IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. AUGUST IRA BASS, Appellant.	No. 40937-2-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — A jury found August Ira Bass guilty of possession of marijuana with intent to distribute. RCW 69.50.401(1). Bass appeals, arguing that the trial court erred in admitting evidence seized during a warrantless search of his vehicle. Because the officers' search of Bass's vehicle was lawful, the trial court did not err in denying Bass's motion to suppress the evidence. We affirm.

FACTS

On April 11, 2010, City of Castle Rock Police Sergeant Scott Neves learned from the police communications center that a fleeing vehicle had taken Exit 49 on Interstate 5. Neves happened to be sitting at a park and ride near Exit 49 at the time. Neves saw a white passenger vehicle pass him "at a fairly high rate of speed," run a red light, and turn onto the highway. 1A Report of Proceedings (RP) at 7. Neves started to pursue the vehicle but "another vehicle pulled

out rapidly in front of [him] and a female passenger was leaning outside of the window yelling that that was the [speeding white] vehicle that had just struck them, indicating the vehicle that had just passed [his] location." 1A RP at 7.

Sergeant Neves followed the white vehicle as it exited the highway off Exit 48 and initiated a stop to investigate the possible hit and run. Neves contacted the driver, Bass, and took his driver's license. By that time, the other vehicle had arrived and the passengers of that vehicle told Neves that Bass's vehicle had struck them. Neves ran a check on Bass's driver's license and found it was third degree suspended. Neves told the passengers in the second vehicle to wait in their car and turned to return to Bass's vehicle.

Sergeant Neves noticed that Bass "was reaching around in the passenger compartment of the vehicle. He was reaching underneath the driver's seat, in the center compartments and into the passenger seat, the passenger door and into the glove box area." 1A RP at 11. Neves testified that Bass made "the most movement" he had ever seen in his 20-year career. 1A RP at 12. Neves testified that the "non-stop" movement was "a key indicator for officer safety" because Bass could have been "[h]iding a weapon, [or] trying to gain access to a weapon." 1A RP at 11-13. Neves decided to wait until a second unit arrived before re-approaching Bass.

Washington State Patrol Trooper Bradford Moon responded to assist Sergeant Neves. While en route, Moon called Neves's cell phone, who told Moon to "hurry up" because he needed assistance "right away." 1A RP at 16, 37. Bass's movement was "constant" during the 10 to 15 minutes between the time Neves took his driver's license and when Moon arrived. 1A RP at 14. Neves told Moon, "Hey, we need to get the guy out of the vehicle. He has been digging around in there and, you know, he might possibly have a weapon." 1A RP at 16. Moon testified that the

term "furtive movements" generally refers to "movements around the car that are hidden, that are erratic in behavior, not normal like reaching for a wallet, reaching for paperwork in glove box, where they are quick, rapid movements." 1A RP at 32. Moon testified that such movements are concerning to law enforcement officers because "there are a lot of different hazards and things. Weapons, primarily, are the biggest one inside a vehicle." 1A RP at 33.

Trooper Moon contacted Bass, who complied with Moon's request that he exit his vehicle. Moon handcuffed Bass and advised him that he was not under arrest, only detained because of his furtive movements. Moon frisked Bass, found a baggie of marijuana[1] on Bass's person, and advised him of his *Miranda*[2] rights. Moon then secured Bass in the back seat of his patrol vehicle. Neither officer drew his weapon.

Sergeant Neves testified that once Bass was handcuffed and secured in the patrol vehicle, the immediate threat to the officers' safety—that Bass could access a weapon—was diminished. Nevertheless, Neves initiated a search of Bass's vehicle to look for weapons because it was unclear at that point whether the officers would release and allow him to return to his vehicle. Neves stopped his search when he found a glass pipe in the driver's side console, however, and Trooper Moon completed the search.[3] Moon then advised Bass that he was "at least under arrest

[1] At the CrR 3.6 hearing, Trooper Moon testified that he found a baggie of marijuana on Bass but that Bass was not under arrest at the time. The trial court ruled that "[t]he baggie of marijuana found on the defendant" would be suppressed at trial but Bass waived the suppression. Clerk's Papers (CP) at 53. Bass does not assign error as to this suppression issue or Moon's frisk and we do not discuss either further.

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

[3] Trooper Moon found individually wrapped packages of marijuana underneath the passenger-side front seat. Moon also found cash, a digital scale, and six empty plastic baggies.

for hit and run and driving on a suspended license." 1A RP at 59. Neither officer searched the backseat of the vehicle because Neves did not observe Bass reaching into the backseat. No weapons were found.

