

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 68362-4-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	UNPUBLISHED OPINION
JOSEPH DEFOREST CARTER,	)	
	)	
Appellant.	)	FILED: November 5, 2012

---

Schindler, J. — Joseph Deforest Carter seeks reversal of the jury convictions for two counts of unlawful possession of a firearm, the deadly weapon enhancement, and the jury finding that he was armed with a firearm during the commission of the crime of attempting to elude and possession of a controlled substance. Carter contends the trial court erred in denying his motion to suppress the warrantless seizure of three guns from his car. Because the unchallenged findings establish justification to seize the loaded guns under the open view, plain view, and exigent circumstances exceptions to the warrant requirement, we affirm.

FACTS

On March 25, 2010, Tacoma Police K-9 Officers Christopher Martin and David Johnson were conducting surveillance of a house located on South Cushman Avenue.

South Cushman Avenue is a residential street in a high-crime area. The officers were parked in a marked patrol car next to the east curb of the 3500 block of South Cushman Avenue.

At approximately 9:40 p.m., a grey Toyota Camry heading southbound on South Cushman Avenue “sped” past the parked patrol car traveling “over 40 miles an hour.” The officers said that the driver abruptly “pulled to the east curb,” opened and shut the driver’s door “very quickly,” and then drove off, “accelerat[ing] rapidly.” The driver turned right onto South 36th Street and “made no attempt to stop at the stop sign . . . at 36th [and] Cushman Avenue.” Officer Martin and Officer Johnson followed the Camry as it turned onto South Ainsworth Avenue. After the driver “rapidly accelerate[d]” and did not stop at an intersection or “yield to any traffic” while making a left turn, Officer Martin activated the patrol car lights and siren. The driver did not pull over.

The driver turned south onto Alaska Street, “making no attempt to slow or stop.” The officers said that the Camry was approximately a block ahead of the patrol car, reaching speeds in excess of 50 m.p.h.<sup>1</sup> Officer Martin testified that the Camry did not stop at a four-way intersection and made a “very sharp” turn from Alaska Street onto South 36th Street, “dipping down into a drainage ditch at the corner as it made the turn.” When the driver turned right onto South 36th Street, the officers briefly lost sight of the Camry, and Officer Martin turned off the emergency lights and siren.

As the officers approached the alley west of Alaska Street, Officer Johnson “observed [the] brake lights” of the Camry in the alley heading north. As the officers drove into the alley, they saw the Camry “skid to a stop behind a garage, off of the

---

<sup>1</sup> (Miles per hour.)

alley, . . . stop abruptly,” and park. Officer Martin pulled up next to the parked Camry.

Officer Johnson got out of the patrol car. The Camry lights were off and the alley was “completely” dark. The Camry had very dark, tinted windows that prevented Officer Johnson from seeing into the car through the side windows. Officer Johnson “thought

. . . the driver . . . had fled from the vehicle.” But when Officer Johnson walked to the front of the Camry, he was able to see a person “slumped down in the driver’s seat.”

That person has the advantage. It’s dark. I don’t know what they have going on in the car. We just pursued a vehicle that didn’t want to stop for us. Again, I made a poor decision going around without clearing the car, initially. I thought the person bailed out and went between the houses.

Officer Johnson removed his weapon from the holster and shouted to Officer Martin that there was someone in the car. Officer Martin approached the Camry, pulled open the driver’s side door, and found a man “reclined back in the driver’s seat, . . . sweating profusely.” Officer Martin repeatedly told the man, later identified as Joseph Deforest Carter, to show his hands and get out of the car. Carter “made no attempt to comply.” Officer Martin said that Carter kept his hands at his waist and did not move. Officer Martin grabbed Carter by the shirt and pulled him out of the car, handcuffed him, and moved him to the front of the patrol car.

