

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

STATE OF WASHINGTON,)	No. 65876-0-1
)	
Respondent,)	
)	
v.)	
)	
RICHARD DWIGHT COUSINS,)	UNPUBLISHED OPINION
)	
Appellant.)	FILED: February 19, 2013
)	

Verellen, J. — Police may conduct a warrantless search and seizure under the exigent circumstances exception if there is a reasonable risk that evidence may be destroyed. Here, an officer saw a the driver slough a baggie containing suspected cocaine onto the driver's side floor as he stepped out of the vehicle. The baggie was within the reach of the unattended, unmonitored car passenger. The officer had to deal with the unsecured driver standing outside the car at the same time that the passenger had an opportunity to conceal or destroy the baggie. Under all the surrounding facts, the exigent circumstances exception supported the officer's quick reach into the car to secure the evidence. That evidence is sufficient to support the driver's conviction for possession of cocaine. We affirm.

FACTS

Shortly before 1 a.m. on Sunday, October 18, 2009, two Seattle bicycle patrol officers heard extremely loud music coming from a sport utility vehicle stopped at a red light in the busy Belltown bar district. Officers Bailey and Zwaschka rode their bikes over to the vehicle, intending to warn the occupant about the excessive noise and possibly issue a citation for the offense. Officer Zwaschka went to the back of the vehicle to note the license plate and report the stop, while Officer Bailey rode to the driver's window and dismounted. Through the half-open window, Officer Bailey saw the driver, Richard Cousins, a front seat passenger, and an open container of beer in the center console. Officer Bailey told Cousins to turn down the music. As Cousins reached for the radio knob, Officer Bailey saw that Cousin's hand clenched a clear plastic baggie containing a white, chunky substance. Suspecting that the bag held crack cocaine, Officer Bailey ordered Cousins to remove the keys from the ignition.

Cousins did not comply. He looked back at the traffic and turned up the volume on his radio. Officer Bailey repeated the order to take the keys out of the ignition. Cousins turned down the radio, looked at Officer Bailey, and then looked back at the traffic light. Fearing flight, Officer Bailey issued his order a third time. Cousins looked at the traffic again and finally removed the keys from the ignition. Officer Bailey ordered Cousins out of the vehicle. As Cousins began getting out, he threw the baggie of suspected crack cocaine onto the floor near the driver's seat. It was visible from the door.

After stepping out, Cousins complied with Officer Bailey's order to place his

hands on the rear driver's side door. Officer Bailey quickly reached into the car and retrieved the baggie from the driver's floorboard, then handcuffed Cousins. Officer Bailey noticed that the retrieved baggie was open, and he was concerned that cocaine could have fallen out when it was thrown down. Officer Bailey put his head in the car, looked under the driver's seat and found a second baggie of suspected crack cocaine. Throughout the seizure of the two baggies, the passenger remained seated but unsecured in the front seat. The police later identified and released the passenger.

The State charged Cousins with possession of cocaine. Cousins filed a motion to suppress the evidence. The trial court denied the motion, concluding that Officer Bailey had obtained the evidence during a lawful search incident to arrest. In both its oral decision and subsequent written findings, the trial court determined that Officer Bailey had a reasonable concern that the unmonitored, unrestrained passenger could reach and destroy the drugs. A jury found Cousins guilty. Cousins appeals.

DISCUSSION

Cousins challenges the trial court's denial of his motion to suppress the drug evidence. "The trial court's ruling on a motion to suppress evidence must be affirmed if substantial evidence supports the court's findings of fact, and those findings support the court's conclusions of law."¹ We review conclusions of law pertaining to suppression of evidence de novo.²

Warrantless Search

¹ State v. Chang, 147 Wn. App. 490, 495, 195 P.3d 1008 (2008).

² State v. Neeley, 113 Wn. App. 100, 106, 52 P.3d 539 (2002).

A warrantless search of a vehicle is per se unconstitutional unless one of the few, carefully drawn exceptions applies.³ The State bears the heavy burden of establishing that a search falls within one of the narrowly drawn exceptions to the warrant requirement.⁴ Officer Bailey did not obtain a warrant prior to reaching into the vehicle to seize the baggies on the floorboard and under the driver's seat. As a result, admission of the drug evidence depends upon the State's ability to satisfy one of the exceptions allowing a warrantless search.

At the suppression hearing, the State argued that the search of Cousins' vehicle was a valid search incident to arrest under the existing case law. After the trial in this matter, the Washington Supreme Court held that the warrantless search of a vehicle incident to arrest is limited to situations in which an "arrestee would be able to obtain a weapon from the vehicle or reach evidence of the crime of arrest to conceal or destroy it."⁵ The provisions of article I, section 7 of the Washington Constitution do not allow for a search incident to arrest merely for evidence relevant to the crime of arrest.⁶ Because Cousins was out of the vehicle and unable to reach the evidence, the search incident to arrest exception cannot support the warrantless search in this case.

