IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. SIDNEY MCDOWELL, Appellant.	No. 39489-8-II UNPUBLISHED OPINION

Penoyar, C.J. – Sidney McDowell appeals his second degree identity theft conviction, claiming the trial court erred in finding that he had abandoned his lunch box before the police searched it without a warrant. Because McDowell abandoned the lunch box in a public place, walked away from it, and denied ownership of it, the trial court did not err in denying his motion to suppress. We affirm.

Facts

By amended information, the State charged McDowell with second degree identity theft[1] and first degree possession of stolen property.[2] Before trial, the superior court held a combined CrR 3.5/3.6 hearing to determine if statements McDowell made to Sergeant Trent Stephens during Stephens's investigation were admissible and whether Stephens lawfully seized evidence from McDowell's lunch box. The superior court denied McDowell's motions to suppress and the matter went to a jury. The jury found McDowell guilty of identity theft but not guilty of possessing stolen property. The sentencing court then imposed a 50-month standard range

[1] A violation of RCW 9.35.020(3).

[2] A violation of RCW 9A.56.140(1) and RCW 9A.56.150(1).

sentence.

On appeal, McDowell challenges only the propriety of Stephens' search. Thus our review is limited to the pretrial suppression hearing and the superior court's findings of fact and conclusions of law from that hearing, which follow:

> Undisputed Facts
>
> I.
>
> On August 22, 2008, the defendant and Paula Ray Fitzhugh were on foot in the area of 96t[h] Street South and Steele Street South.
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> II.
>
> The defendant and Paula Ray Fitzhugh were observed by both Sergeant Trent Stephens and Deputy Tommie Nicodemus, who were in a patrol car together. It appeared to Sergeant Stephens and Deputy Nicodemus that the defendant and Fitzhugh were engaged in a possible domestic violence situation.
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> III.
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> Sergeant Stephens and Deputy Nicodemus stopped their patrol car and exited, approaching the defendant and Fitzhugh. Upon their approach the defendant dropped a lunch box that he had in his hands.
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> IV.
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> Sergeant Stephens contacted the defendant. At the time the defendant was contacted the lunchbox was several feet away from the defendant.
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> V.
>
> The defendant told Sergeant Stephens that nothing was wrong between himself and Fitzhugh.
>
> VI.
>
> Sergeant Stephens looked in the lunchbox that he had recovered from the ground and located $16,200 in savings bonds in the name of Margaret Millin.
>
> VII.
>
> Sergeant Stephens also located a passport in the name of Margaret Millin and some personal paperwork in the name of the defendant.
>
> VIII.
>
> The defendant was placed under arrest and advised of his *Miranda* warnings by Sergeant Stephens.
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> IX.
>
> The defendant indicated that he understood his rights and did not want to speak to Sergeant Stephens or Deputy Nicodemus.
>
> X.
>
> After the defendant indicated he did not wish to speak to the deputies, no further questioning occurred.

> Disputed Facts
>
> I.
>
> It is disputed whether the defendant made a statement to Sergeant Stephens at the scene of the incident in which he denied that the lunchbox he had dropped belonged to him.
>
> II.
>
> It is disputed whether the defendant, when asked by Sergeant Stephens if he could look in the lunchbox, the defendant shrugged his shoulders.
>
> . . . .
>
> Conclusions of Law As to Admissibility
>
> I.
>
> The lunchbox recovered by Sergeant Stephens had been abandoned by the defendant, and therefore the defendant had no privacy rights at the time the lunchbox was lawfully searched.
>
> II.
>
> The lunchbox is deemed to be abandoned property and the court relies, in part, on *State v. Nettles,* 70 Wn. App. 706, 855 P.2d 699 (1993). Sergeant Stephens' search of the lunchbox was lawful.

Clerk's Papers (CP) at 113-117).

analysis

I. Abandonment

McDowell challenges only finding of fact IV, contending that the record does not support it. We review a challenged finding of fact for substantial evidence in the record supporting it. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). We do not review unchallenged findings of fact; rather, we treat them as verities on appeal. *Hill*, 123 Wn.2d at 647. Finally, we review a suppression court's conclusions of law de novo. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999) *overruled on other grounds by Brendlin v. California,* 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007).