After Carter was secured, Officer Johnson went back to the Camry “to ensure no one else was hiding in the car.” When Officer Johnson looked into the car, he saw a revolver on the driver’s seat “where the driver had been sitting” and “looked to see if there was anyone in the back seat.” Officer Johnson also saw another handgun “tucked between the cushion and the console, right next to where your right leg would

be in the driver seat.” Officer Johnson told Officer Martin that there was a gun in the car on the driver’s seat.

Officer Martin removed a .38-caliber revolver from the driver’s seat. The Rockledge revolver was loaded with six .38-caliber rounds. Officer Martin testified, in pertinent part:

I then went to the vehicle, the open door, observed this revolver in open view, laying on the driver’s seat, which would have been right under where Mr. Carter had been seated.

Q. Could you observe that from outside the car?

A. Yes. I secured the firearm, rendering it safe, rounds removed from the revolver. . . . I picked it straight up off the cushion of the seat.

Q. Did you get into the car or reach into the car?

A. I reached in through the open driver’s door.

As Officer Martin was removing the revolver, he saw the grip of a second gun between the driver’s seat and the center console. Officer Martin removed a .45-caliber Kimber semiautomatic from the center console. The Kimber semiautomatic had a handgrip-activated laser sight and a round in the chamber.

As I was securing that firearm, I then observed the handgrips of what I assumed to be another semiautomatic handgun between the driver’s seat and the center console. There were camouflaged print grips of a handgun.

I then secured that handgun also by reaching in, pulling it out by the grips, ejecting a magazine. I also observed at that point it had a laser site, a grip activated on it, ejected a round from the chamber and secured that weapon.

As Officer Martin was “rendering” the gun from the center console “safe,” he saw the handle of a loaded 9mm Hi-Point semiautomatic handgun sticking out from under the driver’s seat.

As I was securing that firearm, I looked straight down at the floorboard in front of the driver seat cushion, and I saw the handgrips of another handgun sticking out in plain view. This was a nine-millimeter, semi-

No. 68362-4-1/5

automatic handgun that was loaded, also.

In a further search of the Camry, the officers found “a pair of nunchakus under the defendant’s driver’s seat,” as well as:

[A] pistol magazine containing seven .45 caliber rounds, three loose .45 caliber rounds, a sock containing thirteen .38 caliber rounds, two vehicle titles with defendant’s name on them, and the defendant’s social security card.

A records check identified Carter as “a convicted felon” prohibited from possessing a firearm.

Tacoma Police Officer Kevin Clark arrived at the alley at approximately 10:03 p.m. to transport Carter to the Pierce County Jail. At the jail, the officers found a small plastic bag rolled up in Carter’s sock that contained hydrocodone and powder cocaine.

The State charged Carter with three counts of unlawful possession of a firearm in the second degree in violation of RCW 9.41.040(2)(a)(i), and alleged a deadly weapon enhancement. The State also charged Carter with attempting to elude a pursuing police vehicle while armed with a firearm, Count IV; and two counts of unlawful possession of a controlled substance while armed with a firearm, Count V and Count VI.

Carter filed a CrR 3.6 motion to suppress the guns the officers seized from the Camry. The State stipulated that the “nunchakus, pistol magazine containing seven .45 caliber rounds, three loose .45 caliber rounds, a sock containing thirteen .38 caliber rounds, two vehicle titles with defendant’s name on them, and the defendant’s social security card, all of which were found under the driver’s seat,” were not admissible.

The court held a four-day hearing on the motion to suppress. Officer Martin and Officer Johnson testified about the pursuit of the Camry, the inability to see into the car

in the alley, safety concerns, and seizure of the guns. The trial court denied Carter's motion to suppress. The court concluded the officers saw the revolver on the driver's seat in "open view" outside the constitutionally protected area of the car. The court also concluded the evidence showed the officers needed to secure the revolver out of concern for officer safety because "[a]t that point, the officers did not know if there were any passengers in the vehicle."

