IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DANIEL SWEANEY, Appellant.	No. 38138-9-II UNPUBLISHED OPINION

Armstrong, J. — Daniel Sweaney appeals his conviction for unlawfully possessing a controlled substance, arguing that the trial court should have granted his motion to suppress the evidence obtained after a traffic stop. He contends that after the traffic stop terminated, the police officer wrongfully seized him without articulable facts giving rise to a reasonable suspicion of criminal activity. We agree, and therefore reverse and remand for the trial court to dismiss.

FACTS

On March 26, 2008, Trooper Jeffrey Kershaw stopped Sweaney for speeding. As Kershaw exited his patrol car, he heard Sweaney loudly ask, "Uh-oh, what did I do now?" Report of Proceedings (RP) at 12. Kershaw explained the traffic violation to Sweaney, and

Sweaney acknowledged his speed. During this contact, a woman passenger appeared to be sleeping in the front seat.

Sweaney offered his driver's license to Kershaw before Kershaw asked for it. Kershaw then asked for Sweaney's vehicle registration and insurance. Sweaney was initially unable to locate either document. As Sweaney crawled into the back seat to continue looking for the documents, Kershaw saw Sweaney quickly shove a plastic bag underneath the driver's seat. Sweaney eventually found his vehicle registration behind the driver's seat. But he could not produce proof of insurance even after Kershaw prompted him to continue searching. At that point, Sweaney stepped out of his vehicle and continued searching for his paperwork in the backseat. Kershaw thought "it was kind of strange" that Sweaney did not go into the hatchback area of the vehicle where there was a blue backpack. RP at 19.

When Kershaw asked about black plastic in Sweaney's left shirt pocket, Sweaney removed the item revealing factory packaging for a screwdriver. Kershaw testified that Sweaney looked nervous, did not make good eye contact, and fidgeted during the traffic stop.

After Kershaw checked Sweaney's driving status, he decided not to issue any infractions. Kershaw handed Sweaney, who was back in the car, his driver's license and registration. Sweaney acknowledged the return of his documents, and Kershaw said "he was free to go." RP at 19.

But Kershaw then immediately asked Sweaney if he would mind answering some questions. Sweaney responded, "Like what?" RP at 20. Kershaw, rather than answering the question said, "Let me visit with you out here." RP at 20. Sweaney stepped out of the vehicle

and walked with Kershaw to the rear of Sweaney's car. Kershaw testified as to why he wanted to ask Sweaney more questions:

> based on the totality of the things that I had seen in the car, again, initially his comment out the window to me, having his driver's license ready to go . . . his actions in the vehicle, the plastic bag that he had shoved underneath the front driver's seat at the time, just everything taken together . . . I felt that there was some type of criminal activity afoot.

RP at 20.

Kershaw and Sweaney made small talk about the multicolored paint on Sweaney's car. Kershaw then told Sweaney he wanted to ask some specific questions and then he would "get [Sweaney] on down the road." RP at 23. Kershaw asked Sweaney if he had any controlled substances in his vehicle. Sweaney responded with a higher-toned "no" and looked toward the blue backpack in the hatchback of the car. RP at 23, 25. Kershaw then asked if there was marijuana in the car. Sweaney responded with a lower-toned "no." RP at 23. Kershaw testified that Sweaney crossed his arms tightly across his chest, spoke quickly, and was not able to stand still. Sweaney also seemed to swallow hard a couple of times and lick his lips.

When Kershaw asked to look in the backpack, Sweaney shook his head no and stated he "just wanted to go home." RP at 27. Kershaw asked if there was marijuana in the backpack. Sweaney denied having any marijuana. Kershaw asked to search the backpack again, and Sweaney again refused. Kershaw informed Sweaney that he would be calling a drug dog to the scene.

Sweaney asked Kershaw, "Do we have to go through all of that?" RP at 29. Kershaw responded that a drug dog would not be needed if Sweaney consented to the search. Sweaney

said, "Go ahead and look." RP at 29. Kershaw told Sweaney that he needed a consent-to-search form signed. Sweaney responded that he wanted the drug dog instead. Kershaw asked if he had ever spent time in jail and Sweaney said, "No." RP at 31. Kershaw asked for consent again; Sweaney declined and waited for the drug dog.

