

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)	No. 66152-3-I
)	
Respondent,)	DIVISION ONE
v.)	
)	UNPUBLISHED OPINION
JAMES CARL RICHARDSON)	
)	
Appellant.)	FILED: January 30, 2012

Schindler, J. — An officer’s objectively reasonable safety concerns during a traffic stop justify a limited protective search of a vehicle for weapons. We affirm the jury conviction of James Carl Richardson for unlawful possession of a firearm in the first degree.

FACTS

The facts are undisputed. At approximately 8:45 p.m. on October 14, 2009, Whatcom County Sheriff Deputy Magnus Gervol was driving on Interstate 5 and observed the driver of a black Dodge Durango following other vehicles too closely and changing lanes without signaling. Before stopping the Durango, Deputy Gervol learned that the registered owner of the car was James Carl Richardson. Deputy Gervol knew a James Richardson with an extensive criminal history that included a conviction for unlawful possession of a firearm and “assaults with deadly weapons.” But Deputy

Gervol testified that because “there are numerous people with the same name, it could have been any James Richardson.”

Deputy Gervol initiated the traffic stop by turning on the patrol car’s flashing lights and siren. Deputy Gervol also turned on the high beams and pointed a spotlight at the car. The driver slowed down and then pulled over to the shoulder, but did not immediately stop. The car drove for approximately 50 feet before coming to a complete stop next to the guardrail. As the car came to a stop, Deputy Gervol saw the silhouette of the driver and passenger in the car. Deputy Gervol watched as the driver leaned forward, “making furtive movements, as if reaching under the seat below him.”

As Deputy Gervol approached the car, he noticed the driver watching him intently in the side mirror. When Deputy Gervol reached the driver’s side of the car, he smelled burnt marijuana. Deputy Gervol said that he recognized the driver as the James Richardson he knew. Deputy Gervol asked Richardson for his identification, registration, and proof of insurance. Richardson handed his identification and vehicle registration through the driver’s side window, but did not provide proof of insurance.

Deputy Gervol asked Richardson to get out of the car. As Richardson opened the car door, Deputy Gervol saw a “large club like” stick, later identified as an African walking stick, between the driver’s seat and the door. Deputy Gervol talked to Richardson “about the reason for the traffic stop,” and asked about “his documentation, license, insurance, registration.”

Deputy Gervol said that Richardson was reluctant to answer questions and paused for long periods of time.

He seemed to search for answers to my questions. He seemed to be reluctant to answer them. He’d pause for unusual periods of time. And

based on my experience, that wasn't due to any impairment from alcohol or drugs but rather that there was potentially crime afoot based on experience.

While talking to Richardson, Deputy Gervol saw the top of a knife sticking out of his pants pocket. Before contacting the passenger and continuing the investigation, Deputy Gervol removed the knife, handcuffed Richardson, and placed him in the patrol car.

Deputy Gervol testified that he "intended to return Mr. Richardson to the vehicle once the traffic stop was complete but did not inform Mr. Richardson of that fact." Deputy Gervol also said that he intended to return the walking stick and the knife to Richardson but planned to make sure the weapons were placed "outside of Mr. Richardson's reach."

At Deputy Gervol's request, the passenger got out of the car and stood approximately 50 feet in front of the Durango. Deputy Gervol then conducted a search of the driver's seat area of the car where he saw Richardson making furtive movements. After finding a loaded gun under the driver's seat, Deputy Gervol called for backup. Deputy Gervol read Richardson his Miranda¹ rights and placed him under arrest for unlawful possession of a firearm. Deputy Gervol also cited Richardson for following too closely and for no proof of insurance.

The State charged Richardson with unlawful possession of a firearm in the first degree. Richardson filed a motion to suppress the gun.² Richardson argued Deputy Gervol did not have an objectively reasonable safety concern justifying a protective

¹ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

² Richardson also filed a motion under CrR 3.5 to suppress his statements to Deputy Gervol. The CrR 3.5 motion is not at issue in this appeal.

search because Richardson was in handcuffs in the patrol car, and the passenger was not in the Durango at the time of the search.

