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NO. 69563-1-I

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

STATE OF WASHINGTON

Respondent

v.

ROY E. DETAMORE, JR.

Appellant

BRIEF OF RESPONDENT

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I. ISSUES

1. Did the officer have probable cause to believe the defendant was committing the crime of possession with intent to use drug paraphernalia in violation of Everett Municipal Code (EMC) 10.35.020?

II. STATEMENT OF THE CASE

On September 17, 2010 at 10:15 p.m. Everett Police Officers Stephen Harney and Joseph Woods were on duty when they were dispatched to a disturbance at 1031 North Broadway in the city of Everett. That address is a trailer park accessed off of 12th Street. Upon their arrival they encountered the defendant, Roy Detamore, standing in the carport of his trailer home. 9-24-12 RP 59-62, 101-104.¹

Officer Harney asked the defendant if he had any weapons on his person. The defendant responded affirmatively. In order to secure the scene Officer Harney had the defendant put his hands on his head and then frisked the defendant. Upon doing so the officer felt what he immediately recognized as a methamphetamine

¹ The report of proceedings includes 7 volumes: 12-18-11, CrR 3.6 hearing; April 16 and April 17, 2012, first trial which ended in a hung jury; September 24, 25, and 26, second trial which ended in conviction; 11-8.2012, sentencing.

pipe in the defendant's pocket. The officer then placed the defendant under arrest for possession of drug paraphernalia. 9-24-12 RP 62-65.

Officer Harney continued to frisk the defendant and found a knife in his pocket. He then searched the defendant incident to arrest. In that search he located another methamphetamine pipe and a black bag. The bag contained scales with some crystal substance on it, some small plastic baggies commonly used to carry illegal drugs, a small baggie with suspected methamphetamine inside, a straw with some crystal residue on it, a stylus, and a receipt with the defendant's name on it dated the day before. A stylus is sometimes used to clean out drug pipes. 9-24-12 RP 71-77, 106-109.

The suspected methamphetamine was tested by the Washington State Patrol Crime Lab. The test confirmed the substance was .28 grams of methamphetamine. 9-25-12 RP 8-14.

The defendant was charged with one count of Possession of a Controlled Substance, to wit; methamphetamine. 1 CP 180-181. Prior to trial the defendant challenged the search on two grounds. First he challenged the officer's authority to conduct the frisk for

weapons under the circumstances. Second he challenged the basis for the arrest and search incident to arrest. 1 CP 165-175.

At a suppression hearing Officer Harney testified that he had specific training and experience with drugs and drug paraphernalia. He was familiar with the shape of various drug pipes, including those used to smoke methamphetamine. He described methamphetamine pipes as glass with a big bulb on one end. He had never encountered a pipe like that used to smoke any kind of legal substance. 12-8-11 RP 3-4.

Officer Harney testified that he was dispatched to the Detamore residence on September 17, 2010 on a report of a male and female involved in a physical disturbance. Dispatch identified the person involved as "suspect possibly ...Roy, twenties, white male." Officer Harney was familiar with the residence and the family as he had responded to several incidents there in the past involving assaults and an assault with a weapon. 12-8-11 RP 4-6, 14-17.

Officer Harney testified that the defendant was standing in the carport of his mobile home. The defendant responded affirmatively when the officer asked if he had any weapons. Upon frisking the defendant Officer Harney felt what he immediately

recognized was a methamphetamine pipe. He did not have to manipulate the item to recognize what it was. As soon as he recognized the item the officer placed the defendant under arrest for possession of drug paraphernalia. The officer continued to frisk for weapons. He found a knife in the defendant's pocket. Upon searching the defendant incident to arrest he found another methamphetamine pipe and the black bag with the scales and suspected methamphetamine in another pocket. 12-8-11 RP 6-13, 19-22.

