IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. DONALD RANDALL JORDAN, aka DON RANDALL JORDAN, Appellant.	)	No. 62076-2-I DIVISION ONE UNPUBLISHED OPINION FILED: June 28, 2010

Appelwick, J. — Jordan appeals his conviction for possession of methamphetamine, arguing the officer who seized him lacked a specific articulable suspicion that criminal activity was afoot. He also appeals his conviction for manufacture of methamphetamine, the evidence of which the officer obtained in a search of a vehicle incident to his arrest for possession of methamphetamine. The officer conducted a lawful Terry stop, Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), and had probable cause to search the vehicle for evidence of the crime of arrest. We affirm.

FACTS

On December 9, 2004, at approximately 12:30 a.m., Deputy Gabriel Morris was conducting a "problem solving project" in the parking lot of the Barrel

Tavern in Burien. The King County Sheriff's Office had received numerous citizen complaints about narcotic activities at the Barrel Tavern. In a community policing effort, Deputy Morris had begun to focus attention on the Barrel Tavern.

Deputy Morris was standing in a dark corner of the parking lot when he saw Donald Jordan leave the bar and walk over to a Ford Explorer. Lisa Flygare, Jordan's girlfriend, owned the Explorer and had driven it to meet him at the Barrel Tavern. Jordan opened the driver's door, sat down, and shut the door. Jordan did not start the car, and none of the Explorer's lights turned on. After approximately two minutes, Deputy Morris decided to see what was happening in the vehicle.

He approached the vehicle from the rear passenger's side and stopped when he was about an arm's length away from it. He had a clear view inside. He testified he observed Jordan in the driver's seat and Flygare in the passenger's seat. Both were turned inwards toward the center console of the vehicle. They had their "hands together and appeared to be shielding something from view while they were passing it back and forth." He did not observe the occupants using a lighter, nor did he smell anything unusual. The deputy did not see what they actually had in their hands. Deputy Morris concluded that, based on the circumstances, it appeared they were possibly conducting a narcotics transaction.

After a few moments of observing what he characterized as furtive movements, Deputy Morris illuminated his flashlight to see what Jordan and Flygare were doing with their hands. Both of the occupants jerked their hands

away from the center console. Jordan put his hands between his legs. Deputy Morris testified that one of Jordan's hands was cupped, as if he was trying to conceal something from view.

Deputy Morris asked Jordan and Flygare to show him their hands. Jordan did not initially comply. Deputy Morris repeated his command. After more hesitation, Jordan showed the deputy his hands. The deputy then decided to order both Jordan and Flygare out of the Explorer. As the deputy walked around the rear of the vehicle to approach Jordan on the driver's side, he noticed Jordan had placed his hands in his coat pockets. Deputy Morris observed a bulge in one of the pockets and told Jordan to turn around. As he conducted a pat down search, the deputy felt what he believed to be a large key ring with a pocketknife attached to it. As the deputy removed the object from Jordan's pocket, a plastic baggie containing an off-white substance fell out of the same pocket.

The deputy asked Jordan what the bag contained, and Jordan replied that it was methamphetamine (meth). Deputy Morris then arrested Jordan, handcuffed him, and advised him of his rights. At this point, Deputy Mark Hodge arrived on the scene as backup and contacted Flygare.[1] Deputy Morris informed Jordan that he was going to search the car. Deputy Morris testified that Jordan replied, "'Everything in there is mine.'" Deputy Morris placed Jordan in his patrol car.

Both deputies then searched the passenger area of the Explorer. They

[1] Deputy Hodge put Flygare in the back of his patrol car.

found syringes and a digital pocket scale in the center console. Deputy Hodge recovered a meth pipe from the rear seat. The deputies then looked in the rear cargo area and saw some plastic bins. When Deputy Hodge opened the lid of one of the bins, he found items consistent with the manufacture of methamphetamine. Due to the hazardous nature of the materials involved, they called the narcotics detectives to search further. Deputy Morris also found a second baggie containing an off-white substance near the driver's side of the vehicle.

