No. 28149-3-III

Korsmo, J. (dissenting) — The primary issue presented by this appeal involves whether Clarissa Rivas obstructed an officer in the performance of his official duties. I agree with the trial court that she did and would therefore affirm the juvenile court adjudications for obstructing a public servant, possession of marijuana, and possession of drug paraphernalia. Since the majority decides otherwise, I respectfully dissent.

Ms. Rivas argues that she was unlawfully seized by the order to display her hands, and subsequently was illegally arrested for obstruction. I will address each claim in turn.

Seizure. Ms. Rivas contends that the officer lacked authority to seize her, while the State contends that the officer reasonably acted to ensure his safety during an investigation. An officer may seize a person to investigate possible criminal activity if the officer has an articulable suspicion, based on objective facts, that a person has or is about to commit a crime. *Terry v. Ohio*, 392 U.S. 1, 21, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968); *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986).

An officer also has the ability to maintain his personal safety and can frisk a

subject or conduct a brief search for weapons if there is an articulable reason for believing they may be present. *Terry*, 392 U.S. at 21. Cases have also recognized that instead of patting a person down, an officer can take the less intrusive step of having the subject person keep his hands in plain sight. *E.g.*, *State v. Nettles*, 70 Wn. App. 706, 709-712, 855 P.2d 699 (1993), *review denied*, 123 Wn.2d 1010 (1994); *City of Seattle v. Hall*, 60 Wn. App. 645, 806 P.2d 1246 (1991). In *Nettles,* a man was contacted on a street by an officer and agreed to talk to her. The officer directed the man to take his hands out of his pockets. The court concluded that the directive was permissible and did not even amount to a seizure under the circumstances. *Nettles*, 70 Wn. App. at 712. Similarly in *Hall,* an officer approached a man who had just left a "huddle" of other men in an area of known drug trafficking. The man kept his hands in his pockets and acted "antsy" and "nervous." The court concluded that the officer could pat him down since the behavior caused legitimate concern for officer safety. *Hall*, 60 Wn. App. at 647, 651.

The facts known to Officer Hawkins when he approached the group were that the five were gang members, sitting at a table marked with gang graffiti, in a park known for gang and drug activity. As he approached them, one person acted to block his view of the others, all of whom were putting their hands in their pockets. This furtive activity justified the order to have the five youths display their hands. *Nettles.* The group was

trying to hide something from the officer. Under these circumstances, the officer was justified in having them display their hands to ensure that no one was about to draw a weapon of some type. If there was a seizure here, and *Nettles* suggests there was not, it nonetheless was proper under the facts articulated by the officer and found by the trial court.

I agree with the trial court that Officer Hawkins had articulable suspicion justifying the order that Ms. Rivas take her hands out of her pockets. The motion to suppress was correctly denied.

Arrest. Ms. Rivas challenges her arrest for obstructing a public servant on the basis that she was not lawfully seized, arguing that one cannot obstruct a public servant who is performing an illegal act. *State v. Barnes*, 96 Wn. App. 217, 225, 978 P.2d 1131 (1999). Her argument runs afoul of governing Washington Supreme Court precedent.

One obstructs an officer when she "willfully hinders, delays, or obstructs" the officer "in the discharge of his or her official powers or duties." RCW 9A.76.020(1). Ms. Rivas argues that an illegal seizure does not constitute "official powers or duties." The case law holds otherwise.

In *State v. Hoffman*, 116 Wn.2d 51, 804 P.2d 577 (1991), a defendant argued that an officer was not performing his official duties because the officer had (allegedly)

illegally attempted to arrest the defendant without a warrant. *Id.* at 99-100. Our court disagreed, ruling that as long as the officer was not engaged in a "frolic of his or her own," the officer was still performing his official duties even if the arrest was improper or had even lacked probable cause. *Id.* at 100. *State v. Mierz*, 127 Wn.2d 460, 901 P.2d 286 (1995), involved a similar claim by a defendant who argued that he was not guilty of assault because the officers he attacked were trespassing on his property in violation of the Fourth Amendment. Our court again disagreed, holding that officers were still performing official duties even if they were acting outside the strictures of the constitution. *Id.* at 473-476. In *State v. Valentine*, 132 Wn.2d 1, 935 P.2d 1294 (1997), the court, rejecting an old common law rule, determined that a person cannot respond to police illegality by performing a criminal act in return. *Id.* at 21.