The trial court found that during a frisk for weapons the officer felt an object in the defendant's pocket that the officer immediately recognized as a drug pipe used to smoke methamphetamine without having to manipulate the object. The court concluded that the officer had a reasonable basis on which to frisk the defendant. Further he had probable cause to believe the defendant possessed the pipe with intent to smoke methamphetamine because a pipe like that serves no other purpose based on the officer's training and experience. The court therefore denied the motion to suppress. 1 CP 154-156. A copy of the court certificate pursuant to CrR 3.6 is attached as appendix A.

III. ARGUMENT

A. THE OFFICER HAD PROBABLE CAUSE TO ARREST THE DEFENDANT FOR POSSESSION OF DRUG PARAPHERNALIA.

On appeal the defendant only challenges the trial court's conclusion that the officer had probable cause to arrest the defendant for possession of drug paraphernalia. He does not challenge the officer's authority for the initial frisk. Nor does he challenge any of the trial court's findings of fact. Unchallenged findings of fact are verities on appeal. State v. Neeley, 113 Wn. App. 100, 105, 52 P.3d 539 (2002).

Some of the court's statements of fact are labeled conclusions of law in the CrR 3.6 certificate. The court found

[t]his officer has specific training and experience regarding objects used to smoke illegal drugs. Something shaped like this pipe is unique to smoking methamphetamine. When he felt it, he immediately recognized it for what it was... a pipe like this serves no purpose other than to smoke methamphetamine....

Those incorrectly labeled factual statements are treated as findings of fact. Kunkel v. Meridian Oil, Inc. 114 Wn.2d 896, 903, 792 P.2d 1254 (1990).

Probable cause exists when the arresting officer is aware of facts and circumstances sufficient to cause a reasonable officer to believe a crime has been committed. State v. Mance, 82 Wn. App.

539, 541, 918 P.2d 527 (1996). The arrest must be based on information in the officer's possession before the arrest is made. Id. at 542, State v. O'Neill, 148 Wn.2d 564, 587, 62 P.3d 489 (2003). The quantum of evidence necessary is less than that necessary to establish guilt beyond a reasonable doubt. State v. Conner, 58 Wn. App. 90, 97, 791 P.2d 261, review denied, 115 Wn.2d 1020 (1990). It is sufficient if the officer has reasonable grounds for suspicion, "along with evidence of circumstances sufficiently strong in themselves to allow a cautious and disinterested person to believe the suspect is guilty." Id. at 98. "The experience and expertise of an officer may be taken into account in determining whether there is probable cause." State v. Remboldt, 64 Wn. App. 505, 510, 827 P.2d 282, review denied, 119 Wn.2d 1005 (1992).

Probable cause is not negated simply because there may be an innocent explanation for the officer's observations. State v. Fore, 56 Wn App. 339, 344, 683 P.2d 626 (1989), review denied, 114 Wn.2d 1011 (1990). It exists even if the officer does not possess absolute certainty that what he observed was contraband. Id. at 345.

The officer here discovered the methamphetamine pipe during the course of a Terry² pat down for weapons. A frisk for weapons is an exception to the general rule that police must have a warrant in order to conduct a search. State v. Horton, 136 Wn. App. 29, 32, 146 P.3d 1227 (2006), review denied, 162 Wn.2d 1014 (2008). Under the “plain touch” doctrine an officer does not exceed the scope of the lawful intrusion if during the course of a pat down he encounters an object possessing characteristics that make its identity as contraband immediately apparent without further manipulation. State v. Hudson, 124 Wn.2d 107, 114, 874 P.2d 160 (1994).

Everett Municipal Code (EMC) 10.35.020 makes it a misdemeanor:

For any person to use, or possess with intent to use, drug paraphernalia to plan, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body a controlled substance, as defined by Chapter 69.50, RCW, as now or hereafter amended

EMC 10.35.020.(emphasis added).