At the outset, we note that in making his claim that the record does not support finding four, McDowell cites only testimony from the trial, not the suppression hearing. We do not consider such evidence but, instead, confine our examination to only that testimony presented at

the suppression hearing. That testimony provides substantial evidence supporting the trial court's finding.

First, Stevens testified that he and Deputy Nicodemus saw McDowell and Fitzhugh having what appeared to be a physical confrontation. He testified that McDowell was holding an orange lunch box and that McDowell "dropped it and walked away from it." Report of Proceedings (RP) at 15. When he approached McDowell, he and McDowell and Fitzhugh "were probably within ten feet of [the lunch box]." RP at 15. Stevens explained that McDowell was between him and the lunch box and that McDowell had dropped it "[w]hen he saw us turn our vehicle around." RP at 16. Finally, he testified that after McDowell dropped the lunch box, "[h]e walked away from it, just made distance from himself." RP at 16.

After speaking with McDowell about the apparent altercation McDowell was having with Fitzhugh, Stephens asked McDowell "if that was his lunch box" and McDowell responded "no." RP at 18. Stephens then asked McDowell what was inside the lunch box and McDowell responded that he did not know. When Stephens walked over to the lunch box, picked it up, and asked McDowell if he could look in it, McDowell "just shrugged. He didn't really say anything." RP at 18.

Nicodemus testified that they stopped to investigate what appeared to be a domestic dispute. He testified that McDowell was holding the orange lunch box as they approached but that he dropped it while speaking to Stephens. He then clarified that McDowell dropped the lunch box as they were approaching. He testified that McDowell "just dropped it, had his hand down to the side and let go of it." RP at 35. When asked to clarify the sequence of events, Nicodemus testified that McDowell dropped the lunch box "before we made verbal contact with

them." RP at 40.

Fitzhugh testified that McDowell set the lunch box down on the ground while they were speaking with the officers, that "[i]t was on the ground there with us," and that the officer walked "right over to the lunch box" before speaking with them. RP at54. She then testified that "We are standing there talking to the police, and he just set it down." RP at 55. During cross-examination, the following colloquy took place:

> PROSECUTOR: When he dropped the lunch box, where was the deputy?
>
> FITZHUGH: Pulled up in the car in front of us.
>
> PROSECUTOR: So they hadn't gotten out of the car when he did that?
>
> FITZHUGH: I don't know. It all happened so fast.
>
> PROSECUTOR: Had either of them said anything at the time he dropped the lunch box?
>
> FITZHUGH: No. They pulled clear across lanes of traffic right in front of us. The driver's side got out and went around behind and went straight for the lunch box, and the other one came straight to me and said, Is everything okay?
>
> PROSECUTOR: So before either of them said anything, the lunch box was on the ground?
>
> FITZHUGH: Yeah. I didn't really pay much attention to the lunch box.

RP at 60-61.

McDowell testified that in the minute or two before the police arrived, Fitzhugh had discovered the savings bonds lying on the ground, stuffed most of them in the lunch box, but kept some in her hand as well. McDowell explained that he was chasing after Fitzhugh to see what she had in her hand when the lunch box slipped off his shoulder onto the ground. He said that when he stopped to speak with the police, he was about 10 feet from the lunch box. He testified that as

he was speaking with Stevens, Stevens looked over at the lunch box and asked him what was in it. McDowell said that he did not answer and Stevens walked over, picked up the lunch box, and opened it. During cross-examination, the following colloquy took place:

> PROSECUTOR: Okay. When you saw the police for the first time, did you have your lunch box?
>
> MCDOWELL: No, ma'am, I didn't.
>
> PROSECUTOR: Okay. You had already dropped it?
>
> MCDOWELL: Yes. It already had fell off my shoulder.
>
> PROSECUTOR: You heard Ms. Fitzhugh say that she thought you dropped the lunch box because you were hot. Is that your testimony, sir?
>
> MCDOWELL: No.
>
> PROSECUTOR: Now, you say that when the officers approached you, the lunch box is how far away from you?
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> MCDOWELL: Anywhere from eight to ten feet.
>
> PROSECUTOR: And it has your personal property in it, your paperwork with your name on it?
>
> MCDOWELL: Yes. Yes, ma'am.
>
> PROSECUTOR: And it has the savings bonds?
>
> MCDOWELL: Yes, ma'am.

