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Certification of Word Count: 1,803

COURT OF APPEALS, STATE OF COLORADO Colorado State Judicial Building Two East 14th Avenue Denver, Colorado 80203	2009 JAN 13 P 5:43 CLERK COURT OF APPEALS
El Paso District Court Honorable J. Patrick Kelly Case Number 06CR6026	
THE PEOPLE OF THE STATE OF COLORADO Plaintiff-Appellee v. Anthony Thomas Defendant-Appellant	☐ COURT USE ONLY ☐
Douglas K. Wilson, Colorado State Public Defender LYNN M. NOESNER, #39209 1290 Broadway, Suite 900 Denver, CO 80203 Appellate.pubdef@coloradodefenders.us (303) 764-1400 (Telephone)	Case Number: 07CA2367

REPLY BRIEF OF DEFENDANT-APPELLANT

In response to matters raised in the Attorney General's Answer Brief, and in addition to the arguments and authorities presented in the Opening Brief, Defendant-Appellant submits the following Reply Brief.

ARGUMENT

I. AS CONCEDED BY THE PEOPLE BELOW, THE POLICE DETENTION OF MR. THOMAS WAS NOT CONSENSUAL, AND THERFORE THE DETENTION REMAINS SUBJECT TO THE REQUIREMENTS OF THE FOURTH AMENDMENT.

For the first time on appeal, the People contend that the police detention of Mr. Thomas was a consensual encounter rather than an investigatory stop. The People seek to circumvent the requirements of the Fourth Amendment by raising an issue that the district attorney conceded below. This argument cannot prevail for two reasons. First, the People effectively waived this argument below and did not preserve it for appellate review. *See People v. Salazar*, 964 P.2d 502, 507 (Colo. 1998). Secondly, even assuming this Court chooses to address this for the first time on appeal, Mr. Thomas adequately proved that he was seized and the evidence shows that it was an investigatory detention, not a consensual encounter.

A. The People waived the issue of consensual encounter below and as such cannot raise it on appeal.

At the start of the suppression hearing, the district attorney characterized her argument as follows:

> And I can tell the Court preliminarily that our argument is going to be that the defendant was stopped pursuant to 16-3-103, the stopping of a suspect. He was seen with a known -- excuse me -- pros--prostitute and in an area which sale of narcotics and prostitution is common.(2007-04-20, p6)

The statute cited by the district attorney concerns investigatory stops and the justification necessary to support a stop. *See* § 16-3-103. It is implicit in the district attorney's statement and her statutory citation that the State believed that the police contact at issue amounted to an investigatory stop. Further, at no point during the suppression hearing did the district attorney ever assert that the detention was consensual. Rather, the district attorney contended that the police were justified in seizing Mr. Thomas because he was present in a high crime area with a known prostitute.

The issue before the district court concerned the constitutionality of the warrantless seizure of Mr. Thomas. The district attorney never disputed the fact that Mr. Thomas was seized. The district attorney never argued that the stop was consensual. As such, the district court's findings regard whether the "investigatory stop" was constitutionally permissible.(2007-04-20, p66-68) The district court implicitly found that Mr. Thomas had been seized. The district court made no findings or rulings as to whether the detention was actually a consensual encounter, because that issue was never before the court.

"It is axiomatic that issues not raised in or decided by a lower court will not be addressed for the first time on appeal." *Salazar*, 964 P.2d at 507; *see King v. People*, 785 P.2d 596, 604 (Colo.1990) (holding the People lost the right to raise on appeal an issue which the People failed to raise at trial); *People v. Sporleder*, 666 P.2d 135, 138-39 (Colo.1983). Here, because the People did not dispute that fact that Mr. Thomas was seized or otherwise assert that the Mr. Thomas had a consensual encounter with the police at the suppression hearing, the People have waived this argument for appeal. *Moody v. People*, 159 P.3d 611, 614 (Colo. 2007).

The present case is analogous to *People v. Salazar*, 964 P.2d 502 (Colo. 1998). In *Salazar*, the People tried to argue for the first time on appeal, as here, that the police contact at issue amounted to a consensual encounter rather than a seizure. 964 P.2d at 507. The Colorado Supreme Court found that the People had conceded the issue below by focusing entirely on whether there was reasonable suspicion to support the seizure, and therefore, the Court declined to address the People's consensual encounter argument on appeal. *Id.*

Accordingly, this Court should decline to address the People's new argument on appeal.

B. The evidence supports the district court's implicit finding that the police seized Mr. Thomas.

Assuming *arguendo* this Court decides to address the issue raised by the People for the first time on appeal, the evidence in the record demonstrates that the contact between the police and Mr. Thomas constituted a seizure, specifically an investigatory stop, not a consensual encounter.

A person is "seized" within the meaning of the Fourth Amendment when law enforcement officers cause any "meaningful interference, however brief, with an individual's freedom of movement." *United States v. Jacobsen*, 466 U.S. 109, 126 n.5 (1984) (citations omitted). Conversely, police contact is consensual when a person is free to leave and there is no restraint on the person's liberty. *Terry v. Ohio*, 392 U.S. 1 (1968); *Outlaw v. People*, 17 P.3d 150, 155 (Colo. 2001); *People v. Padgett*, 932 P.2d 810, 813-14 (Colo. 1997).

