IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent/ Cross-Appellant, v. JUAN LUIS LOZANO, Appellant/ Cross-Respondent.	)	NO. 67147-2-I DIVISION ONE UNPUBLISHED OPINION FILED: July 23, 2012

Becker, J. — An objective view of the language used by the law enforcement officer who approached appellant Juan Lozano and asked him about an outstanding warrant shows that Lozano was seized even before the officer arrested him on the warrant and found him in possession of cocaine. However, the seizure was lawful based on the officer's specific and reasonable suspicion that there was an outstanding warrant for Lozano's arrest. The trial court did not err by denying Lozano's motion to suppress the evidence of cocaine obtained in the officer's search of Lozano incident to his arrest. We affirm.

FACTS

According to the trial court's unchallenged findings of fact entered following a hearing on Lozano's motion to suppress, Snohomish County Sheriff's Deputy James Atwood was driving his marked patrol car on night patrol in February 2011. Around 3:00 a.m. he observed a man, later identified as Juan Lozano, walking in front of a closed business in Everett. It was dark and there was no one else in the vicinity.

Deputy Atwood pulled his patrol car up to a stop in front of Lozano, rolled down his window, and said "Hey, what's up?" Lozano was listening to earphones and did not hear him. Deputy Atwood called out to him again. Lozano stopped walking and removed the earphones. Deputy Atwood stepped out of his car. Within about 30 seconds of speaking to Lozano, Deputy Atwood recognized him from earlier police contacts. He remembered that in both December 2010 and January 2011, police records indicated Skagit County had a warrant out to arrest Lozano. Officers did not arrest Lozano on the warrant on those earlier occasions because they had been unable to confirm the warrant's validity with Skagit County.

Deputy Atwood asked Lozano if he had ever cleared up the outstanding warrant. Lozano gave an "equivocal" response, stating that he would have to talk with his lawyer about it. The deputy responded, "Let's go ahead and check on that warrant." The deputy ran a check through dispatch. Around 8 to 10 minutes elapsed, during which time Atwood engaged Lozano in conversation. Dispatch then informed Deputy Atwood that the warrant was still valid and outstanding and that Skagit County had confirmed it. He placed Lozano under arrest. In a search incident to the arrest,

Deputy Atwood found Lozano in possession of a small amount of cocaine.

Lozano was charged with one count of possession of a controlled substance. Before trial, Lozano moved to suppress evidence of the cocaine, arguing the officer obtained it following an unlawful seizure.

After a suppression hearing, the court entered findings and conclusions and denied Lozano's motion. Lozano agreed to a bench trial on stipulated documentary evidence. The court found Lozano guilty and imposed a standard sentence of six months and one day. He now appeals.

SEIZURE

Lozano argues that the trial court erred when it denied his motion to suppress the cocaine. He claims he was illegally seized before the arrest and the search that revealed the drugs. If police unconstitutionally seize an individual prior to arrest, the exclusionary rule calls for suppression of any evidence obtained by searching the individual after the arrest. State v. Garvin, 166 Wn.2d 242, 254, 207 P.3d 1266 (2009).

In Washington, a warrantless search or seizure is *per se* unconstitutional under article I, section 7 of the state constitution[1] unless it falls within one of the narrowly drawn and "jealously guarded" exceptions to the warrant requirement. State v. Rankin, 151 Wn.2d 689, 695, 92 P.3d 202 (2004); State v. Ladson, 138 Wn.2d 343, 356, 979 P.2d 833 (1999). Article I, section 7 provides individuals

[1] "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Wash. Const. art. I, § 7.

greater protection in regard to privacy rights than the Fourth Amendment to the United States Constitution. Rankin, 151 Wn.2d at 694. A seizure occurs under the state constitution when "considering all the circumstances, an individual's freedom of movement is restrained and the individual would not believe he or she is free to leave or decline a request due to an officer's use of force or display of authority." Rankin, 151 Wn.2d at 695, citing State v. O'Neill, 148 Wn.2d 564, 574, 62 P.3d 489 (2003). Whether police action is a seizure is determined by looking objectively at all the actions of the law enforcement officer. Rankin, 151 Wn.2d at 695, citing State v. Young, 135 Wn.2d 498, 501, 957 P.2d 681 (1998).

An officer does not commit a seizure merely by approaching a citizen in a public place, engaging the citizen in conversation, or requesting information or identification. Young, 135 Wn.2d at 511; O'Neill, 148 Wn.2d at 577-78. Consistent with this rule, Lozano does not contend Deputy Atwood "seized" him merely by approaching him on the public street, by saying "Hey, what's up?," by engaging him in conversation, or by asking him for identification.

Neither does Lozano contend he was seized by any physical display of force prior to his arrest. Before confirming the warrant and carrying out the arrest, Deputy Atwood did not touch Lozano, display a weapon, or turn on his patrol car lights or siren. See Young, 135 Wn.2d at 512 (a permissive "social contact" with a citizen may become a seizure by means of, for example, the "'threatening presence'" of more than one officer, the display of a weapon, or "'some physical touching of the person of

the citizen'"), quoting United States v. Mendenhall, 446 U.S. 544, 554, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980).

Even without a show of physical force, however, an officer's use of language or tone of voice can be enough to convert a permissive interaction into a seizure. Young, 135 Wn.2d at 511. This occurs when the statements indicate that compliance with the officer's request might be compelled. Young, 135 Wn.2d at 511. "Gentlemen, I'd like to speak with you, could you come to my car?" is an example of a permissive statement. State v. Nettles, 70 Wn. App. 706, 708, 855 P.2d 699 (1993), review denied, 123 Wn.2d 1010 (1994). "Can I talk to you guys for a minute?" is likewise permissive. State v. Aranguren, 42 Wn. App. 452, 455-56, 711 P.2d 1096 (1985); State v. Richardson, 64 Wn. App. 693, 695, 825 P.2d 754 (1992).