At the CrR 3.6 hearing, Jordan moved to suppress the evidence obtained as a result of the seizure and search incident to arrest.[2] The court denied the suppression motion, finding that the seizure was a lawful Terry stop. The court also concluded that Jordan lacked standing to challenge the vehicle search, as he had no legitimate expectation of privacy in the contents of the vehicle. The court also concluded that Jordan could not assert automatic standing under State v. Jones, 146 Wn.2d 328, 45 P.3d 1062 (2002).

At trial, Detective Mark Christianson, who had responded to the request for a narcotics detective, testified that the search of the cargo area revealed a bag containing men's clothing, as well as several other items containing Jordan's name. The search also revealed many, but not all, of the components necessary to manufacture methamphetamine. Another detective found several documents and letters addressed to Jordan, as well as a jacket containing a

[2] The possession charge stemmed only from the methamphetamine found on Jordan's person or outside the car. The State charged Flygare with possession of the methamphetamine found in the cargo area of the Explorer.

letter addressed to Jordan and a receipt from a hardware store listing items consistent with methamphetamine manufacturing.

There was conflicting testimony at trial about the ownership of the contents of the Explorer. Jordan testified that when he told officers that "'[e]verything in there is mine,'" he was referring to the methamphetamine that he thought officers would find on his person, and he had no idea that there was anything in the back other than his clothing and the medical bills Flygare was bringing to him. Deputy Hodge testified that Flygare had told him the contents of the vehicle belonged to Jordan. Flygare testified at trial that she had accepted money from another person to dispose of the containers containing the meth lab components. She further testified that she did not tell Jordan what was in the back of the vehicle. She explained that she had initially told the police that the contents in the trunk were Jordan's, instead of explaining that she was being paid to dispose of them by someone else, because she was afraid and confused and did not want the officers to think the contents were hers.

After trial, a jury returned guilty verdicts on both the count of possession of methamphetamine and the count of manufacturing methamphetamine. Jordan received a standard range sentence and timely appealed.

DISCUSSION

Jordan argues that Deputy Morris lacked a reasonable and articulable suspicion that criminal activity was afoot, and therefore lacked justification for a Terry stop.

I. Seizure

The parties dispute when the seizure actually occurred. The timing of the seizure affects our evaluation of whether Deputy Morris's investigatory stop was supported by a reasonable and articulable suspicion. Jordan contends the seizure occurred when Deputy Morris told Jordan to show his hands. The State asserts Jordan was not seized until the deputy ordered Jordan out of the Explorer. The only thing that occurred between when Deputy Morris told Jordan to show his hands, and when he ordered Jordan out of the car, was Jordan's initial refusal to show his hands. The trial court found Jordan was seized at "the point at which he was asked to step from the vehicle." We review de novo whether the facts surrounding a police encounter amount to a seizure. State v. Rankin, 151 Wn.2d 689, 709, 92 P.3d 202 (2004).

A seizure occurs where, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave, or free to otherwise decline an officer's request. State v. O'Neill, 148 Wn.2d 564, 574, 62 P.3d 489 (2003); State v. Armenta, 134 Wn.2d 1, 10–11, 948 P.2d 1280 (1997). The defendant has the burden of proving that a seizure occurred. O'Neill, 148 Wn.2d at 574. The parties dispute whether State v. Nettles, 70 Wn. App. 706, 855 P.2d 699 (1993), contains sufficiently analogous facts to determine the point of seizure in the instant case.