Drug paraphernalia is defined as “all equipment, products,

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

and materials of any kind which are used, intended for use, or designed for use in.... injecting, ingesting, inhaling or otherwise introducing into the human body a controlled substance, as defined by Chapter 69.50. RCW..." EMC 10.35.010(A). Methamphetamine is a Schedule II controlled substance. RCW 69.50.206(d)(2).

Here the officer had specifically been trained to identify controlled substances and drug paraphernalia associated with controlled substances. In particular he was familiar with the unique shape of pipes used to ingest various kinds of controlled substance, including marijuana, crack cocaine, and methamphetamine pipes. He knew that methamphetamine pipes were made of glass and had a large bulb on one end where the drug was placed. An item with that shape was not used to ingest legal substances. During the search he felt a long cylinder with bulb on the end in the defendant's pocket. Consistent with his training and experience the officer immediately recognized it as a methamphetamine pipe. 12-8-11 RP 3. Under these circumstances the officer had reasonable grounds to believe that the defendant possessed a methamphetamine pipe with the intent to use it to ingest methamphetamine.

The defendant challenges this conclusion asserting that without more information the officer did not have reason to believe that the defendant intended to use the pipe to ingest a controlled substance. He argues the officer only had reason to believe that he possessed drug paraphernalia which is not a crime absent evidence it was intended to be used.

The defendant relies on State v. Fisher, 132 Wn. App. 26, 130 P.3d 832, review denied, 158 Wn.2d 1021 (2006). In Fisher a Snohomish County Sheriff's Deputy arrested Fisher for possession of drug paraphernalia in violation of SCC 10.48.020. Like EMC 10.35.020, the county code prohibited possession of drug paraphernalia with intent to use. The drug pipe was found in the course of a pat down search. The deputy felt a hard object, removed it, and found a pipe with burnt residue in it. Fisher said the pipe was not his, but gave no other explanation for the presence of the pipe on his person. This Court found that evidence of the pipe had been used plus Fisher's lack of explanation gave reason to believe that Fisher intended to use the pipe in the future. Id. at 30.

Unlike Fisher, the officer here felt the pipe and placed the defendant under arrest before pulling it out of his pocket and

observing residue in the pipe. This difference does not mean that the officer lacked probable cause to arrest for possession of drug paraphernalia because probable cause is evaluated on a case by case basis. State v. Helmka, 86 Wn.2d 91, 93, 542 P.2d 115 (1975). Here the record demonstrates an additional fact not mentioned in Fisher: the officer knew pipes that shape were used to smoke methamphetamine and were not used for any legitimate purpose. This additional fact supports the court's conclusion that there was probable cause to believe the defendant was in possession of drug paraphernalia with intent to use it. 1 CP 155-156.

Similarly the defendant's comparison of this case to possession with intent to deliver cases does not show that the officer lacked probable cause to arrest the defendant here. With the exception of one case each of the cases cited by the defendant dealt with a challenge to the sufficiency of the evidence.³ Evidence

³ The defendant also cited State v. Darden, 145 Wn.2d 612, 41 P.3d 1189 (2002). There the Court considered whether the defendant was denied his right to confront the witnesses against him when the trial court prohibited him from cross-examining a police officer about where he was standing when the defendant was seen dealing drugs. The Court relied on the rule that a conviction for possession with intent to deliver required more than mere possession to conclude the defendant's confrontation rights were violated because that officer was critical to providing the additional facts necessary to establish intent to deliver beyond mere possession.

is sufficient to convict if after viewing the evidence in the light most favorable to the State, any rational fact finder could find the essential elements of the crime beyond a reasonable doubt. State v. Brown, 68 Wn. App. 480, 483, 843 P.2d 1098 (1993). “Washington law forbids the inference of an intent to deliver based on ‘bare possession of a controlled substance, absent other facts and circumstances.’” Id. citing State v. Harris, 14 Wn. App. 414, 148, 542 P.2d 122 (1975) review denied, 86 Wn.2d 1010 (1976).

