

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY J. PALERMO,

Appellant.

No. 39647-5-II

UNPUBLISHED OPINION

Hunt, J. — Jeffrey J. Palermo appeals his stipulated facts bench trial convictions for unlawful possession of a controlled substance (methamphetamine) and unlawful use of drug paraphernalia. He argues that the trial court erred when it denied his two motions to suppress the evidence.¹ We agree with Palermo (1) that the trial court erred when it determined that the officer’s initial contact with Palermo was a social contact and the officer did not seize Palermo until there was probable cause to arrest him; and (2) that the seizure was not based on a reasonable, articulable suspicion of criminal activity. Accordingly, we reverse the trial court’s

¹ Palermo also argues that the arrest was not supported by probable cause and that the search was unlawful under *Arizona v. Gant*, 556 U.S. ___, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009). Because we reverse based on unlawfulness of the initial contact, we do not address these other arguments.

denial of Palermo's motions to suppress, reverse Palermo's convictions, and remand to the trial court to dismiss these charges with prejudice.

FACTS

I. Police Contact and Arrest

At 8:48 pm on August 13, 2008, it was dusk and the local street lights were on in a known high crime area² where Centralia Police Officer Michael Lowrey was on patrol. Lowrey was familiar with the location and usually "cruise[d]" this block about "50 times a night" when on patrol. Verbatim Report of Proceedings (Mar. 18, 2009, Mar. 26, 2009, July 10, 2009, Aug. 18, 2009) (VRP) at 18. On Centralia's 100 block of West Chestnut, he noticed a legally parked car with three people inside sitting close together in the dark. Other cars were parked in front of this car. Although it was not unusual to see cars parked in this area, Lowrey thought it was "unusual" to see three people "huddled inside a car that's not running with the lights off and everything else." VRP at 18.

Lowrey did not suspect the parked car's occupants of criminal activity, but he thought the situation was "unusual" enough to justify talking to them. VRP at 18. In uniform, Lowrey parked his unmarked patrol car about ten feet behind the occupied car; informed the dispatcher where he was, and gave the dispatcher the car's license plate number. He then approached the driver's window; contacted the car's occupants; and, because it was getting dark, used a flashlight to see into the car to watch the occupants' hands to ensure his safety.

² The area is known for drug trafficking, arsons, robberies, gang activity, thefts, and vehicle prowls incidents.

Jeffrey James Palermo was in the driver's seat, Cory Aldrich was in the front passenger seat, and an unidentified woman was in the center of the back seat. The woman was "kind of leaning forward in conversation or whatever was going on." VRP at 7. Lowrey noticed that Aldrich was wearing a lot of red, which Lowrey believed was "significant for some of the gang issues that happen[ed]" in the immediate area. VRP at 7.

In a conversational tone, Lowrey "identified himself," Clerk's Papers (CP) at 55, asked Palermo what he and the others in the car were doing, "told them basically about the area," and asked if they were "familiar" with the fact it was a "high crime area with the drugs at the [nearby apartment building] and gang stuff that's been going on lately." VRP at 20. Lowrey then told Palermo that there had been numerous vehicle prowl incidents in the area and stated that he (Lowrey) was "just making sure this is your vehicle and you guys aren't going through somebody else's vehicle," VRP at 20, and asked Palermo who owned the car. Palermo told Lowrey that his (Palermo's) mother owned the car and gave Lowrey a name.³ Lowrey did not tell Palermo or the passengers that they must stay or that they could not leave.

Lowrey then stepped away from the parked car and asked the dispatcher for the registration information. The owner's name was not the name Palermo had given Lowrey. When Lowrey told Palermo about this discrepancy, Palermo nervously responded that his mother had recently purchased the car from his aunt, whose full name he could not remember. While Lowrey was speaking with Palermo, Aldrich attempted to reach into or towards a backpack at his feet. Lowrey twice asked Aldrich not to reach inside the backpack for officer safety reasons; Aldrich

³ The name is not in the record on appeal.

complied after the second request.

About a minute after Lowrey initiated contact with Palermo, Centralia Police Officer Douglas Lowrey⁴ arrived in his marked patrol car which he parked near Lowrey's car. After finishing his conversation with Palermo, Lowrey walked towards Officer Douglas Lowrey and told him about being unable to determine who owned the car. After asking Officer Douglas Lowrey to make sure that Aldrich kept his hands out of the backpack, Lowrey returned to his vehicle to verify the registration information.