In Nettles, the court found that seizure had not occurred by focusing on the permissive nature of the officer's request to speak with the defendant. 70 Wn. App. at 711–12. There, the officer, in her patrol car, observed Nettles and two other people standing on a street corner. Id. at 707. The officer was on her

way to investigate reported narcotics activity. Id. When the defendant and the two others saw the patrol car, they quickened their pace and turned to stare at her car. Id. at 707–08. The officer pulled over, exited her car, and called out to Nettles and his companions, "Gentlemen, I'd like to speak with you, could you come to my car?" Id. at 708. Nettles turned toward the officer, and the officer asked Nettles to remove his hands from his pockets. Id. As he withdrew one hand from his pocket, he threw a plastic baggie under her patrol car. Id. The officer then ordered Nettles to place his hands on her patrol car. Id.

The court concluded the officer's request that Nettles remove his hands from his pockets did not, by itself, immobilize Nettles, who had voluntarily agreed to speak with the officer, so no seizure had occurred. Id. at 712–13. The court further reasoned that police, as part of their community caretaking function, must be able to approach citizens and permissively inquire as to whether they will answer questions. Id. at 713. Here, like in Nettles, Deputy Morris approached the Explorer as part of his community caretaking function. Noticing furtive movements, Deputy Morris was entitled to ask questions of Jordan. Like in Nettles, Deputy Morris asked Jordan to show his hands. Jordan could have exited the vehicle and walked away.[3,4]

[3] Jordan points to Deputy Morris's testimony at the CrR 3.6 hearing, stating that he believed Jordan was not free to leave and would have stopped him had Jordan attempted to leave, at the point when he asked Jordan to show his hands. The deputy's subjective belief cannot be considered here, as the test focuses on the belief of a reasonable person interacting with law enforcement. O'Neill, 148 Wn.2d at 574.

[4] A factual difference between Nettles and the current case is the fact that Jordan was inside a vehicle when the deputy approached him, whereas the officer and Nettles were both on foot. However, the Supreme Court has declined

Jordan also argues that the nature of the verbal communication was, unlike in Nettles, a command, and therefore the encounter could not be a permissive one. The Supreme Court has recognized a distinction based on the nature of the officer's initial verbal communication. O'Neill, 148 Wn.2d at 577–78. Where an officer commands a person to halt or demands information, a seizure occurs. Id. at 577. No seizure occurs where an officer approaches an individual and requests to talk to him and engages in conversation, so long as the individual need not answer and may walk away. Id. at 577–78. Deputy Morris's first verbal interaction with Jordan was to request that he show his hands. Jordan testified that the deputy's tone was demanding, but Flygare testified that it was "not really loud, just abrupt." Further, Deputy Morris's request did not demand that Jordan give any information. He simply asked Jordan to show his hands.

The trial court did not err in determining Deputy Morris seized Jordan when he ordered Jordan to step from the vehicle.

II. Terry Stop

Jordan argues that, even if he was not seized until Deputy Morris ordered him out of the Explorer, Deputy Morris lacked a reasonable and articulable suspicion that criminal activity was afoot, and therefore lacked justification for a Terry stop.

Warrantless seizures are per se unreasonable and violate both the Fourth

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to recognize a distinction where the person being questioned is in a parked vehicle instead of on foot. See State v. Thorn, 129 Wn.2d 347, 352–53, 917 P.2d 108 (1996), overruled on other grounds by O'Neill, 148 Wn.2d 571.

Amendment and article I, section 7 of the Washington State Constitution. State v. Williams, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). However, there are a few "'jealously and carefully drawn'" exceptions to the warrant requirement, where the potential consequences of the delay to obtain a warrant outweigh the traditional requirement of obtaining a warrant from a neutral magistrate. Id. (quoting State v. Houser, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980)). These exceptions include an investigative stop, and this state uses the rationale of Terry when examining the validity of such a stop. State v. Kennedy, 107 Wn.2d 1, 5, 726 P.2d 445 (1986). A Terry stop of a person or vehicle is justified if the officer can "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Terry, 392 U.S. at 21; Kennedy, 107 Wn.2d at 5. A reasonable suspicion is the "substantial possibility that criminal conduct has occurred or is about to occur." Kennedy, 107 Wn.2d at 6. Whether an officer's suspicion is reasonable is determined by the totality of the circumstances known to the officer at the inception of the stop. State v. Rowe, 63 Wn. App. 750, 753, 822 P.2d 290 (1991).

