief detention. The information about a drug transaction was provided by a named citizen. The officer believed it came from information observed by the citizen. There was a detailed description about those involved and the circumstances that occurred were corroborated by the truck seen in the parking lot. Additionally prior to requesting identification, the defendant himself corroborated the circumstances acknowledging that the two bicycles and the other vehicle had been present. 9/24/14 RP 14. Finally, the situation described by the known citizen was consistent with Officer Hannawalt’s knowledge that the parking lot was known for drug activity.

These circumstances supported the trial court’s conclusion that there was sufficient articulable suspicion to justify a brief detention. CP 29.

V. CONCLUSION

For the foregoing reasons, this Court should affirm the trial court’s decision that there was no seizure, deny the suppression of the methamphetamine found during a search incident to arrest and affirm the conviction.

DATED this 10th day of September, 2015.

SKAGIT COUNTY PROSECUTING ATTORNEY



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Skagit County Prosecutor's Office #91059

DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; United States Postal Service; ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Lila J. Silverstein, addressed as Washington Appellate Project, 1511 Third Avenue, Seattle, WA 98101 . I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 10th day of September, 2015.



KAREN R. WALLACE, DECLARANT