Procedural Facts

On April 14, 2010, the State charged Bass with one count of possession of marijuana with intent to deliver and one count of a hit and run of an attended vehicle. RCW 69.50.401(1); RCW 46.52.020(2)(a), (3). Bass moved to suppress the evidence seized during the warrantless search of his vehicle, arguing that because he was handcuffed and secured in the back of a patrol vehicle, the officers' search of his vehicle was unlawful under *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), *State v. Valdez*, 167 Wn.2d 761, 224 P.3d 751 (2009), the Fourth Amendment, and article I, section 7 of the Washington Constitution. The State asserted that Bass's stop was a *Terry*[4] stop, and although neither *Gant* nor *Valdez* applied, even if they did, the search of Bass's vehicle would fall into the warrant exception for an officer's safety.

The trial court denied Bass's motion after a CrR 3.6 hearing. The trial court concluded that Sergeant Neves's stop of Bass was justified, that the officers had legitimate safety concerns, and that the search of Bass's vehicle was reasonable. On June 17, Bass pleaded guilty to the hit and run charge. RCW 46.52.020(2)(a), (3). On June 22, a jury found Bass guilty of possession of marijuana with intent to deliver. RCW 69.50.401(1). Bass timely appeals his conviction for possession of marijuana with intent to deliver.

DISCUSSION

Bass assigns error to the trial court finding that Trooper Moon did not know whether he

[4] *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

would release Bass when he searched Bass's vehicle. Bass also assigns error to the trial court's conclusions that the search of his vehicle was reasonable and that the marijuana evidence was admissible. Bass asserts that the trial court erred in admitting the marijuana evidence because he was under custodial arrest and the warrantless search of his vehicle incident to his custodial arrest was unlawful. Because substantial evidence supports the trial court's finding that Moon did not know whether he would allow Bass to return to his vehicle, and this finding supports the trial court's legal conclusion that the search was reasonable, we affirm.

We review a 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. *State v. Bliss*, 153 Wn. App. 197, 203, 222 P.3d 107 (2009) (citing *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)). Substantial evidence is "'evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premises.'" *State v. Jeannotte*, 133 Wn.2d 847, 856, 947 P.2d 1192 (1997) (internal quotation marks omitted) (quoting *Olmstead v. Dep't of Health*, 61 Wn. App. 888, 893, 812 P.2d 527 (1991)). Unchallenged findings of fact are verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). We review conclusions of law de novo. *Bliss*, 153 Wn. App. at 203 (citing *Mendez*, 137 Wn.2d at 214).

First, Bass asserts that substantial evidence does not support the trial court finding that Trooper Moon did not know whether he would release Bass because Moon had probable cause to arrest Bass once Sergeant Neves discovered Bass's license was third degree suspended. But Bass fails to cite any legal authority to support his apparent contention that when a situation arises such

that there may be probable cause to arrest an individual, the fact that probable cause to arrest may exist compels a presumption that an officer will automatically arrest the individual. RAP 10.3(a)(6). Moreover, Bass's bald assertion that "both officers" knew that his license was suspended is unsupported by the record. Moon testified that the dispatcher initially told him only that Neves needed assistance with a possible hit and run suspect. Neves asked Moon to "hurry up." 1A RP at 16. Moon testified that he did not know Bass's license was suspended or whether Bass had actually hit and run the second vehicle when he approached Bass to secure him.

Trooper Moon explained that he detained Bass based solely on Sergeant Neves's observations of Bass's furtive movements and his concern for the officers' safety. Moon testified, "I'm coming to the situation somewhat blind. Most of my initial impressions are from Sergeant Neves who I have developed this rapport with and the way he is describing these things to me this is a serious situation where we could be dealing with somebody who has retrieved a weapon or is hiding a weapon and waiting for -- for whatever." 1A RP at 41. Moon testified he was "mostly concerned about making sure that the vehicle is safe because if we do let [Bass] go, what is he going to have access to as we are walking back to the car." 1A RP at 44. Moon further testified that the fact he found a small amount of marijuana on Bass's person—the only evidence Moon was then aware of that indicated Bass may have committed a crime—did not mean Moon would automatically book Bass. Moon explained the standard "is somewhat fluid," and that he makes the decision whether to book a person for marijuana possession on a "situation to situation" basis. 1A RP at 45. Accordingly, substantial evidence from the record supports the trial court's finding that Moon did not know whether, based on Bass's furtive movements and the small amount of marijuana found on his person, he would release Bass. *Bliss*, 153 Wn. App. at 203-04.