After about 20 to 25 minutes, the drug dog arrived and "alerted" to three points on the car, but the dog did not pinpoint the presence of drugs. RP at 32-33. Nevertheless, Kershaw obtained a telephonic search warrant. In a search of Sweaney and the backpack, Kershaw found a glass container with a straw that looked like a crack cocaine pipe in the backpack and a small amount of crack cocaine in Sweaney's front shirt pocket.

The State charged Sweaney with unlawful possession of a controlled substance. RCW 69.50.4013(1). Sweaney moved to suppress all evidence obtained from the vehicle search. The trial court denied the motion, finding that Kershaw released Sweaney after the traffic stop, that Sweaney was free to go at that point, and that Sweaney consented to further discussion with Kershaw outside the vehicle. The trial court also found that during the course of the consensual contact, Kershaw developed a reasonable suspicion of criminal activity that justified the seizure and detention of Sweaney until the drug dog arrived. The trial court found Sweaney guilty as charged.

ANALYSIS

I. Was Sweaney Seized Immediately Following the Traffic Stop?

A. Standard of Review

When reviewing a trial court's denial of a suppression motion, we ask whether substantial

evidence supports the challenged findings of fact and, if so, whether the findings support the trial court's conclusions of law. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Evidence is substantial when it is sufficient to persuade a fair-minded rational person of the truth of the finding. *State v. Vickers*, 148 Wn.2d 91, 116, 59 P.3d 58 (2002). Although the trial court's factual findings are entitled to deference, whether those facts constitute a seizure is a question of law that we review de novo. *State v. Thorn*, 129 Wn.2d 347, 351, 917 P.2d 108 (1996), *overruled on other grounds by State v. O'Neill*, 148 Wn.2d 564, 62 P.3d 489 (2003).

B. Investigative Stop

Sweaney argues that Kershaw continued to seize him after the purpose of the traffic stop had been completed. Alternatively, Sweaney maintains that he was re-seized when Kershaw asked him about controlled substances in the vehicle.

A police officer seizes a person under article I, section 7 of the Washington State Constitution when a reasonable person in the individual's position would not believe that he or she is free to leave or free to decline an officer's request and terminate the encounter. *O'Neill*, 148 Wn.2d at 574. Although an investigative stop is less intrusive than an arrest, it is nevertheless a seizure. *See State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986) (citing *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)). Sweaney has the burden of proving that a seizure occurred in violation of article I, section 7. *See O'Neill*, 148 Wn.2d at 574.

Whether a seizure occurred and whether that seizure was valid are separate inquiries. *O'Neill*, 148 Wn.2d at 575-76. If an officer's conduct, objectively viewed, rises to the level of a seizure, that seizure is valid only if the officer has a well-founded suspicion that the individual is

engaged in criminal activity based on specific and articulable facts that reasonably warrant detaining the individual. *O'Neill*, 148 Wn.2d at 576 (quoting *Terry*, 392 U.S. 1). "The officer's reasonable suspicions are, therefore, relevant *once a seizure occurs*, and relate to the question whether the seizure is *valid* under article I, section 7." *O'Neill*, 148 Wn.2d at 576.

The State argues that Kershaw terminated the traffic stop when he advised Sweaney that "he was free to [go]" and Sweaney consented to the conversation that followed. Br. of Resp't at 8. During a consensual encounter, a police officer seeks the voluntary cooperation of an individual by asking noncoercive questions. *State v. Rankin*, 151 Wn.2d 689, 717, 92 P.3d 202 (2004). Here, viewing Kershaw's actions objectively, no reasonable person would believe he was free to leave the scene rather than comply with Kershaw's direction to get out of the car and "[l]et me visit with you out here." Although Kershaw purported to terminate the traffic stop when he told Sweaney "he was free to [go]," he instantly asked Sweaney if "he would mind answering some questions for me." RP at 19. When Sweaney responded, "Like what?", Kershaw did not explain that he wanted to ask about drugs. Rather, Kershaw requested Sweaney exit the vehicle. *See O'Neill*, 148 Wn.2d at 582 (O'Neill was seized when the officer asked him to exit the vehicle). Kershaw exercised considerable authority over Sweaney while he looked for his registration and insurance documents by asking to see the plastic in Sweaney's pocket, encouraging Sweaney to continue looking, and suggesting that he look in the backpack. In addition, Kershaw did not answer Sweaney's question as to what Kershaw wanted to talk about. We are unwilling to say that Sweaney consented to getting out of the car and talking to Kershaw without knowing what the officer wanted to talk about. Given these circumstances, we conclude

that the trial court erred in finding that Sweaney consented to the discussion immediately after Kershaw told Sweaney he was free to leave.

