

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL JOSEPH MOYLE,

Appellant.

No. 42638-2-II

UNPUBLISHED OPINION

Penoyar, J. — Michael Moyle appeals his convictions for possession of a controlled substance other than marijuana (methamphetamine)¹ and possession of 40 grams or less of marijuana.² Moyle argues that his convictions should be reversed because the evidence was obtained pursuant to unlawful searches and should have been suppressed. Because the police did not have reasonable suspicion to frisk Moyle and because they arrested him prior to obtaining probable cause, we agree. We reverse the convictions and remand for the trial court to dismiss the charges.

FACTS

On July 19, 2010, at 11 p.m., Officer Justin Leroux was patrolling the west side of Port Angeles. That area had experienced a high number of vehicle prowls, so he was on the lookout for activity in and around vehicles. Leroux approached two individuals in a vehicle. While he was talking to the individuals, Officer David Arand and Corporal Jesse Winfield arrived to provide backup.

¹ In violation of former RCW 69.50.4013 (2003).

² In violation of RCW 69.50.4014.

On his way to the vehicle, Winfield passed a red Honda Accord parked on the street and noticed Moyle, who appeared to be sleeping or passed out, in the passenger seat. Winfield shined his flashlight through the vehicle's window and saw a clear, glass methamphetamine pipe on the console between the two front seats. He observed brown or black burn residue in the pipe's bowl and white powdery residue on the pipe's neck.

Winfield alerted Arand that he could see a meth pipe through the window. Arand joined Winfield at the vehicle, where he observed a "meth pipe sitting on top of the center console." Report of Proceedings (RP) (Dec. 1, 2010) at 30. Arand is trained to recognize drug residue, and he observed what appeared to be white residue on the pipe's stem.

Winfield and Arand opened the door and asked Moyle to step out of the vehicle. When Moyle stepped out of the vehicle, Arand placed him in handcuffs and informed him that he was being detained. Arand walked Moyle to "the area near the trunk of [his] patrol car" and performed a frisk of his person. RP (Dec. 1, 2010) at 34.

Arand testified that he performed the frisk for officer safety purposes. He located a clip knife and removed a "hard object in his left front pocket" that turned out to be a "marijuana pipe." RP (Dec. 1, 2010) at 34. During the frisk, Arand also felt a "hard cylindrical object" in Moyle's sweatshirt pocket. RP (Dec. 1, 2010) at 34. The object, a "prescription-type bottle," fell out of Moyle's pocket and onto the ground. RP (Dec. 1, 2010) at 35. Arand picked up the translucent bottle and observed, inside, what appeared to be marijuana. A closer inspection revealed that the bottle contained both marijuana and methamphetamine.

At that point, Arand advised Moyle of his *Miranda*³ rights. He then asked Moyle about

³*Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

the pipe that lay on the center console. Moyle admitted that he owned the pipe and that he had recently used it to smoke methamphetamine. He also admitted that there was a marijuana pipe in the vehicle that belonged to him. After these statements, Arand searched Moyle a second time. He discovered a baggie of methamphetamine in Moyle's pocket.

Arand obtained a warrant to search the vehicle, which belonged to Moyle's friend, Fanny Burdette. During his search of the vehicle, he found marijuana in a small metal canister attached to the keys that were in the vehicle's ignition. He also located a pipe commonly used to smoke marijuana.

The State charged Moyle with possession of methamphetamine and possession of 40 grams or less of marijuana.

Moyle filed a motion to suppress the evidence obtained during the searches. The trial court denied Moyle's motion to suppress, concluding that the officers had reasonable suspicion to detain Moyle and that the safety frisk was justified.

After a bench trial on stipulated facts, the trial court found Moyle guilty of possession of a controlled substance other than marijuana (methamphetamine) and possession of 40 grams or less of marijuana. The trial court ordered Moyle to pay \$1,000 for drug court program costs. The trial court also assessed Moyle \$1,000 for the "Drug enforcement fund of Olympic Peninsula Narcotics Enforcement Team (OPNET)." Clerk's Papers (CP) at 20. Moyle appeals.

ANALYSIS

I. Warrantless Searches

Moyle argues that both searches of his person were illegal and that the evidence obtained from both should be suppressed. Because Arand lacked reasonable suspicion that Moyle was

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armed and dangerous and because he arrested Moyle before he had probable cause, we agree.

The trial court concluded that the officers had reasonable suspicion to detain Moyle and that the resulting search was justified for officer safety. We review conclusions of law from a suppression hearing *de novo*. *State v. Gaines*, 154 Wn.2d 711, 716, 116 P.3d 993 (2005). Evidence seized during an illegal search must be suppressed under the exclusionary rule. *Gaines*, 154 Wn.2d at 716-17.