Second, we review de novo whether the trial court's findings support its conclusions of law that the search of the vehicle was reasonable and that the marijuana evidence was admissible. As an initial matter, we note that Bass does not challenge the trial court findings that Sergeant Neves observed him make the most furtive movements Neves had ever observed in his 20-year career as a law enforcement officer, that Neves was "[c]oncerned for his safety," or that the searched area "was limited to the small areas within" Bass's reach. Clerk's Papers (CP) at 51, 52. These unchallenged findings of fact are verities on appeal. *Hill*, 123 Wn.2d at 644. We further note that Bass does not challenge the trial court's conclusions of law that Neves's stop of Bass was justified and that "[b]oth officers had legitimate safety concerns." CP at 52.

Generally, a warrantless search is unreasonable under both the Fourth Amendment and article I, section 7 of the Washington State Constitution, unless the search falls within one or more specific exceptions to the warrant requirement. *State v. Ross*, 141 Wn.2d 304, 312, 4 P.3d 130 (2000). The State has the burden to prove that a warrant exception applies. *State v. Vrieling*, 144 Wn.2d 489, 492, 28 P.3d 762 (2001); *State v. Ladson*, 138 Wn.2d 343, 349-50, 979 P.2d 833 (1999). One exception to the warrant requirement is that an officer may briefly detain a vehicle's driver for investigation if the circumstances satisfy the "reasonable suspicion" standard under *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). *Mendez*, 137 Wn.2d at 220. In addition, the protective search exception to the warrant requirement applies to permit officers to search for weapons during traffic stops. *State v. Larson*, 88 Wn. App. 849, 855, 946 P.2d 1212 (1997) (quoting *State v. Kennedy*, 107 Wn.2d 1, 12, 726 P.2d 445 (1986)); *see Terry*, 392 U.S. at 21; *State v. Chang*, 147 Wn. App. 490, 495, 195 P.3d 1008 (2008) (citing *Kennedy*, 107 Wn.2d at 12), *review denied*, 166 Wn.2d 1002 (2009). Specifically, an officer who

"has a reasonable belief that the suspect in a *Terry* stop might be able to obtain weapons from a vehicle" may perform a search to determine whether a suspect's furtive gesture hid a weapon. *Chang*, 147 Wn. App. at 497 (citing *State v. Holbrook*, 33 Wn. App. 692, 696, 657 P.2d 797, *review denied*, 99 Wn.2d 1023 (1983)).

The purpose of a search under the *Terry* stop exception is to ensure officer safety, and the scope of the search "is limited to the area 'within the investigatee's immediate control.'" *Chang*, 147 Wn. App. at 496 (quoting *Kennedy*, 107 Wn.2d at 12); *Larson*, 88 Wn. App. at 855. To determine whether the search was reasonably based on officer safety concerns, we evaluate "'the entire circumstances'" surrounding the *Terry* stop. *Chang*, 147 Wn. App. at 496 (quoting *State v. Glossbrener*, 146 Wn.2d 670, 679, 49 P.3d 128 (2002)); *State v. Randall*, 73 Wn. App. 225, 229, 868 P.2d 207 (1994). "For example, if a suspect made a furtive movement appearing to be concealing a weapon or contraband in the passenger compartment, a protective search is generally allowed." *Chang*, 147 Wn. App. at 496 (a valid protective search was made when the officer witnessed the driver lean forward in a way that looked like he was hiding something in the front seat of the car (citing *Kennedy*, 107 Wn.2d at 12)); *Larson*, 88 Wn. App. at 857 (when an officer following a speeding driver saw him leaning towards the floorboard, the officer properly searched inside in the area of the furtive movement).

Here, Sergeant Neves observed Bass running a red light while speeding onto the highway. The passengers of a second vehicle told Neves that Bass had hit their vehicle and drove away without stopping. Neves testified that once he pulled Bass over, he observed Bass engage in what Neves considered the most furtive movements he had seen in his 20-year career. Bass moved constantly for 10 to 15 minutes around the entire front passenger area of his vehicle. Both Neves

and Trooper Moon testified that Bass's movements were consistent with someone attempting to access or conceal a weapon. Both officers testified they were concerned about their safety, even after Bass was handcuffed and secured in the back seat of a patrol vehicle, because it was unclear at that point whether the officers would release him and permit him to reenter his vehicle. Neither officer searched beyond the front passenger compartment.

Under these circumstances, the trial court's findings support its conclusions that the vehicle search was reasonable and that the marijuana evidence was admissible. *Bliss*, 153 Wn. App. at 203-04. The facts of the instant case fall squarely into the protective search exception to the warrant requirement. *Chang*, 147 Wn. App. at 496. Accordingly, the trial court did not err in denying Bass's motion to suppress the marijuana evidence. We affirm Bass's conviction for possession of marijuana with intent to deliver. RCW 69.50.401(1).

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 in accordance with RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

VAN DEREN, J.

WORSWICK, A.C.J.