In Brown a conviction for possession of controlled substance with intent to deliver was overturned where the evidence showed the defendant was in possession of a large amount of crack cocaine and an experienced narcotics officer testified that the quantity of controlled substance possessed was in excess of that commonly possessed for personal use only. In the officer’s opinion it was possessed with intent to deliver. Id. This Court found that evidence was insufficient to convict on a charge of possession with intent to deliver, reasoning that an inference from quantity alone was inconsistent with the significant difference in sentencing ranges upon conviction for possession and possession with intent to deliver. Id. at 485.

While Brown addressed the quantum of evidence necessary to convict on a charge of possession with intent to deliver, it says nothing about whether the officer would have had probable cause to arrest for possession with intent to deliver under those same facts. Because the standard for probable includes consideration of the officer's experience and expertise, the officer's interpretation of known facts based on that experience and training weighs heavily in favor of finding probable cause for arrest, a standard that is far less than proof beyond a reasonable doubt.

The defendant argues this Court adopted the analysis from cases deciding whether evidence was sufficient to convict in possession with intent to deliver controlled substances cases in Fisher. BOA at 9. This Court did cite State v. Goodman, 150 Wn.2d 774, 83 P.3d 410 (2004), a case cited by the defendant here. The citation to Goodman followed a description of the defendant's argument that probable cause to believe the suspect intended to use drug paraphernalia required something more than mere possession of drug paraphernalia. This Court then pointed to evidence that under the defendant's analysis, would justify the arrest in that case. Fisher, 132 Wn. App. at 30. Similarly, here, the information in the officer's possession that methamphetamine pipes

are only used to smoke methamphetamine, and not for some other purpose, gave rise to a reason to believe the defendant intended to use the pipe for that purpose.

The State acknowledges that probable cause to arrest for possession of drug paraphernalia may have been insufficient under the circumstances of this case if the item possessed had been another kind of drug paraphernalia. In Neeley the defendant was arrested for possession of drug paraphernalia under RCW 69.50.412(1). Under that statute makes it is a misdemeanor to use drug paraphernalia to “ingest, inhale, or otherwise introduce into the human body a controlled substance.” Neeley, 113 Wn. App. at 107. The drug paraphernalia at issue there was a brillo pad, a small pair of scissors, and a lighter. Id. at 103. The Court upheld the trial court’s finding that there was probable cause to arrest for possession of drug paraphernalia because there was also evidence that the defendant possessed those items in an area known for drug use, late at night, and the defendant had engaged in physical behavior consistent with ingesting controlled substances. Id. at 108.

Brillo pads, small scissors, and lighters are common everyday items. Without the additional evidence pointing to the use

that Neeley had put them to, there likely would not have been probable cause to arrest her for possession of drug paraphernalia. Unlike the common items at issue in Neeley, the glass pipe at issue here was unique. To the officer's knowledge a pipe that shape had one use, to ingest methamphetamine. The unique nature of the pipe, combined with that knowledge gave rise to the reasonable belief that the defendant intended to use it for that purpose.

Finally, the defendant's argument that the trial court's decision effectively criminalizes bare possession of drug paraphernalia should be rejected because it conflates the standard for conviction with the standard for arrest. "In dealing with probable cause, however, as the very name implies, we are dealing with probabilities." Brinegar v. United States, 338 U.S. 160, 175, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949). "This 'means less than evidence which would justify condemnation' or conviction." Id. quoting, Locke v. United States, 7 Cranch, 339, 348, 3 L.Ed.364 (1813). The trial court's decision was not based on possession of drug paraphernalia alone. Rather it was based on the defendant's possession of a unique pipe, in conjunction with the officer's knowledge that the pipe was only used for one purpose, to ingest methamphetamine, to conclude there was probable cause to

believe the defendant possessed it with intent to use it for that illegal purpose. The trial court did not err in concluding the officer had probable cause to arrest the defendant upon feeling the methamphetamine pipe in his pocket.