The exigent circumstances exception applies where "obtaining a warrant is not practical because the delay inherent in securing a warrant would compromise officer safety, facilitate escape or permit the destruction of evidence."⁷ This exception may

³ State v. Rankin, 151 Wn.2d 689, 695, 92 P.3d 202 (2004).

⁴ State v. Jones, 146 Wn.2d 328, 335, 45 P.3d 1062 (2002).

⁵ State v. Snapp, 174 Wn.2d 177, 190, 275 P.3d 289 (2012).

⁶ Id. at 191-92.

provide a basis for a warrantless search where search incident to arrest does not apply.⁸

“The underlying theme of the exigent circumstances exception remains ‘[n]ecessity, a societal need to search without a warrant.’”⁹ A court must look at the totality of circumstances in order to determine whether exigent circumstances support a warrantless search.¹⁰

At the time of the search, Cousins’ vehicle was stopped in traffic in the heart of the Belltown bar district as closing time approached. There was heavy foot traffic. The four lanes of the road, two in each direction, were packed with stop and go traffic. The two bicycle officers approached the vehicle while it was stopped at a red light on the inside southbound lane. Officer Zwaschka rode his bike to the back of the vehicle to radio the stop and license plate. Officer Bailey, alone,¹¹ went to the driver’s window where he saw the driver, a passenger, and an open container of beer in the center console. He then saw a baggie of suspected crack cocaine in the driver’s hand. Cousins was slow to obey orders to turn off the engine. When Cousins finally complied, Officer Bailey ordered him out of the vehicle. As he stepped out, Cousins

⁷ State v. Smith, 165 Wn.2d 511, 517, 199 P.3d 386 (2009) (quoting State v. Audley, 77 Wn. App. 897, 907, 894 P.2d 1359 (1995)).

⁸ Snapp, 174 Wn.2d at 197.

⁹ State v. Tibbles, 169 Wn.2d 364, 372-73, 236 P.3d 885 (2010) (quoting State v. Patterson, 112 Wn.2d 731, 734, 774 P.2d 10 (1989)).

¹⁰ Smith, 165 Wn.2d at 518.

¹¹ At the suppression hearing, Officer Bailey testified that a third bicycle officer, Officer McCauley, “was trailing behind” them. Report of Proceedings (RP) (June 16, 2010) at 18. Officer Bailey was unsure as to when Officer McCauley arrived to assist with the stop. According to Officer Bailey, “Officer McCauley came up at some point not too long after we made the initial stop. I don’t recall exactly when.” RP (June 16, 2010) at 38.

sloughed the baggie onto the driver's side floorboard.

At this point, Officer Bailey, still alone at the front of the vehicle, had to simultaneously manage the driver, who was not yet handcuffed, as well as the passenger. The passenger remained in the car within reach of the baggie. Given his divided attention, Officer Bailey was reasonably concerned that the passenger could take, hide or destroy the baggie. Furthermore, Officer Bailey's experience with drug arrests increased his anxiety about the visible drug evidence lying on the floorboard within reach of the unsecured passenger:

I saw the crack cocaine from, you know, just from being outside the window, in his hand, so I assumed that the passenger knew it was in the vehicle. I was worried that the passenger was either a partner with Mr. Cousins when he came to possessing some of the crack cocaine, or somebody's going to buy the crack cocaine from him. Either way, every half second I'm away from that evidence, it can be destroyed. In my experience, drugs, specifically crack cocaine, is packed like that because it's very easy to get rid of. People swallow it, people throw it [E]ven if the passenger had picked it up and put it in his pocket, I don't know if I could have done anything about that if I hadn't seen it.^[12]

With this concern in mind, within five seconds after Cousins stepped out and put his hands on the top of the vehicle, Officer Bailey quickly retrieved the first baggie from the driver's side floorboard.

Given the totality of these circumstances,—a very crowded scene, a quickly evolving situation, the only nearby officer at the rear of the vehicle, an unsecured driver outside the vehicle, and an unsecured, unmonitored passenger within reaching distance of the suspected crack cocaine—exigent circumstances supported the warrantless

¹² RP (June 16, 2010) at 22-23.

seizure of the first baggie of suspected drugs. The first baggie is squarely within the exigent circumstances exception.

The warrantless search and seizure of the second baggie is problematic. After obtaining the first baggie, Officer Bailey handcuffed Cousins and then returned to the vehicle to search under the driver's seat, where he found the second baggie. The trial court found that "[t]he passenger was still in the car, unrestrained by police, and was within arms' length of the driver's seat. Officer Bailey recovered the baggie to prevent its destruction by the passenger."¹³ Officer Bailey testified that it was much farther under the driver's seat and that he had to put his head down to look under the seat to find it. When asked whether the passenger could access the second baggie, Officer Bailey replied, "It would have been more difficult, but again, it was just under the driver's side seat, so if he knew where it was, he could have reached over, under and grabbed it."¹⁴ He did not remember if the passenger was restrained by his seatbelt.