Deputy Gervol, Richardson, and the passenger testified at the hearing on the motion to suppress the gun and the State's motion to admit statements made by Richardson to Deputy Gervol.

Deputy Gervol testified that he was concerned for his safety during the traffic stop because of Richardson's furtive movements, Richardson's history of "assault[ing] people with knives and unlawfully possessed firearms," his possession of the walking stick and the concealed knife, his behavior as Deputy Gervol approached the car, as well as Richardson's hesitant response to questions. Deputy Gervol also said he was "very concerned" because he was on patrol alone.

Deputy Gervol testified that placing Richardson in handcuffs in the back of the patrol car and having the passenger stand 50 feet in front of the car was necessary "for officer safety reasons while completing this traffic stop," and to check for "additional weapons . . . under the seat where Mr. Richardson had been making furtive movements." Deputy Gervol testified that after conducting a protective search of the area near the driver's seat, he intended to cite Richardson for traffic infractions, ask him about the smell of marijuana, and then release him. Deputy Gervol testified that after Richardson waived his Miranda rights, he admitted the loaded gun belonged to him.

Richardson testified that Deputy Gervol told him he was following the vehicles on the freeway too closely, and did not signal when changing lanes. Richardson said that Deputy Gervol told him to step out of the car, put him in handcuffs, and placed him in the patrol car before asking the passenger to get out of the car and searching underneath

the driver's seat. The passenger testified that Deputy Gervol asked her to stand in front of the car.

The trial court denied the motion to suppress, and the statement Richardson made to Deputy Gervol was admissible. The court entered "Findings of Fact and Conclusions of Law Re: CrR 3.5 and CrR 3.6." The conclusions of law state:

1. Mr. Richardson was not in custody to a degree associated with formal arrest, prior to being placed under arrest.
2. Any statements made by Mr. Richardson prior to arrest are admissible.
3. Deputy Gervol properly provided Miranda rights to Mr. Richardson.
4. Mr. Richardson knowingly, intelligently and voluntarily waived his Miranda rights.
5. Mr. Richardson's statements after Miranda are admissible.
6. The cursory search for weapons in the passenger compartment for officer safety reasons is appropriate.
7. The firearm that was found under the seat shall be admissible in this trial.

A jury convicted Richardson of unlawful possession of a firearm in the first degree.

ANALYSIS

Richardson contends the trial court erred in denying his motion to suppress the gun. Richardson contends the warrantless search of his car violated article I, section 7 of the Washington Constitution. Richardson claims that as in State v. Glossbrener, 146 Wn.2d 670, 49 P.3d 128 (2002), Deputy Gervol did not have an objectively reasonable concern for officer safety when he conducted the protective search of the car.

We review a trial court's decision to deny a motion to suppress to determine whether the findings are supported by substantial evidence and whether those findings, in turn, support the conclusions of law. State v. O'Neill, 148 Wn.2d 564, 571, 62 P.3d

489 (2003). Where, as here, the findings are not challenged, we treat the findings of fact as verities on appeal and review the conclusions of law de novo. O'Neill, 148 Wn.2d at 571; State v. Johnson, 128 Wn.2d 431, 443, 909 P.2d 293 (1996).

Subject to a few “jealously and carefully drawn” exceptions, a warrantless search violates article I, section 7 of the Washington Constitution. State v. Hendrickson, 129 Wn.2d 61, 72, 917 P.2d 563 (1996) (quoting State v. Bradley, 105 Wn.2d 898, 902, 719 P.2d 546 (1986)).³ An individual's right to privacy includes automobiles and their contents. O'Neill, 148 Wn.2d at 584.

One well-established exception is a Terry investigative stop. Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); State v. Duncan, 146 Wn.2d 166, 171-75, 43 P.3d 513 (2002). A Terry stop and frisk extends to a car “ ‘if there is a reasonable suspicion that the suspect is dangerous and may gain access to a weapon in the vehicle.’ ” Glossbrener, 146 Wn.2d at 680-81 (quoting State v. Terrazas, 71 Wn. App. 873, 879, 863 P.2d 75 (1993)). Based on objectively reasonable safety concerns, an officer may conduct a limited search of a car for weapons without regard to whether the driver or the passenger remains in the car. A “ ‘protective search for weapons must be objectively reasonable, though based on the officer’s subjective perception of events.’ ” Glossbrener, 146 Wn.2d at 681 (quoting State v. Larson, 88 Wn. App. 849, 853-54, 946 P.2d 1212 (1997)). In determining whether the search was reasonably based on officer safety concerns, we “evaluate the entire circumstances of the traffic stop.” Glossbrener, 146 Wn.2d at 679.