Officer Douglas Lowrey approached the occupied car and asked Palermo what he and his friends were doing in the area. They responded that they were not doing anything. Recognizing Aldrich, the officer asked Aldrich to identify himself. Overhearing Aldrich identify himself, Lowrey asked the dispatcher to check for warrants on Aldrich. Before Lowrey finished researching the car registration issue, the dispatcher responded that there were outstanding arrest warrants for Aldrich. Hearing the dispatcher's response over his own radio, Officer Douglas Lowrey asked Aldrich to get out of the car, told him about the arrest warrants, and arrested him.

As Aldrich was exiting the car, Officer Douglas Lowrey saw what he believed was a marijuana pipe "partially tucked under" Palermo's right leg, CP at 56, and told Lowrey about the pipe. Lowrey then asked Palermo to exit the car, reached into the car, picked up the pipe, determined that it contained burned marijuana, and handcuffed and arrested Palermo for marijuana possession. Before the officers handcuffed or questioned him, Palermo told Lowrey that the pipe

⁴ To avoid confusion, we refer to Officer Michael Lowrey by his last name and to Officer Douglas Lowrey by his full name.

was his and that he had some marijuana in his pocket. Searching Palermo incident to his arrest, Lowrey found marijuana and another glass pipe containing methamphetamine residue.

II. Procedure

The State charged Palermo with possession of a controlled substance (methamphetamine) and unlawful use of drug paraphernalia. Palermo moved to suppress the evidence resulting from Lowrey's initial contact with the car's occupants.

Palermo argued that Lowrey had seized him by blocking the parked car with his patrol car and repeatedly instructing Aldrich to keep his hands in sight. The State countered that (1) Lowrey's initial contact with Palermo was a lawful social contact, and (2) Palermo was not seized until after the officers had probable cause to arrest him. At the suppression hearing, the officers testified as described above and, additionally, that before Officer Douglas Lowrey saw the marijuana pipe, they never told Palermo that he was free or not free to leave. Lowrey also testified that he used a "conversational voice" when he spoke to Palermo throughout this contact. VRP at 36. There was no testimony indicating that the officers ever spotlighted Palermo's car, used their sirens, or drew their guns during this contact.

Palermo's testimony was generally consistent with the officers' testimonies. But he also asserted that (1) he felt "blocked in" because Lowrey had parked his patrol car just three to four feet from his (Palermo's) car, VRP at 60; (2) he believed that if he had attempted to leave, Lowrey would have stopped him; and (3) he believed that although Lowrey never told him that he could not leave, Lowrey may have said to "hold it a minute" when he (Lowrey) went to check the registration after he (Palermo) had given the officer the aunt's first name, VRP at 69; an assertion

that the trial court did not find credible.

Denying Palermo's motion to suppress, the trial court entered written findings of fact and conclusions of law, including that:

- 2.1 The interaction between Officers M[ichael] and D[ouglas] Lowrey and the defendant and the other occupants of the vehicle was a social contact.
- 2.2 A reasonable person in the position of the defendant would feel that his or her freedom of movement had not been curtailed.
- 2.3 The marijuana pipe was in open view.
- 2.4 The arrest of the defendant was performed with lawful authority.

CP at 56-57.

On April 21, the United States Supreme Court issued *Arizona v. Gant*, 556 U.S. ____, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), which restricted application of the search incident to arrest doctrine during motor vehicle stops. A month later, Palermo filed a second suppression motion, challenging the search at issue here under *Gant*. Following a second suppression hearing, at which the parties presented no additional evidence, the trial court concluded that (1) *Gant* did not apply because Palermo was still in the car when the officers discovered the marijuana pipe, and (2) the officers had probable cause to arrest Palermo at that point.

Following a stipulated facts bench trial, the trial court found Palermo guilty as charged. Palermo appeals.

ANALYSIS

Palermo argues that the trial court erred when it denied his suppression motions. We agree.

I. Standard of Review

We review a trial court's denial of a CrR 3.6 suppression motion "to determine whether substantial evidence supports the trial court's challenged findings of fact and, if so, whether the findings support the trial court's conclusions of law." *State v. Cole*, 122 Wn. App. 319, 322-23, 93 P.3d 209 (2004). We treat unchallenged findings of fact as verities on appeal. *State v. Balch*, 114 Wn. App. 55, 60, 55 P.3d 1199 (2002). We review de novo conclusions of law. *Cole*, 122 Wn. App. at 323. Whether an officer has seized a person is a mixed question of law and fact. *State v. Harrington*, 167 Wn.2d 656, 662, 222 P.3d 92 (2009).