RP at 78.

While there is conflicting testimony about the lunch box's exact location in relation to McDowell, both McDowell's and Stephens's testimony fully support the trial court's finding. As such, we treat the finding as an established fact and review whether the facts support the trial court's conclusion that the police did not need a warrant to search McDowell's lunch box under

the exception for abandoned property.

> One of the exceptions to the warrant requirement is for voluntarily abandoned property. *State v. Reynolds*, 144 Wn.2d 282, 287, 27 P.3d 200 (2001). As we explained in *Reynolds*, "Needing neither a warrant nor probable cause, law enforcement officers may retrieve and search voluntarily abandoned property without implicating an individual's rights under the Fourth Amendment or under article I, section 7 of our state constitution." *Id.*
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> . . . .
>
> A defendant's privacy interest in property may be abandoned voluntarily or involuntarily. Involuntary abandonment occurs when property was abandoned as a result of illegal police behavior. *See, e.g., State v. Reichenbach*, 153 Wn.2d 126, 137, 101 P.3d 80 (2004). Because neither party has argued that Evans involuntarily abandoned the briefcase, we assume that whatever actions he took in regard to the briefcase were voluntary and that other aspects of the search and seizure were proper. *See, e.g., State v. Zakel*, 119 Wn.2d 563, 567, 834 P.2d 1046 (1992) (holding that this court has "repeatedly stated that we will not decide a constitutional issue unless it is absolutely necessary for the determination of a case"). Thus, we must determine if Evans abandoned the briefcase voluntarily.
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> Voluntary abandonment is an ultimate fact or conclusion based generally upon a combination of act and intent. 1 Wayne R. LaFave, Search and Seizure § 2.6(b), at 574 (3d ed.1996). "Intent may be inferred from words spoken, acts done, and other objective facts, and all the relevant circumstances at the time of the alleged abandonment should be considered." *State v. Dugas*, 109 Wn. App. 592, 595, 36 P.3d 577 (2001). The issue is not abandonment in the strict property right sense but, rather, "'whether the defendant in leaving the property has relinquished her reasonable expectation of privacy so that the search and seizure is valid.'" *Id.* (quoting *United States v. Hoey*, 983 F.2d 890, 892-93 (8th Cir.1993)); *see also United States v. Nordling*, 804 F.2d 1466 (9th Cir.1986). Thus, Evans must show a reasonable expectation of privacy in the briefcase and that he did not voluntarily abandon it.

State v. Evans, 159 Wn.2d 402, 407-409, 150 P.3d 105 (2007) (footnote omitted) (denial of ownership not sufficient in itself to establish abandonment).

The circumstances here support the trial court's conclusion. We begin with the assumption that the abandonment occurred before the police arrested McDowell as the evidence supports this and neither party argues otherwise. We conclude then that this is a voluntary not a coerced abandonment. *See State v. Nettles,* 70 Wn. App. 706, 713, 855 P.2d 699 (1993) (not

coerced abandonment because defendant was not illegally seized when he threw baggie of cocaine under police car).

Several things support our conclusion that McDowell abandoned any privacy interest he had. First, it is undisputed that McDowell had a privacy interest in the lunch box as it contained personal effects as well as the stolen savings bonds and passport. Second, McDowell dropped it on the sidewalk in a public place, not in a place for which he retained any privacy interest as in *Evans,* 159 Wn.2d at 405 (locked briefcase found in backseat of truck). Third, Stephens asked McDowell if it was his and McDowell said no and that he did not know what was in it. Fourth, McDowell, by his own admission, had moved away from the lunch box after he dropped it on the ground. And fifth, when Stephens asked if he could search the lunch box, McDowell merely shrugged his shoulders, implicitly disavowing any privacy interest. *Cf. State v. Reynolds,* 144 Wn.2d 282, 287, 27 P.3d 200 (2001) (seizure of contraband found in jacket underneath stopped vehicle proper when defendant denied ownership); *State v. Dugas,* 109 Wn. App. 592, 36 P.3d 577 (2001) (no abandonment when defendant merely left his jacket on hood of car).

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Penoyar, C.J.

We concur:

Quinn-Brintnall, J.

Johanson, J.P.T.