In State v. Ellwood, 52 Wn. App. 70, 757 P.2d 547 (1988), we concluded that "wait right here" is a coercive statement that constitutes a seizure. Ellwood, 52 Wn. App. at 73. In Ellwood, a uniformed officer stopped two men walking on the street in Everett around midnight. We found no seizure when the officer approached the men and asked to see their identifications. A seizure did occur, however, when the officer asked the men to "wait right here" while he checked for any outstanding warrants. Ellwood, 52 Wn. App. at 73.

In State v. Barnes, 96 Wn. App. 217, 978 P.2d 1131 (1999), the court likewise concluded a citizen was seized after the officer asked if he "would be willing to stick around while I check on" an old outstanding warrant. Barnes, 96 Wn. App. at 219. The court reasoned that

the officer's exact words were not dispositive because his clear intent was that the individual should remain on the scene while the officer investigated the warrant:

> Here, contact was established when Officer Moran told Mr. Barnes he thought there was a warrant outstanding on him. Officer Moran then requested that Mr. Barnes wait while he checked the warrant out. A reasonable person would not have felt free to walk away at this point, regardless of whether the exact words were, "*please* wait right here," or "*why don't you* wait right here," or "*would you mind* waiting right here," instead of just plain "wait right here." The ensuing interaction was a detention, not a social encounter.

Barnes, 96 Wn. App. at 223.

Similarly, in the present case, the deputy stated, "Let's go ahead and check on that warrant." The deputy's use of the contraction "Let's"—meaning "Let us"—conveyed the clear message that Lozano was no longer free to walk away; rather, the two would wait together until the warrant status could be confirmed. Like the officer's request in Barnes, Deputy Atwood's invitation was a thinly veiled command that Lozano remain on the scene.

Barnes further persuades us that the encounter became a seizure as of the moment Deputy Atwood first inquired about the outstanding warrant. In Barnes, the social encounter "ceased to be consensual" as soon as the officer "communicated his belief or suspicion that lawful grounds existed to detain" the citizen based on an outstanding warrant. Barnes, 96 Wn. App. at 223. The same holds true here; once the deputy communicated his suspicion that Lozano might have an outstanding warrant, which is grounds for arrest, the contact became coercive. As of this time, it was

plainly a "detention, not a social encounter." Barnes, 96 Wn. App. at 223.

It is of no consequence that Lozano appeared to have a "confident" attitude about the outstanding warrant. Such confidence may have been mere puffery to conceal fear of imminent arrest. Objectively, a reasonable individual would not have felt free to leave.

TERRY STOP

A warrantless seizure may nevertheless pass constitutional muster if it falls within one of the narrowly drawn exceptions to the warrant requirement. One such exception is the "Terry stop." Terry v. Ohio, 392 U.S. 1, 21-22, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Under this rule, even in the absence of probable cause to arrest, a police officer may conduct a brief investigative detention of a suspect if he or she has a "reasonable, articulable suspicion, based on specific, objective facts, that the person seized has committed or is about to commit a crime." State v. Duncan, 146 Wn.2d 166, 172, 43 P.3d 513 (2002); Terry, 392 U.S. at 21-22. The level of suspicion necessary to support an investigative detention under both the federal and state constitutions is a "substantial possibility that criminal conduct has occurred or is about to occur." State v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). The burden of proof falls on the State to show that a particular search or seizure falls within the Terry exception. Duncan, 146 Wn.2d at 172.

The trial court concluded that because Lozano "did not appear to be engaged in any criminal activity" at the

time Deputy Atwood first initiated the contact, there were "no underlying facts to justify a Terry stop." Although we accord significant deference to the trial court's findings of fact, the ultimate determination of whether the facts justified a valid seizure is a question of law which this court reviews de novo. Rankin, 151 Wn.2d at 694.

The nature of an initially permissive, social interaction may shift into a lawful detention as new information emerges that generates reasonable suspicion. See, e.g., O'Neill, 148 Wn.2d at 574 (officers may approach citizens in the course of carrying out official duties even before the officer's "suspicions rise to the level necessary for a Terry stop"); cf. State v. Harrington, 167 Wn.2d 656, 666, 222 P.3d 92 (2009) (what begins as a social contact may "escalate" into a seizure).

The State contends the deputy's knowledge of Lozano's previously outstanding warrant was a "reasonable and articulable suspicion" that a crime had taken place. We agree. In State v. Bailey, 154 Wn. App. 295, 300, 224 P.3d 852, review denied, 169 Wn.2d 1004 (2010), the court held that once an officer learned that a citizen he encountered on the street "may have had an outstanding warrant," the officer had an adequate basis for detaining him:

> Significantly, Mr. Bailey volunteered that he may have had an outstanding warrant as soon as he handed Officer Walker his identification. . . . At that point, the officer had the reasonable suspicion necessary to seize Mr. Bailey.

Bailey, 154 Wn. App. at 30.

Here, the trial court found that

"about 30 seconds" into the deputy's conversation with Lozano, the deputy recognized Lozano from "earlier police contacts in December and January and remembered that there was then a warrant out for his arrest." The deputy's familiarity with Lozano and the previously outstanding warrant provided the deputy a reasonable and constitutionally permissible basis for detaining Lozano to inquire further.

Affirmed.

Becker, J.

WE CONCUR:

Spearman, A.C.J.

Leach, C.J.