

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
) No. 66406-9-I
 Respondent,)
) DIVISION ONE
 v.)
) UNPUBLISHED OPINION
 PAUL MARK VILLALON, aka PETER)
 JOHN JAMES,)
)
 Appellant.) FILED: April 23, 2012
)

Grosse, J. — When, during a protective frisk, a police officer encounters an item of questionable identity that could reasonably be a weapon, the officer may remove that object from the defendant’s clothing and examine it. Here, the officer’s removal of a hard square object from Paul Villalon’s pants pocket was reasonable under the circumstances and did not exceed the scope of a valid protective frisk. Nor has Villalon demonstrated any prejudice resulting from the trial court’s untimely entry of written CrR 3.6 findings of fact and conclusions of law. We therefore affirm Villalon’s conviction for one count of possession of methamphetamine.

FACTS

The relevant facts are undisputed. At about 3:00 p.m. on July 30, 2010, Whatcom County Sheriff’s deputies Magnus Gervol and Mike Taddonio drove to check on the status of property on E. Smith Road in Bellingham. The Sheriff’s

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Office had seized the property, which was the subject of a forfeiture proceeding, and the deputies wanted to check whether there had been any vandalism. The property was posted with a "No Trespassing" sign.

Upon arrival, the deputies found two men on the property who appeared to be working on cars. They recognized one of the men as someone with an extensive criminal record involving firearms and drugs.

Deputy Gervol approached the second man and asked for identification, attempting to determine if he was trespassing. The man claimed that he had not seen the "No Trespassing" sign and that he did not have any identification with him. He identified himself as Peter John James and said that his date of birth was May 26, 1989.

Gervol became suspicious because the man, later identified as Paul Villalon, looked significantly older than the indicated date of birth. Villalon was wearing a baggy tee shirt and baggy pants and his pockets were bulging and weighted down with what appeared to be heavy objects. When asked how he arrived on the property and whom he was visiting, Villalon replied, "I don't know." Villalon also fidgeted nervously and continued to put his hands into his pockets, despite Gervol's repeated directions to keep them in view.

Concerned about the circumstances of the encounter, Gervol decided to conduct a pat down for officer safety. When Villalon refused to cooperate and attempted to pull away, the officers handcuffed him.

During the pat down, Gervol felt “a hard square object” in Villalon’s right pants pocket. Concerned that it might be a weapon or contain a weapon, Gervol removed the object and discovered that it was a clamshell-style cell phone. Gervol immediately observed an identification card slip out from the middle of the phone with the name “Paul Villalon” and a matching photograph. Deputy Taddonio recalled that there had been a bulletin indicating that Villalon had outstanding warrants.

After confirming that Villalon had two outstanding arrest warrants, the deputies arrested him. During a search incident to the arrest, the deputies recovered a baggie containing methamphetamine.

The State charged Villalon with one count of possession of methamphetamine. Prior to trial, Villalon moved to suppress the drugs seized incident to the arrest, arguing that the deputies’ removal of the cell phone from his pocket exceeded the valid scope of a protective frisk. The trial court denied the motion to suppress. Following a trial on stipulated evidence, the court found Villalon guilty as charged.

DECISION

Villalon first contends that both his initial detention and the protective frisk were unlawful. He argues that the deputies lacked a reasonable suspicion that he was involved in criminal activity and a reasonable safety concern that justified a protective frisk for weapons.

We review the trial court's denial of a suppression motion to determine whether substantial evidence supports the challenged findings of fact and whether those findings support the trial court's conclusions of law.¹ Unchallenged findings of fact are verities on appeal.² We review conclusions of law de novo.³

Generally, a police officer may briefly stop and detain an individual for investigation without a warrant if the officer reasonably suspects the person is engaged or about to be engaged in criminal conduct.⁴ The officer may also briefly frisk the individual for weapons based on a reasonable belief that the officer's safety or the safety of others is endangered.⁵

Here, however, defense counsel expressly informed the trial court, both at the beginning and at the conclusion of the suppression hearing, that the defense was not challenging the validity of the initial investigatory detention or the officer's decision to conduct a protective frisk:

We are not questioning whether or not Deputy Gervol was justified for conducting a pat down for weapons at that point. I believe that at that point he was justified in at least conducting a pat down. So we are not questioning any of that stuff that the prosecutor just said [relating to the validity of the initial detention and the decision to conduct a protective frisk].

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¹ State v. Bliss, 153 Wn. App. 197, 203, 222 P.3d 107 (2009).

² State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

³ Bliss, 153 Wn. App. at 203.

⁴ State v. Day, 161 Wn.2d 889, 895, 168 P.3d 1265 (2007).