IV. CONCLUSION

For the foregoing reasons the State asks the Court to affirm the trial court's conclusion that the officer had probable cause to arrest the defendant and affirm the defendant's conviction.

Respectfully submitted on September 4, 2013.

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SUPERIOR COURT OF WASHINGTON
FOR SNOHOMISH COUNTY

THE STATE OF WASHINGTON,

Plaintiff,

v.

DETAMORE JR, ROY EDISON

Defendant.

No. 11-1-01303-5

CERTIFICATE PURSUANT TO
CrR 3.6 OF THE CRIMINAL RULES
FOR SUPPRESSION HEARING

On 12/8/2011, a hearing was held on the defendant's motion to suppress evidence. The court considered the testimony of the witnesses at the hearing and the arguments and memoranda of counsel. Being fully advised, the court now enters the following findings of fact and conclusions of law:

I. FINDINGS OF FACT

On September 17th, 2010 Everett Police Officer Harney responded to a physical disturbance between a male and female at 1031 N. Broadway #45 in Everett, Washington. Officer Harney recognized the residence to belong to the Detamore family, which had a history of felony criminal activity. He received information from dispatch that the address had a history of complaints including a priority assault and an assault with a weapon. Officer Harney did not know when these specific complaints were made, nor whether the complaints were associated with the Detamore family. The complaints were associated with the address only.

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When Officer Harney arrived, he found the defendant standing outside the home and asked the defendant if he had any weapons. The defendant responded that he had a knife in his pocket. Officer Harney then conducted a weapons frisk of the defendant. During the frisk he felt an object in the defendant's pocket that he immediately recognized as a drug pipe used to smoke methamphetamine. He recognized the pipe immediately without manipulation. The item that he felt had a straight, hard stem and a round bulb at the bottom. Officer Harney then placed the defendant under arrest and, search incident to arrest, located a knife in the defendant's pocket as well as assorted drug paraphernalia and a bag containing a substance that later tested positive for methamphetamine.

Officer Harney believed that the defendant was wearing Carhart overalls at the time of the search. He did not believe Roy Detamore was in his twenties or anywhere near his twenties.

II. CONCLUSIONS OF LAW

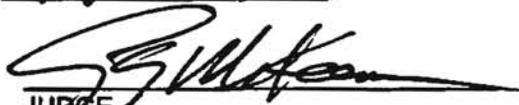
The first issue raised by the defense is whether the seizure of the defendant to frisk him for weapons was lawful. The officer was responding to a call of a dispute between two parties, one of whom was named Roy and in his twenties. The officer had reasonable suspicion to detain the defendant and talk to him about what had happened. Upon learning that the defendant had one knife in his pocket, the officer had valid officer safety reasons to pat the defendant down.

The second issue is whether or not, upon feeling the pipe, the officer had grounds to arrest the defendant. This officer has specific training and experience regarding objects used to smoke illegal drugs. Something shaped like this pipe is unique to smoking methamphetamine. When he felt it, he immediately recognized it for what it was. Because a pipe like this serves no

purpose other than to smoke methamphetamine, the officer had probable cause to believe the defendant possessed it with the intent to smoke methamphetamine. Although the officer could not have proven that beyond a reasonable doubt at the time of the arrest, that was not the level of proof needed. There was enough evidence that established a fair probability that the pipe was there to smoke methamphetamine and the officer had probable cause to arrest the defendant.

The defense motion to suppress and dismiss is denied.

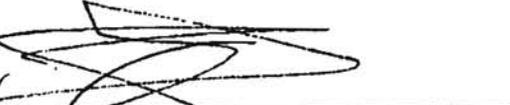
DONE IN OPEN COURT this 6 day of March, ²⁰¹²~~2011~~


JUDGE

Presented by:


CHRISTOPHER K. SEDGEWICK, #37800
Deputy Prosecuting Attorney

Copy received this _____ day of _____, 2011.


MARY E. DINGLEY, #25369
Attorney for Defendant

ROY EDISON DETAMORE JR
Defendant