These cases stand for the proposition that an officer's improper or even illegal action does not justify an illegal response. One illegal act does not authorize or excuse another one. An officer must be on a "frolic" beyond the scope of his official duties before he is not acting within his powers. An officer's incorrect assessment of the facts or of his lawful authority does not a frolic make.

Applying the noted authorities, Officer Hawkins was performing his "official duties" when he contacted Ms. Rivas and her associates. Thus, even if he had illegally

detained Ms. Rivas, it would not have negated her own illegal response.[1] Her repeated refusal to remove her hands from her pockets, and the later effort to escape the handcuffs, constituted obstruction of a public servant.

The cases relied upon by the majority are not persuasive on this point. *Barnes*, which is factually similar to this case, determined that a person is not guilty of obstructing an officer if the officer lacks grounds to detain him. 96 Wn. App. at 224.[2] It allegedly finds support for this proposition in the lead opinion in *State v. Little*, 116 Wn.2d 488, 806 P.2d 749 (1991). However, the *Little* opinion never even addressed the topic. At issue in *Little* was the validity of stopping non-residents who were allegedly trespassing on public housing property. Several people who fled from police were convicted of obstructing a public servant and appealed, challenging the validity of their detentions. *Id.* at 492-495. The plurality lead opinion found that there was articulable suspicion for investigating the crime of trespassing and upheld the convictions for obstructing a public servant. *Id.* at 496-498.[3] The court did not address whether or not

[1] The obstructing statute, RCW 9A.76.020, stands in contrast to the resisting arrest statute, RCW 9A.76.040, in which the lawfulness of the arrest is an element of the crime that must be established by the prosecution. RCW 9A.76.040(1).

[2] *Barnes* was a split decision. Judge Brown in dissent argued that the officer was acting in the course of his official duties while checking on Mr. Barnes's warrant status. 96 Wn. App. at 225-227.

[3] The three judges in the concurrence simply stressed the facts that justified the seizure for trespass in those cases. 116 Wn.2d at 498-499 (Guy, J., concurring).

the defendants could lawfully still be convicted of obstructing a public servant for fleeing an unlawful detention. The question was not presented by the majority's disposition of the case.[4] *Barnes*, however, concluded that because *Little* had upheld the validity of the stops and the accompanying convictions, a valid stop was essential to a conviction for obstructing a public servant.[5] The *Little* case simply does not support that proposition. Subsequent to *Little*, the Washington Supreme Court has several times addressed the issue of a criminal act in response to allegedly illegal police action. *See Mierz*, *supra*; *Hoffman*, *supra; Valentine*, *supra. Little* simply is not apropos. *Barnes* erred in relying upon it.[6]

Because any seizure was justified and because Ms. Rivas was not privileged to respond illegally even if it had not been proper, I agree with the trial court that the defendant obstructed the officer in the performance of his official duties. The arrest was

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[4] The important issue the parties needed resolved in *Little* concerned the validity of the "no trespass" policy at public housing complexes. The parties were not concerned with the consequences of fleeing allegedly illegal detentions. Hence, the court was not presented with the issue and did not address it.

[5] It is quite possible to obstruct a public servant without being involved in a stop or a seizure. For instance, someone who lies to an officer filling out an accident report would be guilty of obstructing. *Nessman v. Sumpter*, 27 Wn. App. 18, 22, 615 P.2d 522, *review denied*, 94 Wn.2d 1021 (1980).

[6] Interestingly, *Barnes* cited *Nettles* with approval for the proposition that directing someone to remove his hands from his pockets does not constitute a seizure. 96 Wn. App. at 222. The *Barnes* conclusion that an accumulation of actions could convert a voluntary encounter into a detention also foreshadowed *State v. Harrington*, 167 Wn.2d 656, 222 P.3d 92 (2009).

proper and the evidence derived from the arrest could be used against her.[7]

I would affirm. Since the majority concludes otherwise, I respectfully dissent.

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Korsmo, J.

[7] I also would hold that the evidence of drug paraphernalia possession was sufficient, a topic that the majority does not address in light of its disposition of the case.