⁵ Day, 161 Wn.2d at 895; see also Terry v. Ohio, 392 U.S. 1, 20-27, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

We are not disputing, again -- again, as I said, when we began, we are not disputing that the officer had a reasonable basis to conduct a pat down. We don't dispute that.

Rather, Villalon alleged only that the deputy had exceeded the proper scope of the frisk by removing the cell phone from his pocket.

Under the circumstances, Villalon has waived any alleged error relating to the validity of the initial detention and the justification for conducting a protective frisk. And Villalon has not alleged or demonstrated any basis for raising these contentions for the first time on appeal.⁶

Villalon also contends that even if the investigatory detention and protective frisk were valid, Deputy Gervol exceeded the proper scope of a protective frisk. He argues that Gervol could not reasonably have believed that the small, hard object in his pocket was a weapon or potentially dangerous.

A valid protective frisk is strictly limited to a search of the outer clothing for weapons that might be used to assault the officer.⁷ Once the officer concludes that the individual does not have a weapon, the protective frisk is over and any continuing search without probable cause constitutes an unreasonable intrusion into the individual's private affairs.⁸

There are, however, cases where the patdown is inconclusive, in which case reaching into the clothing is the only reasonable course of action for the police officer to follow. If the officer feels an item of questionable identity that has the size and density such that it might or might not be a weapon, the officer may only take such

⁶ See State v. Robinson, 171 Wn.2d 292, 304-306, 253 P.3d 84 (2011).

⁷ State v. Hudson, 124 Wn.2d 107, 112, 874 P.2d 160 (1994).

⁸ Hudson, 124 Wn.2d at 113.

action as is necessary to examine such object.^[9]

Gervol testified that he felt a “hard square object.” He did not immediately recognize the object and was concerned that it might be a weapon, including a possible firearm or a commercial stun gun. Washington courts have held that the removal of questionable objects of comparable size and density was proper during a protective frisk.¹⁰ Under the circumstances, Gervol’s decision to remove the object to confirm its identity was reasonable and did not exceed the scope of a valid protective frisk.

The evidence also supports the trial court’s finding that upon removing the object and confirming that it was a cell phone, the deputies immediately saw, with no further manipulation, Villalon’s identification card and a matching photograph. At this point, Deputy Taddonio recognized that Villalon was the subject of arrest warrants. The subsequent arrest and search incident to the arrest were therefore lawful.¹¹

Finally, Villalon contends that the trial court erred in failing to enter written CrR 3.6 findings of fact and conclusions of law. He notes that the trial court devoted a significant portion of the oral ruling to a recollection of personal

⁹ Hudson, 124 Wn.2d at 112 (citations omitted); see also State v. Garvin, 166 Wn.2d 242, 250-252, 207 P.3d 1266 (2009).

¹⁰ See State v. Allen, 93 Wn.2d 170, 172, 606 P.2d 1235 (1980) (wallet); State v. Horton, 136 Wn. App. 29, 38, 146 P.3d 1227 (2006) (cigarette pack); State v. Fowler, 76 Wn. App. 168, 170-71, 883 P.2d 338 (1994) (pager).

¹¹ Because Villalon’s arrest was not the fruit of an unlawful protective frisk, we need not address his contentions about whether probable cause to arrest existed at the time the deputies discovered the identity card.

matters unrelated to the legal issues raised in the suppression hearing. Villalon argues that the trial court's oral decision is inadequate to permit meaningful appellate review.

The trial court entered written CrR 3.6 findings of fact and conclusions of law after Villalon filed his opening brief. We will not reverse a conviction for the late entry of CrR 3.6 findings and conclusions unless the delay prejudiced the defendant or the findings and conclusions were tailored to address the issues raised in the defendant's appellate brief.¹²

The sparseness of the trial court's oral decision was at least partly the result of the limited challenge that Villalon raised during the suppression hearing. Villalon did not challenge the lawfulness of his initial detention or the deputies' decision to conduct a protective pat down. Rather, he argued only that Gervol's decision to remove the hard object exceeded the proper scope of the weapons frisk. Under the circumstances, the written findings and conclusions accurately reflect the evidence presented to the trial court, the parties' arguments, and the court's oral decision. Villalon has not made any showing that the written findings and conclusions were tailored to meet the issues in his opening brief, that they are inadequate to permit appellate review, or that the delayed entry was in any way prejudicial. Reversal is therefore not warranted.¹³

¹² State v. Cannon, 130 Wn.2d 313, 329-30, 922 P.2d 1293 (1996).

¹³ See State v. Brockob, 159 Wn.2d 311, 344, 150 P.3d 59 (2006); Cannon, 130 Wn.2d at 330.

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Affirmed.

Grosse, J

WE CONCUR:

Schiveller, J Edenfor, J