II. Not a Social Contact

Palermo first argues that the trial court erred in concluding (1) that Lowrey's initial contact with him and the other occupants of the parked car was a permissible "social contact," and (2) that the officers did not seize him until after they had probable cause to arrest him for marijuana possession once Officer D. Lowrey saw the marijuana pipe under Palermo's leg. Palermo asserts that Lowrey initially seized him when Lowrey parked his patrol car behind and blocked Palermo's legally parked car or when Lowrey directed Palermo's passenger Aldrich not to reach into the backpack. Although we conclude that the seizure occurred at a different time, we agree with Palermo that the trial court erred in concluding that Lowrey's initial contact with Palermo was a "social contact."

A person is "seized" when, under the circumstances surrounding the incident, "a reasonable person would have believed that he was not free to leave" or to "decline the officers' requests or otherwise terminate the encounter." *State v. Armenta*, 134 Wn.2d 1, 10, 948 P.2d

1280 (1997) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980); *Florida v. Bostick*, 501 U.S. 429, 439, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991)).⁵ But “[n]ot every encounter between an officer and an individual amounts to a seizure.” *Armenta*, 134 Wn.2d at 10 (quoting *State v. Aranguren*, 42 Wn. App. 452, 455, 711 P.2d 1096 (1985)). Courts consider an officer approaching an individual in a car that is parked in a public place, requesting identification, and making general inquiries about what a person is doing, to be a “social contact” that, without more, is not usually a seizure as long as a reasonable person in the same circumstances would have felt free to leave or otherwise to terminate the contact. *Harrington*, 167 Wn.2d at 665; *State v. O’Neill*, 148 Wn.2d 564, 579, 62 P.3d 489 (2003); *Armenta*, 134 Wn.2d at 11.⁶ An officer’s subjective intent is irrelevant as to whether a seizure has occurred unless the officer communicates his subjective intent to the defendant. *O’Neill*, 148 Wn.2d at 575.

Our Supreme Court has articulated a “nonexclusive list” of police actions that may indicate when a contact is a seizure, including:

“[(1)] the threatening presence of several officers, [(2)] the display of weapons by an officer, [(3)] some physical touching of the person of the citizen, or [(4)] the use of language or tone of voice indicating that compliance with the officer’s request might be compelled.”

Harrington, 167 Wn.2d at 664 (quoting *State v. Young*, 135 Wn.2d 498, 512, 957 P.2d 681

⁵ See also *State v. O’Neill*, 148 Wn.2d 564, 575-76, 62 P.3d 489 (2003).

⁶ See also *State v. Soto-Garcia*, 68 Wn. App. 20, 24, 841 P.2d 1271 (1992), reversed on other grounds by *State v. Thorn*, 129 Wn.2d 347 (1996), overruled on other grounds by *O’Neill*, 148 Wn.2d at 571.

(1998)). Lowrey was the only officer present at the initial contact, during which no one displayed any weapons and Lowrey did not touch Palermo. Therefore, we must examine whether Lowrey's "use of language or tone of voice indicat[ed] that compliance with the officer's request might be compelled." *Harrington*, 167 Wn.2d at 664 (quoting *Young*, 135 Wn.2d at 512).

According to Lowrey, he parked his unmarked patrol car behind the legally parked car, approached the vehicle, told Palermo that he and the car's passengers were in a high crime area where there were often vehicle prowls incidents, told Palermo that he (Lowrey) was "just making sure this is your vehicle and you guys aren't going through somebody else's vehicle," VRP at 20, and asked Palermo who owned the car. Lowrey did more than contact Palermo, ask Palermo his name, request identification, ask Palermo what he and his friends were doing, or engage in general conversation. In advising Palermo that he (Lowrey) was trying to verify that Palermo and his friends were not in another person's vehicle and asking Palermo who owned the car, Lowrey communicated his intent to investigate Palermo and his passengers—clearly something that would require Palermo's continued cooperation.