The risk that the passenger might retrieve and destroy the second baggie is tenuous. Officer Bailey had to put his head in the car and reach far under the driver's seat while the passenger may or may not have been restrained by a seatbelt on the other side of the vehicle. Significantly, Officer Bailey had handcuffed Cousins before he began the second search. While concerns about Officer Bailey's ability to control Cousins, keep his eye on the passenger and protect loose evidence provided exigent circumstances for the first search, the second search lacks the same risk that the

¹³ Clerk's Papers at 63.

¹⁴ RP (June 16, 2010) at 25.

passenger could not have been monitored. The State did not establish that the exigent circumstances exception extends to the second search.

However, even assuming the second baggie should have been excluded, any error in admitting it is harmless beyond a reasonable doubt as the cocaine in the properly seized first baggie was sufficient to support Cousin's conviction for possession of cocaine.^{15 16}

Delayed Entry of Findings of Fact and Conclusions of Law

Cousins challenges the delayed entry of the findings of fact from the CrR 3.6 hearing. At the conclusion of the hearing on June 17, 2010, the trial court issued oral findings of fact. The trial concluded with the jury verdict on June 21, 2010 and sentencing occurred July 26, 2010. Cousins filed his notice of appeal on July 26, 2010. Written findings of fact and conclusions of law were entered on April 18, 2011. Cousins argued in his opening brief that the absence of written findings of fact and conclusions of law required dismissal or remand.

The written findings of fact and conclusions of law were untimely. “The primary purpose in requiring findings and conclusions is to enable an appellate court to review

¹⁵ “A violation of the Fourth Amendment and Const. art. 1, § 7 guaranty against illegal searches and seizures may be determined harmless, on appeal, where the court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of error.” State v. Gonzales, 46 Wn. App. 388, 402, 731 P.2d 1101 (1986).

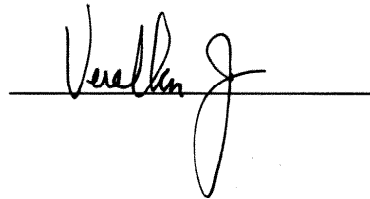
¹⁶ According to evidence presented at trial, the total weight of the two “chunks” of crack cocaine was 6.7 grams. See RP (June 21, 2010) at 29. The record does not clarify the weights of the individual baggies. As confirmed at oral argument, the cocaine in the first baggie alone supports the conviction for possession.

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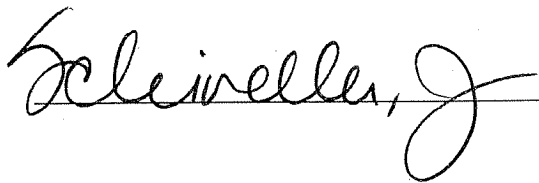
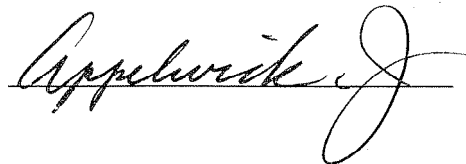
the questions raised on appeal. The practice of entering findings after the appellant has

framed the issues in the opening brief has the appearance of unfairness and burdens the court with motions to supplement the record.”¹⁷ But the trial court mentioned its concerns about the unsecured passenger in its oral ruling.¹⁸ Because the findings of fact and conclusions of law are consistent with the trial court's ruling and there is no suggestion of tailoring, their tardiness did not prejudice Cousins.¹⁹

Affirmed.

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WE CONCUR:

A handwritten signature in cursive script, appearing to read "Schiveller, J.", written over a horizontal line.A handwritten signature in cursive script, appearing to read "Appelwick, J.", written over a horizontal line.

¹⁷ State v. McGary, 37 Wn. App. 856, 861, 683 P.2d 1125 (1984).

¹⁸ “There are clearly concerns as to why there’s a need to secure the evidence right away because you have a passenger in the car who isn’t being monitored or restrained in any fashion . . . so there’s a need to act quickly to prevent destruction of evidence.” RP (June 17, 2010) at 44.

¹⁹ Late entry of the findings and conclusions will not result in reversal of a conviction where the delay causes no prejudice to the defendant. State v. Byrd, 83 Wn. App. 509, 512, 922 P. 2d 168 (1996). Even where, as here, the case has proceeded to the appeal phase before entry of written findings and conclusions, “a conviction will not be reversed for tardy entry of findings unless the defendant can establish either that she was prejudiced by the delay or that the findings and conclusions were tailored to meet the issues presented in her appellate brief.” State v. Tagas, 121 Wn. App. 872, 875, 90 P. 3d 1088 (2004).