Deputy Morris's observations as he approached the Explorer must amount to specific and articulable facts that reflect a substantial possibility that criminal conduct occurred or was about to occur. As reflected in the court's unchallenged findings of fact, the seizure was based on:

> 1) the officer's knowledge of drug activity in the area surrounding the Barrel Tavern, 2) the fact that the activity was taking place at 12:30 a.m. in the parking lot of a tavern, 3) the defendant entered

> the car and nothing happened within the approximately two minutes prior to the officer approaching the car, 4) the officer's observations of the occupants of the car, including the observation that the occupants were huddled over the center console and moving their hands in a furtive manner consistent with efforts trying to conceal the activity from observers, 5) the occupants' reaction to the officer shining the light into the vehicle, including the defendant placing his hands between his legs and his initial refusal to show his hands when requested to do so, 6) the officer's belief that the occupants were engaged in drug-related activity, and 7) the officer's training and experience.

The State concedes that the combination of the deputy's knowledge of drug activity at the Barrel Tavern and the fact that Jordan did not start the vehicle or otherwise turn on any of its lights does not form a basis for an investigative stop. Certainly, presence in a high crime area at night is not enough. State v. Martinez, 135 Wn. App. 174, 180, 143 P.3d 855 (2006).

The deputy's experience with narcotics transactions and his observation of furtive movements over the center console of the vehicle, along with Jordan's reaction to the deputy, are sufficient for a Terry stop. Jordan sat in his car for two minutes without starting it, and Deputy Morris observed that the occupants were huddled over the center console and moving their hands in a furtive manner consistent with efforts to conceal the activity from observers. While facts could have other innocuous explanations, circumstances appearing innocuous to the average person may appear incriminating to a police officer, based on the officer's experience. State v. Samsel, 39 Wn. App. 564, 570, 694 P.2d 670 (1985). Considered in conjunction with the deputy's knowledge of narcotics activity at the Barrel Tavern, Deputy Morris's Terry stop was justified by specific, articulable facts indicating criminal activity. Further, Jordan acted

startled and then resisted the deputy's request that he show his hands, reinforcing the deputy's reasonable suspicion of criminal activity.

Jordan asserts that, notwithstanding the deputy's experience, the facts he observed were nevertheless innocuous and could not have amounted to more than an inchoate hunch. Jordan contends his case is similar to State v. Gatewood, 163 Wn.2d 534, 540, 182 P.3d 426 (2008), where the court focused on the nature of the defendant's reactions to seeing the police. Gatewood was sitting in bus shelter with a few other people when officers drove by. Id. at 537. He looked surprised to see the patrol car and twisted his whole body to the left, as though he was trying to hide something. Id. By the time the officers turned around to drive by the bus shelter again, Gatewood had left the bus shelter and was crossing the street illegally. Id. at 537–38. The court held that these facts were insufficient to justify a Terry stop, as startled reactions to seeing police are not enough to form a reasonable suspicion. Id. at 540. Unlike in Gatewood, there were facts independent of Jordan's startled reaction to the deputy that supported the deputy's reasonable suspicion.