Moyle argues that Arand's initial frisk of his person was unlawful because the officers did not have reasonable suspicion that he was armed and dangerous. The State concedes that the frisk was unlawful. We agree. The evidence obtained as a result of the frisk—the pill bottle containing marijuana and methamphetamine and the marijuana pipe—must be suppressed.

Moyle also contends the second search, which the State categorizes as a search incident to arrest, took place before Arand had probable cause to arrest him. He argues, therefore, that the evidence obtained from the second search—a baggie of methamphetamine—must be suppressed. The State responds that Moyle's post-*Miranda* admission that he used the pipe to smoke methamphetamine occurred before he was placed under arrest and provided probable cause for his subsequent arrest and search.

Searches incident to lawful arrest are a recognized exception to the warrant requirement. *State v. Johnson*, 128 Wn.2d 431, 447, 909 P.2d 293 (1996). A lawful custodial arrest supported by probable cause is a prerequisite to a search incident to arrest. *State v. Moore*, 161 Wn.2d 880, 885, 169 P.3d 469 (2007). Probable cause for arrest exists where the officer knows of circumstances that would lead a reasonably cautious person to believe that the suspect has committed a crime. *State v. Terronova*, 105 Wn.2d 632, 643, 716 P.2d 295 (1986).

Here, Arand had probable cause to arrest Moyle for drug possession only after he confessed to owning the pipe and smoking methamphetamine. The State does not argue that probable cause existed before this point, as Moyle's mere proximity to the pipe is not sufficient and the evidence obtained from the illegal frisk may not be used to prove probable cause. Thus, the question is whether Moyle's confession came before or after his arrest. If it came after his arrest, Arand did not have sufficient lawfully obtained evidence to support probable cause. This in turn would make Moyle's arrest and incidental search unlawful, and the evidence seized must be suppressed. Put another way, we must determine if Moyle was unlawfully under custodial arrest before he made the confession.

Determination of custodial arrest "is not dependent on the subjective intent of the officer making the detention[;] [r]ather, it hinges upon the manifestation of the arresting officer's intent." *State v. Salinas*, 169 Wn. App. 210, 218, 279 P.3d 917 (2012) (citing *State v. Radka*, 120 Wn. App. 43, 49, 83 P.3d 1038 (2004)). An arrest takes place when "a reasonable detainee under [the] circumstances would consider himself or herself under a custodial arrest." *State v. Reichenbach*, 153 Wn.2d 126, 135, 101 P.3d 80 (2004)

Manifestations of intent indicating custodial arrest include handcuffing the suspect and placing him in the back of the patrol car. *Salinas*, 169 Wn. App. at 218. Courts also consider whether the officer informed the defendant he was under arrest. *State v. Patton*, 167 Wn.2d 379, 387, 219 P.3d 651 (2009).

In *Radka*, the court concluded that the defendant was not under custodial arrest. Although the officer told the defendant he was arrested and then placed him in a patrol car, the defendant was not handcuffed or frisked and he was allowed to use his cell phone, facts which

would lead a reasonable person to believe that the arrest was not custodial. *Radka*, 120 Wn. App. at 50. By contrast, in *State v. Glenn*, the court concluded that the defendant was under arrest where the police ordered him out of his car, handcuffed him, read him *Miranda* rights, and placed him in the patrol car. 140 Wn. App. 627, 631, 639, 166 P.3d 1235 (2007).

Here, the facts are more similar to *Glenn*. The police ordered Moyle out of the vehicle, informed him he was being detained, handcuffed him, moved him near the patrol car, searched him, discovered illegal drugs on his person, and then read him *Miranda* rights. At that point, a reasonable person would consider himself caught “red handed” and under a custodial arrest. Although Arand told Moyle that he was being “detained” and not that he was under arrest, this declaration by an officer is only one factor we consider in determining whether a custodial arrest occurred. Further, Arand did not tell Moyle that he was free to leave or that he would be released. *See State v. Craig*, 115 Wn. App. 191, 196, 61 P.3d 340 (2002) (contrasting a situation where there was a custodial arrest with a situation where the suspect was told she was free to leave). Because Moyle was arrested before Arand had probable cause, the subsequent search was not pursuant to a lawful custodial arrest and the methamphetamine obtained from the search must be suppressed.

Moreover, the State’s argument that the confession was an independent source justifying Moyle’s arrest is inapposite where the arrest took place before the confession. As discussed above, Moyle was subjected to custodial arrest before he confessed to owning the pipe and smoking marijuana.

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The evidence from both searches must be suppressed and Moyle's convictions must be reversed. In light of this conclusion, it is unnecessary for us to consider Moyle's other arguments.

We reverse Moyle's convictions and remand for the trial court to dismiss the charges.

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 in accordance with RCW 2.06.040, it is so ordered.

Penoyar, J.

We concur:

Quinn-Brintnall, J.

Van Deren, J.