The written findings of fact and conclusions of law state, in pertinent part:

As Officer Johnson went back to the Camry's still open driver's side door, to ensure that no one else was hiding in it, from outside the car, Officer Johnson observed a black revolver on the driver's seat where the defendant had been sitting. Uncertain as to whether someone else was hiding in the back seat, one of the officers entered the car and picked up the gun [sic] the officer then saw the handgrip of a second handgun (.45 caliber Kimber semi-automatic with handgrip-activated laser sight, loaded, with one round chambered) protruding from between the driver's seat cushion and the center console. While making the second gun safe, the officer then observed the handgrips of yet a third handgun (a loaded 9mm Hi-Point semi-automatic, with one in the chamber) on the floorboard, sticking out from under the driver's seat.

. . . .  
. . . The revolver was observed by the officer in "open view." While that gun was on the seat inside the Camry, Officer Johnson observed it through the open door and while he was outside the Camry. Officer Johnson was not in a constitutionally protected area when he observed that gun. He immediately recognized that gun as contraband.

. . . .  
As the officers could not determine from outside the car whether or not anyone else was hiding in the Camry, officer safety required that one of them enter the Camry and retrieve the revolver.

The court ruled that the officer saw the second and third guns in "plain view" while lawfully in the Camry to retrieve the loaded revolver located on the driver's seat of the car, and was justified in removing the guns for safety reasons.

Once inside the Camry to retrieve the revolver, the officer inadvertently saw the .45 caliber Kimber firearm in between the driver's seat and the

center console. As that gun was in “plain view,” the officer was entitled to retrieve that gun as well. While the Camry was a constitutionally protected area, the officer was entitled to be in that area. He immediately recognized that gun as contraband. While he was rendering that gun safe, he inadvertently saw the Hi-Point firearm on the floorboard. Again, while the Camry was a constitutionally protected area, the officer was entitled to be in that area. He immediately recognized that third gun as contraband.

At trial, Carter stipulated that he had been previously convicted of a felony.

Charisma Taylor and Carter testified on behalf of the defense. Taylor testified that she owned the three guns in the car. Carter testified that he did not hear the police car siren, and he was not aware there were guns in the car.

The jury found Carter guilty of unlawful possession of the firearm located on the driver’s seat and the semiautomatic firearm near the console, Count I and Count II; attempting to elude, Count IV; and two counts of unlawful possession of a controlled substance, Count V and Count VI. In a special verdict form, the jury found that Carter was armed with a firearm during the commission of the crimes of attempting to elude and unlawful possession of a controlled substance. The jury found Carter was not guilty of unlawful possession of the firearm located under the driver’s seat, Count III.

#### ANALYSIS

Carter appeals his conviction of two counts of unlawful possession of a firearm, the deadly weapon enhancement, and the jury finding that he was armed with a firearm during the commission of the crime of attempting to elude and possession of a controlled substance. Carter does not challenge the court’s CrR 3.6 findings of fact on the motion to suppress. Carter argues the trial court erred in denying his motion to suppress the warrantless seizure of the guns from the Camry after his arrest. Carter



asserts the seizure was not valid under article I, section 7 of the Washington State Constitution.<sup>2</sup>

We review the 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).

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.” An individual's right to privacy includes automobiles and their contents. O'Neill, 148 Wn.2d at 584. Subject to “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)<sup>3</sup>). Our supreme court recognizes a few carefully drawn exceptions to the warrant requirement, including consent, plain view, an inventory search, exigent circumstances, and an investigatory stop under Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). State v. Duncan, 146 Wn.2d 166, 171-72, 43 P.3d 513 (2002). The burden is on the State to show that a warrantless search or seizure falls within one of the exceptions. Hendrickson, 129 Wn.2d at 70.

Carter argues the officers could not seize the guns under the “open view” or

---

<sup>2</sup> The State does not dispute that Carter has standing to challenge the search of the Camry.

<sup>3</sup> (Internal quotation marks and citation omitted.)

“plain view” exception to the warrant requirement because it was not immediately apparent to the officers that the guns were evidence. The State contends that the open view exception applies to the revolver the officers saw on the driver’s seat of the Camry, and the plain view exception applies to the other two loaded semiautomatic guns in the car, and exigent circumstances justified seizure of the guns. We agree with the State.