³ (Internal quotation marks and citation omitted.) Article I, section 7 of the Washington Constitution provides: “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”

Here, there is no dispute the traffic stop was valid, and Richardson concedes that Deputy Gervol initially had objectively reasonable safety concerns. But Richardson argues that as in Glossbrener, because Deputy Gervol handcuffed and placed him in the patrol car, and the passenger was standing 50 feet in front of the car, the circumstances did not support an objectively reasonable basis to conduct the protective search.

In Glossbrener, an officer stopped Glossbrener for driving with a defective headlight. While pulling the car over, the officer noticed Glossbrener reaching down toward the passenger side of the car for several seconds before coming to a complete stop. Glossbrener, 146 Wn.2d at 673. After asking Glossbrener to explain the movements he observed, the officer allowed Glossbrener to remain in the car while the officer returned to his patrol car to check for warrants. When the officer returned, he patted down Glossbrener for weapons and performed field sobriety tests. The officer allowed Glossbrener to stand next to the car while calling for backup and then conducting a search of the car. Glossbrener, 146 Wn.2d at 673-74.

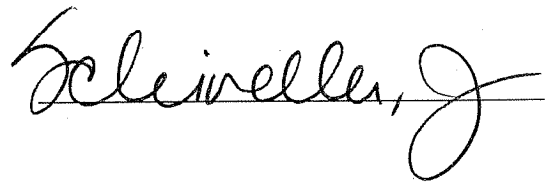
After evaluating the circumstances of the traffic stop, the court held that “although [the officer] may have had a reasonable belief that Glossbrener was armed and dangerous when he first observed the furtive movement, any such belief was no longer objectively reasonable at the time he actually conducted the search because of the intervening actions of both [the officer] and Glossbrener.” Glossbrener, 146 Wn.2d at 681. As the court pointed out, allowing Glossbrener to sit in the car while the officer checked for warrants suggested the officer was not “truly concerned” for his safety. Glossbrener, 146 Wn.2d at 682.

Here, unlike in Glossbrener, the record shows that Deputy Gervol had objective

and reasonable grounds to conduct a limited protective search of the driver's area of the car for weapons. There is no dispute that before stopping the car, the driver leaned forward and engaged in furtive movements near the driver's seat. Deputy Gervol recognized the driver as the James Richardson he knew who had a criminal history of assaults and possession of unlawful weapons. There is no dispute that Richardson was carrying a concealed knife, and there was a club-like walking stick in the car. Nor is there any dispute that Deputy Gervol was alone and the passenger was still in the car. Based on these safety concerns, Deputy Gervol removed Richardson from his car and placed him in handcuffs in the back of the patrol car before performing a limited search for additional weapons. The record also shows that the investigation was not complete when Deputy Gervol placed Richardson in the patrol car and conducted the protective search. Deputy Gervol said that after conducting a protective search near the driver's seat, he planned to cite Richardson for traffic violations, ask him about the marijuana odor in the car, and "return Mr. Richardson to the vehicle once the traffic stop was complete."

Based on the circumstances of this traffic stop, objectively reasonable safety concerns justified the protective search of the area near the driver's seat.

Affirmed.⁴

A handwritten signature in black ink, appearing to read "Schweiler, J". The signature is written in a cursive style with a large, sweeping flourish at the end.

⁴ Although Richardson assigns error to the late entry of the findings of fact and conclusions of law, he does not assert prejudice. State v. Cannon, 130 Wn.2d 313, 329-30, 922 P.2d 1293 (1996) (absent a showing of prejudice, the appellate court will not reverse a conviction for the late entry of findings and conclusions); State v. Brockob, 159 Wn.2d 311, 344, 150 P.3d 59 (2006).

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WE CONCUR:

Becker, J.

Grosse, J.