II. Reasonable Suspicion of Criminal Activity

Sweaney argues that his seizure was not justified by articulable facts, which gave rise to a reasonable suspicion of criminal activity.

Generally, warrantless searches and seizures are unconstitutional. *State v. Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008). An investigative stop, known as a *Terry* stop, is an exception that requires a reasonable, articulable suspicion, based on specific, objective facts, that the person seized has committed or is about to commit a crime. *Gatewood*, 163 Wn.2d at 539.

Here, Kershaw's investigative questioning of Sweaney after the traffic stop was lawful if either (1) it was within the scope of the original traffic stop or (2) Kershaw had a lawful reasonable suspicion of criminal activity to investigate further. *State v. Allen*, 138 Wn. App. 463, 471, 157 P.3d 893 (2007). It is undisputed that Kershaw's questioning outside of the vehicle was not within the scope of the original traffic stop. Thus, the State must demonstrate that Kershaw had a reasonable suspicion that Sweaney was engaged in criminal activity.

The seizure must be justified at its inception. *Gatewood*, 163 Wn.2d at 539. Kershaw testified that before asking Sweaney to answer additional questions outside the vehicle, he had observed only that Sweaney (1) made a strange comment out the window, (2) produced his driver's license unprompted, (3) was nervous, (4) continually searched behind the driver's seat and not in the hatchback area of the vehicle, (5) quickly shoved a plastic bag under the driver's seat, (6) did not make good eye contact, and (7) exhibited "body language, just fidgeting, looking, things that just didn't seem consistent with, to me, the innocent motoring public." RP at 16. Kershaw testified at trial:

> based on even his nervous tendencies, I believed that there was some type of criminal activity afoot, and so I wanted to further ask him some questions about what may have been in the vehicle. But I also know that, by law, typically, I need to let these guys know they're free to go.

RP at 43. Kershaw's description of Sweaney's nervous behavior is not sufficient to give rise to a reasonable suspicion of criminal activity. *State v. Henry*, 80 Wn. App. 544, 552, 910 P.2d 1290 (1996). "'Most persons stopped by law enforcement officers display some signs of nervousness.'" *Henry*, 80 Wn. App. at 552 (quoting *State v. Barwick*, 66 Wn. App. 706, 710, 833 P.2d 421 (1992)). In *Henry*, a Benton County sheriff stopped a car for a traffic violation. The officer noticed the driver acted very nervous, had glassy eyes, moved slowly, looked at the floorboard, and could not locate his driver's license, vehicle registration, and proof of insurance right away, but eventually found them. *Henry*, 80 Wn. App. at 546. The court held that these facts were not objectively reasonable to justify the officer's further detention of the driver. *Henry*, 80 Wn. App. at 553.

With several exceptions, the facts here do not go beyond *Henry*. Kershaw found it suspicious that Sweaney offered his driver's license before being asked. While this demonstrates that Sweaney knew Kershaw intended to ask for his license and that Sweaney was anxious to comply, it does not objectively suggest any criminal behavior. Neither does Sweaney's continued search of the backseat area and not the backpack. Sweaney found his registration in the backseat area, not the backpack. Kershaw knew this before he detained Sweaney after the traffic stop. Thus, any suspicion Kershaw might have had from this was dissipated before he told Sweaney to get out of the car to "visit." Moreover, this circumstance is far too subjective to amount to

specific, objective facts suggesting criminal activity. We hold that the trial court's findings of fact do not support a legal conclusion that Kershaw had a reasonable suspicion of criminal activity that would support his seizure of Sweaney. The trial court should have granted Sweaney's motion to suppress.

We reverse and remand for the trial court to dismiss.

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.

Armstrong, J.

We concur:

Bridgewater, J.

Van Deren, C.J.