The “open view” exception applies to an officer’s observation from a nonconstitutionally protected area. State v. Seagull, 95 Wn.2d 898, 901-02, 632 P.2d 44 (1981). Under the open view doctrine, when an officer observes evidence from a nonconstitutionally protected area, article I, section 7 is not implicated. State v. Kennedy, 107 Wn.2d 1, 10, 726 P.2d 445 (1986).

[I]f an officer, after making a lawful stop, looks into a car from the outside and sees a weapon or contraband in the car, he has not searched the car. Because there has been no search, article [I], section 7 is not implicated. Once there is an intrusion into the constitutionally protected area, article [I], section 7 is implicated and the intrusion must be justified if it is made without a warrant.

Kennedy, 107 Wn.2d at 10. Once there is an intrusion into the constitutionally protected area, the intrusion must be justified if it is made without a warrant. Kennedy, 107 Wn.2d at 10. Accordingly, in order to seize evidence in open view, the officer must have probable cause to believe the item is evidence of a crime or there are “exigent circumstances regarding the security and acquisition of” the evidence making it impracticable to obtain a warrant. State v. Smith, 88 Wn.2d 127, 137-38, 559 P.2d 970 (1977).

By contrast, under the “plain view” exception, an officer observes evidence after

a lawful intrusion into a constitutionally protected area. Seagull, 95 Wn.2d at 901-02.

If the intrusion is justified, an object of obvious evidentiary value that is in plain view and discovered inadvertently may be lawfully seized. Kennedy, 107 Wn.2d at 10. If the officer happens across some item for which they had not been searching and, considering the surrounding circumstances, the incriminating character of the item is immediately recognizable, that item may be seized. State v. Hudson, 124 Wn.2d 107, 114, 874 P.2d 160 (1994).

Here, there is no dispute that the officers saw a loaded revolver on the driver's seat in "open view." The unchallenged findings of fact state, in pertinent part:

Once the defendant was secured, Officer Johnson went back to the car to ensure no one else was hiding in the car. . . . As Officer Johnson went back to the Camry's still open driver's side door, to ensure that no one else was hiding in it, from outside the car, Officer Johnson observed a black revolver on the driver's seat where the defendant had been sitting.

The court concluded that the officer seized the revolver under the exigent circumstances exception to the warrant requirement. The exigent circumstances exception to the warrant requirement allows the police to seize a gun without a warrant. State v. Smith, 165 Wn.2d 511, 517, 199 P.3d 386 (2009). Under the exigent circumstances exception, the police can conduct a "warrantless search where the circumstances are such that obtaining a warrant is not practical because the delay inherent in securing a warrant would compromise officer safety, facilitate escape or permit the destruction of evidence." State v. Audley, 77 Wn. App. 897, 907, 894 P.2d 1359 (1995). To determine whether there are exigent circumstances, we look at the totality of the circumstances. Smith, 165 Wn.2d at 518. It is well established that

“danger to [the] arresting officer or to the public” can constitute exigent circumstances. State v. Counts, 99 Wn.2d 54, 60, 659 P.2d 1087 (1983).

Here, the totality of the circumstances establish exigent circumstances justifying the seizure of the revolver. The unchallenged findings establish exigent circumstances based on danger to the officers.

The police located a Camry in the alley just west of S. Alaska St. It's [sic] lights were off by the time the officers reached it. Officer Johnson exited the patrol car, but was unable to see in through the driver's side windows of the Camry. At that time, he could not see who or if anyone was in it. Believing that whoever had been driving the Camry had already fled from it, Officer Johnson began to move past the front of the Camry. As he moved by the windshield, Officer Johnson was able to see that Defendant JOSEPH CARTER was reclining, as if hiding, in the driver's seat. Officer Johnson advised Officer Martin that the driver was still in the car. Officer Martin observed the defendant in the driver's seat. The defendant was sweating profusely, and refused the officer's orders to exit the vehicle with hands exposed.

