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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. DARREN R. HOPKINS, Appellant.	)))))))))	No. 29895-7-III UNPUBLISHED OPINION

Korsmo, C.J. — Darren Hopkins challenges the juvenile court's determinations that he possessed marijuana and alcohol, arguing that he was illegally detained and improperly searched. We affirm the adjudications.

FACTS

Deputy Sheriffs Mark Williams and Christopher Garza were on patrol when they saw four young men walk out of an abandoned field that had been the scene of earlier incidents of vandalism and partying. Getting out of their car, the deputies approached the four and asked what was going on. Smelling alcohol, and believing the young men to be

teenagers, they asked if the boys had been drinking. Mr. Hopkins replied, "No, not me." Report of Proceedings (RP) at 80-81.

Deputy Williams then spoke separately with Mr. Hopkins, while Deputy Garza spoke with the other three. Deputy Williams could smell alcohol on Mr. Hopkins' breath and believed he was more intoxicated than the other three young men. Asked again if he had been drinking, Mr. Hopkins affirmed that he had. The deputy then asked and received permission to conduct a weapons frisk.

No weapons were found, but a hard metal container was noted in a pocket. Mr. Hopkins identified it as an Altoids tin. When asked if only Altoids were in the tin, Mr. Hopkins told the deputy it also contained marijuana. He then handed the container to the deputy, who opened it and found three marijuana buds. Deputy Williams arrested Mr. Hopkins and advised him of his constitutional rights.

At a pretrial hearing, the court ruled that the frisk was functionally the same as an arrest and suppressed the statements made in response to questions. The court ruled that the Altoids container and its contents were the fruits of a valid arrest. Mr. Hopkins subsequently was found guilty of misdemeanor possession of marijuana and minor in possession of alcohol. He then timely appealed to this court.

ANALYSIS

Mr. Hopkins argues that he was subjected to an improper stop and that the container was illegally searched. The State argues that the court erred in finding an arrest and in suppressing the statements. We conclude that there was a proper investigatory detention and that the evidence was turned over voluntarily by Mr. Hopkins.[1] Each issue will be addressed in turn.

Investigatory Stop

Because searches and seizures disturb private affairs, article I, section 7[2] protections apply where an individual is seized. *State v. Rankin*, 151 Wn.2d 689, 694, 92 P.3d 202 (2004). A seizure occurs when, under the totality of the circumstances, an individual's freedom of movement is restrained, and that person would not feel free to leave or decline a request due to a police officer's use of force or display of authority. *Id.* at 695. Generally, no seizure occurs where a police officer merely asks an individual whether he or she will answer questions or when the officer makes some further request that falls short of immobilizing the individual. *State v. Nettles*, 70 Wn. App. 706, 710, 855 P.2d 699 (1993). An officer may seize a person to investigate whether or not a crime has occurred if the officer has an articulable suspicion, based on objective facts, that a

[1] Since we uphold the convictions, we will not address the State's argument concerning the suppression of the defendant's statements.

[2] "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

person has or is about to commit a crime. *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); *State v. Kennedy*, 107 Wn.2d 1, 5, 726 P.2d 445 (1986).

A seizure becomes a custodial arrest when the seized person is restrained to the degree associated with formal arrest. *Berkemer v. McCarty*, 468 U.S. 420, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984); *State v. Short*, 113 Wn.2d 35, 40-41, 775 P.2d 458 (1989). The defendant bears the burden of demonstrating that a seizure occurred. *State v. Young*, 135 Wn.2d 498, 510, 957 P.2d 681 (1998). It then becomes the prosecutor's burden to justify the seizure. *State v. Armenta*, 134 Wn.2d 1, 10, 948 P.2d 1280 (1997).

The parties agree that Mr. Hopkins was seized, dispute exactly when that occurred, but also agree that he was not arrested until after the confirmation that marijuana was in the Altoids tin. We agree with the parties that there was a seizure and that there was no arrest until after the discovery of the marijuana. Accordingly, the remaining question is whether the State justified the seizure.

Identifying when the seizure took place is somewhat difficult given this record. Mr. Hopkins argues that it occurred when the police contacted the four youths. That is clearly not the case; there was no show of authority or other efforts made to immobilize the four. *Nettles*, 70 Wn. App. at 710. Even though Mr. Hopkins consented to the weapons frisk, we believe that the frisk was a sufficient display of authority to constitute

a seizure. *See Terry*, 392 U.S. at 16-17. Prior to that point, there was no show of authority or control that amounted to a seizure of Mr. Hopkins or his companions.

The seizure was justified. Mr. Hopkins appeared to be a minor, had given conflicting answers to the question of whether he had been drinking, and smelled of alcohol. Under these circumstances, the officer had an articulable suspicion that a violation of RCW 66.44.270(2) had occurred. A detention to investigate this situation was justified under both the Fourth Amendment and article I, section 7. *Terry*, 392 U.S. 1; *Kennedy*, 107 Wn.2d 1.

Deputy Williams was justified in seizing Mr. Hopkins to investigate the apparent violation of the liquor laws.

Container Search

Mr. Hopkins next contends that the Altoids container was improperly searched because he had not yet been arrested at the time the officer looked inside the container. While we agree that there had been no arrest at that point, it is of no moment. Mr. Hopkins voluntarily turned the container over to the deputy after advising him that it contained marijuana.

When a person hands contraband over to the police, the question typically is analyzed in Fifth Amendment terms to see if the testimonial act of producing the evidence

is itself admissible. *E.g.*, *State v. Wethered*, 110 Wn.2d 466, 468-71, 755 P.2d 797 (1988). Even where the act of producing the evidence is ruled inadmissible, the evidence itself normally is admitted, even if the basis for doing so is left unstated. *Id*. at 471-74. This case does not present any Fifth Amendment issue in this regard.

There may be situations where the voluntary production of contraband is properly viewed as a consent issue. For instance, if the deputy had asked Mr. Hopkins if he could look in the container, the question would probably be correctly framed as whether there had been consent to the action. This case does not present that fact pattern.

Instead, Mr. Hopkins produced the container without being asked once he admitted that there was marijuana inside of it. In this circumstance, we believe that the issue is properly viewed as an abandonment of any privacy interest in the container. This type of claim typically arises when a suspect drops or tosses contraband when being contacted by the police. In such circumstances, our courts consistently find that there is no privacy interest in the abandoned materials.[3] *E.g.*, *State v. Loran*, 62 Wn.2d 4, 380 P.2d 733 (1963); *State v. Serrano*, 14 Wn. App. 462, 544 P.2d 101 (1975); *State v. Davis*, 12 Wn. App. 32, 527 P.2d 1131 (1974).

[3] The issue commonly being litigated in these cases is whether improper police conduct led to the discovery of the contraband. *E.g.*, *Wethered*, 110 Wn.2d at 474-75; *State v. Serrano*, 14 Wn. App. 462, 466-70, 544 P.2d 101 (1975).

In the circumstances here, where Mr. Hopkins voluntarily handed over the container with the contraband after he told the deputy about it, we think the abandonment cases provide the best analogy. He no longer retained any privacy interest in an object that he gave away. The fact that he handed it to the deputy rather than dropped it at his feet or tossed it away in the deputy's presence makes no difference. He divested himself of the contraband without law enforcement action. At that point he could no longer claim a privacy interest in the container.

The trial court properly admitted the marijuana into evidence. The adjudications are affirmed.

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

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Korsmo, C.J.

I CONCUR:

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Siddoway, J.