Because Jordan has not demonstrated the invalidity of either the seizure or the Terry stop, we affirm the conviction for possession of methamphetamine.[5]

III. Validity of the Search of the Vehicle Incident to Arrest

At the suppression hearing and on appeal, Jordan argued the search of

[5] Jordan has not challenged the validity of the pat down search the deputy conducted once Jordan exited the vehicle. During the pat down search, a plastic baggie containing methamphetamine fell to the ground, providing probable cause for his arrest.

the Explorer violated his rights under the Fourth Amendment and under article 1, section 7 of the state constitution. The trial court did not reach the merits of his arguments, finding Jordan lacked standing to challenge the search. We address the validity of the search, assuming he had standing to challenge the search.[6]

The court in Arizona v. Gant, __ U.S. __, 129 S. Ct. 1710, 1719, 173 L. Ed. 2d 485 (2009), held that police may "search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." A search incident to arrest may be justified under the Fourth Amendment when there is reason to believe evidence relevant to the crime of arrest might be found in the vehicle: "circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'" Id. (quoting Thornton v. United States, 541 U.S. 615, 632, 124 S. Ct. 2127, 158 L. Ed. 2d 905 (2004) (Scalia, J., concurring)). The State concedes that Arizona v. Gant applies retroactively to all non-final cases pending in trial court and on appeal.

There can be no dispute that the search of the Explorer did not meet the first Gant exception. The search took place only after both Jordan and Flygare were already arrested and placed in a patrol car. However, the search was justified under the second Gant exception and therefore lawful under the Fourth Amendment. In a search of Jordan's person incident to his arrest, Deputy Morris

[6] Because we hold the search of the Explorer was a valid search under State v. Wright, No. 62142-4-I, 2010 WL 1531484 (Wash. Ct. App. April 19, 2010), we do not address Jordan's automatic standing argument.

found a bag of methamphetamine and arrested him for possession of methamphetamine. The facts here provided Deputy Morris with reason to believe the Explorer contained additional evidence of possession of methamphetamine. Gant, 129 S. Ct. at 1719; see also State v. Wright, No. 62142-I, 2010 WL 1531484, at *6 (Wash. Ct. App. April 19, 2010) (holding that where the officer pulled Wright over and arrested him for possession of marijuana, after the officer had smelled marijuana emanating from the vehicle and observed Wright's agitated and furtive behavior, the officer had reason to believe Wright's car contained evidence of the crime of arrest, and the search of the car was justified under Gant and the Fourth Amendment). Jordan's Fourth Amendment rights were not violated by the search.

Jordan also argues the search of the Explorer violated his rights under article 1, section 7, contending that our State's constitution allows a search of a vehicle incident to arrest only where the arrestee is physically able to reach a weapon or evidentiary item inside the vehicle at the time of the search. While Article I, section 7's protection of privacy is more stringent than the Fourth Amendment, it nevertheless allows a search of a vehicle incident to arrest where an officer has probable cause to support the search. State v. Wright, at *6, *10.

In Wright, police stopped Wright, who was the only occupant of the car. Id. at *1. As Wright opened the car window, the officer noticed the strong odor of marijuana emanating from the vehicle. Id. We held the officer had probable cause to arrest Wright and probable cause to search the vehicle for evidence of the crime, given the clear nexus between the crime of arrest and the search of

the vehicle. Id. at *8–*10. Here, Jordan was arrested for possession of methamphetamine. The deputy had also observed Jordan and Flygare inside the Explorer with their "hands together . . . shielding something from view while they were passing it back and forth," and concluded that it was likely a narcotics transaction. After a few moments of observing what he characterized as furtive movements, Deputy Morris turned on his flashlight to see what Jordan and Flygare were doing with their hands. Jordan jerked his hands away from the center console and put his hands between his legs, as if he was trying to conceal something from his view. Deputy Morris's observations of Jordan's activity in the vehicle, along with his arrest for possession of methamphetamine once outside the Explorer, provided probable cause to search the vehicle for further evidence of the drug crime.

Like in Wright, there was a proper nexus between the crime of arrest, possession of methamphetamine, and the search of the vehicle for that drug. Wright at *8, *10. Deputy Morris' search was supported by probable cause. See Wright at *8–*10. The search of the vehicle did not violate Jordan's rights under article 1, section 7.

We affirm Jordan's convictions.

Appelwick, J.

WE CONCUR:

Edlington, J.

Becker, J.