....  
Officer Martin grabbed the defendant by the shirt and removed him from the car.

....  
. . . Uncertain as to whether someone else was hiding in the back seat, one of the officers entered the car and picked up the gun.

The unchallenged findings also establish the officers were justified in seizing the other two guns under the plain view and exigent circumstances exception to the warrant requirement. There is no dispute that Officer Martin saw the other two guns in plain view after entering the Camry to seize the revolver on the driver's seat.

[Officer Martin] saw the handgrip of a second handgun (.45 caliber Kimber semi-automatic with handgrip-activated laser sight, loaded, with one round chambered) protruding from between the driver's seat cushion and the center console. While making the second gun safe, the officer then observed the handgrips of yet a third handgun (a loaded 9mm Hi-Point semi-automatic, with one in the chamber) on the floorboard, sticking out from under the driver's seat.

Because the loaded semiautomatic located near the center console and the loaded semiautomatic “sticking out from under the driver’s seat” posed a legitimate threat to officer and public safety, we conclude the court did not err in denying Carter’s motion to suppress.

The cases Carter relies on, State v. Patton, 167 Wn.2d 379, 219 P.3d 651 (2009); State v. Abuan, 161 Wn. App. 135, 257 P.3d 1 (2011); and State v. Swetz, 160 Wn. App. 122, 247 P.3d 802 (2011), are inapposite. Those cases address the search incident to arrest exception and not the open view, plain view, and exigent circumstances exceptions to the warrant requirement.<sup>4</sup>

The unchallenged findings support the court’s determination that the warrantless seizure of the guns was justified under the open view and plain view exception and that there were exigent circumstances.

#### Statement of Additional Grounds

In a statement of additional grounds, Carter argues the State did not prove beyond a reasonable doubt that he attempted to elude a pursuing police officer. Viewing the evidence in the light most favorable to the State, we conclude the jury

---

<sup>4</sup> Below, the State did not argue and the court did not address whether the guns were admissible under the search incident to arrest exception. In a statement of additional authorities, Carter also cites the recent decision in State v. Snapp, 174 Wn.2d 177, 275 P.3d 289 (2012). But in Snapp, the supreme court emphasized that the decision only addressed the search incident to arrest exception.

We emphasize that our decision in this case involves only the search-incident-to-arrest exception to the warrant requirement. In a particular case and depending upon the situation, another basis for a warrantless search might exist such as under the community caretaking exception or the exigent circumstances exception that applies when delay in obtaining a warrant would compromise officer safety, aid an escape, or allow evidence to be destroyed. A search might also occur without a warrant when a vehicle is lawfully impounded. Our holding in the present case does not affect the application or availability of these or any other recognized exceptions to the warrant requirement under article I, section 7.

Snapp, 174 Wn.2d at 196, n.13.

could find Carter guilty of attempting to elude. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Carter also claims the court erroneously instructed the jury on the special verdict form in violation of State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010). But in a recent case, State v. Nunez, 174 Wn.2d 707, 285 P.3d 21 (2012), our supreme court overruled the nonunanimity rule set forth in Bashaw. The court concluded that the nonunanimity rule in Bashaw “conflicts with statutory authority, causes needless confusion, does not serve the policies that gave rise to it, and frustrates the purpose of jury unanimity.” Nunez, 174 Wn.2d at 709-10. In reaching this decision, the court noted that under the Sentencing Reform Act of 1981, chapter 9.94A RCW, the legislature “intended complete unanimity to impose or reject an aggravator.” Nunez, 174 Wn.2d at 715 (citing RCW 9.94A.537(3)). The trial court did not err in instructing the jury on the aggravating factor.

Carter also contends that the court erroneously sentenced him to serve the firearm enhancements consecutively. However, under RCW 9.94A.533(3)(e), all firearm enhancements must run consecutively to the underlying offense and to each other.

Notwithstanding any other provision of law, all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter.

RCW 9.94A.533(3)(e).

We affirm.

WE CONCUR:

Leach, C. J.

Jan, J.