Once an officer advises a person that the officer is investigating that person to ensure that the person is not engaging in criminal activity and the officer makes additional requests of that person designed to further that investigation, a reasonable person would not believe he was free to terminate the encounter and to walk or to drive away. *See State v. Soto-Garcia*, 68 Wn. App. 20, 25, 841 P.2d 1271 (1992) (reasonable person would not feel free to decline officer's requests after officer asked whether the person had any drugs and then asked for permission to frisk him), *reversed on other grounds by State v. Thorn*, 129 Wn.2d 347 (1996), *overruled on other grounds*

by *O'Neill*, 148 Wn.2d at 571. Such was the case with Palermo, who, testified that Lowrey had parked his patrol car just three to four feet from his (Palermo's) car, and he (Lowrey) believed that if he had attempted to leave, Lowrey would have stopped him.

Accordingly, we hold that the trial court erred in concluding that Lowrey's initial interaction with Palermo was a "social contact." We further hold that Lowrey seized Palermo when he advised Palermo that he wanted to ensure that Palermo and the passengers were lawfully in the parked car.

III. No Reasonable Articulate Suspicion

Having determined when the seizure occurred, we must next determine whether this seizure was lawful. *O'Neill*, 148 Wn.2d at 575-76 (whether a seizure occurred and whether that seizure was valid are separate inquiries). The seizure must be justified at its inception. *State v. Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008).

If an officer's conduct rises to the level of a seizure, that seizure is valid only if the officer has a well-founded suspicion based on specific, objective, articulable facts that suggest the individual is engaged in or about to engage in criminal activity. *State v. Doughty*, ___ Wn.2d ___, 239 P.3d 573, 575 (2010); *O'Neill*, 148 Wn.2d at 576. The level of articulable suspicion required to justify the seizure is "a substantial possibility that criminal conduct has occurred or is about to occur." *State v. Mendez*, 137 Wn.2d 208, 223, 970 P.2d 722 (1999) (quoting *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986)), *overruled on other grounds by Brendlin v. California*, 551 U.S. 249 (2007). The conduct the officer observes must be "more consistent with criminal than innocent conduct." See *State v. Pressley*, 64 Wn. App. 591, 596, 825 P.2d 749 (1992)

(quoting *State v. Mercer*, 45 Wn. App. 769, 774, 727 P.2d 676 (1986)).

Here, Lowrey testified that he contacted Palermo in a legally parked car because (1) Palermo was parked in a high crime area at dusk, and (2) he (Lowrey) thought that it was “unusual” to see three people “huddled inside a car that [was] not running with the lights off and everything else.” VRP at 18. But although whether this was a high crime area is relevant to the reasonableness of any suspicion of criminal activity, a person’s mere presence in a high crime area is not a sufficient basis for a seizure. *Doughty*, ___ Wn.2d at ___, 239 P.3d at 575 (merely observing a person enter and leave a known drug house is not sufficient to justify a search) (citing *State v. Ellwood*, 52 Wn. App. 70, 74, 757 P.2d 547 (1988)). And although Lowrey believed that the situation was “unusual” and was concerned that the people in the parked car did not belong there, he did not testify about any specific facts supporting this concern that existed before he contacted Palermo. On the contrary, Lowrey testified that he did *not* have “a reasonable suspicion that [the people in the parked car] were about to commit a crime” when he first contacted Palermo. VRP at 17. And Lowrey never asserted that there was a current report of criminal activity in the immediate area when he decided to talk to Palermo.

Furthermore, Lowrey did not describe any objective behavior that occurred before his initial contact, such as persons in the car acting nervous, furtive movements, or other actions suggesting that the people in the parked car should not have been in the car.⁷ Nor did Lowrey testify that he recognized anyone in the car as having a criminal history. Instead, Lowrey merely

⁷ Rather, it was not until after Lowrey started questioning Palermo about the car’s ownership that he noticed Aldrich’s furtive movements.

described three people sitting near each other in a legally parked car in a high crime area at 8:48 pm on a summer evening as it was getting dark. None of these facts suggest any criminal behavior. Because Lowrey did not have a reasonable, articulable suspicion that Palermo was engaged in or about to be engaged in any criminal activity at the time of the seizure, we hold that the seizure was unlawful and that the trial court erred in denying Palermo's first suppression motion.

Because the State's case against Palermo rested exclusively on evidence obtained following this unlawful seizure, we reverse Palermo's convictions and remand to the trial court to dismiss the charges with prejudice.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Armstrong, PJ.

Van Deren, J.