The test for determining whether an encounter is consensual is whether a reasonable person under the circumstances would believe he or she was free to leave or to disregard the officer's request for information. *Outlaw*, 17 P.3d at 155. Factors relevant to this determination include: whether the defendant tries to leave and is prevented from doing so; the number of officers; the display of uniforms or weapons; stopping the defendant's course of travel or relocating the defendant; the use of language or a tone indicating that compliance with the officer's request might be

compelled (or a demand, rather than a request, for information); and any physical touching of the defendant. *See Outlaw*, 17 P.3d at 156 (*citing United States v. Mendenhall*, 446 U.S. 544, 554 (1980)); *Padgett*, 932 P.2d at 814; *People v. Diaz*, 793 P.2d 1181, 1186 (Colo. 1990).

Here, contrary to the Attorney General's contentions, the record establishes that the police interfered with Mr. Thomas' freedom of movement through a show of police authority. The police officers approached Mr. Thomas and his companions in two large vehicles and blocked their path.(2007-04-20, p16, 19, 52) Detective Fox testified that she pulled her SUV in front of their path.(2007-04-20, p16) The police officers were wearing badges, radios, black hats with "POLICE" in large white writing, handcuffs and firearms. (2007-04-20, p9, 16-17, 21, 23, 29, 33) Mr. Thomas attempted to walk away, but Detective Chaney called him back.(2007-04-20, p. 10, 38, 52)

Mr. Thomas made his desire to avoid police contact known by walking away. However, before Mr. Thomas could walk 15 feet away, Detective Chaney summoned him: "Sir, can you step over here for a minute."(2007-04-20, p. 52) At this point, Mr. Thomas likely knew the two police officers were armed and that they had arrested Ms. Evans. Detective Chaney immediately patted Mr. Thomas down, during which time Mr. Thomas was not free to leave.(2007-04-20, p. 37-38)

A reasonable person in Mr. Thomas' circumstances would not have felt free to continue walking and disregard police commands. The police twice altered Mr. Thomas' direction of travel by initially blocking his path and then calling him back when he tried to walk away. When Mr. Thomas walked back to Detective Chaney, it was an act of submission, rather than a voluntary one. Thus, the police effected a seizure the moment they prevented Mr. Thomas from walking away. *See Outlaw*, 17 P.3d at 156; *Padgett*, 932 P.2d at 814; *Parker v. Commonwealth*, 496 S.E.2d 47, 51 (Va. 1998); *Quarles v. State*, 696 A.2d 1334, 1337 (Del.Supr.1997).

II. THE POLICE LACKED ADEQUATE JUSTIFICATION TO SUPPORT MR. THOMAS' SEIZURE, WHICH WAS UNREASONABLE IN SCOPE AND CHARACTER.

The Attorney General mischaracterizes Mr. Thomas' argument both below and on appeal. At the suppression hearing and in his Opening Brief, Mr. Thomas challenged the constitutionality of the investigatory stop to which he was subjected. In his Opening Brief, Mr. Thomas addressed the three factors that the district court made findings on regarding the constitutionality of the police intrusion. (*See* 2007-04-20, p67-69) Discussion of the investigatory stop's reasonableness and constitutionality necessarily encompasses analysis of the purpose and scope of the stop as well. *See Terry v. Ohio*, 392 U.S. 1, 30 (1968); *Outlaw*, 17 P.3d at 156 (an investigatory stop must be brief in duration, limited in scope, and narrow in purpose).

The police immediately searched Mr. Thomas upon detaining him. The scope and nature of the seizure consisted of a physical pat down, not an interview or series of questions. Thus, in challenging the police seizure, Mr. Thomas implicitly challenged the pat down as well, preserving the issue for review.

Further, the district court made specific findings regarding the pat down. In discussing the "scope and character of the intrusion," the court found that "given the nature of the area, given the nature of the offenses that the officers had explored and investigated in this area would cause them concern for their own safety, and it would be a reasonable intrusion for them to pat down the defendant." (2007-04-20, p68-69) This legal conclusion is subject to *de novo* review. *See People v. King*, 16 P.3d 807, 812 (Colo. 2001).

However, if this Court does not deem to address the reasonableness of the police pat down as part of the seizure, the issue may nevertheless be decided based on the police's lack of reasonable suspicion or justification for their intrusion. A pat down performed as a part of an investigatory stop cannot be justified solely on the need for officer safety. *See People v. Rahming*, 795 P.2d 1338, 1341 (Colo. 1990) ("Three conditions must exist before an individual may be subjected to an **investigative stop and limited search of his person**: (1) there must be an articulable and specific basis in fact for suspecting that criminal activity has taken

place, is in progress, or is about to occur; (2) the purpose of the intrusion must be reasonable; and (3) the scope and character of the intrusion must be reasonably related to its purpose.")(emphasis added).

Individuals have a fundamental right to enjoy the use of public streets without being subjected to warrantless searches and seizures. *Id.* at 1340-41. Thus, as a threshold matter, the police must have sufficient justification that amounts to more than an inchoate and unparticularized suspicion or hunch for intruding upon a person's personal security. *Id.* Before the police could lay a hand on Mr. Thomas, regardless of the incidence of crime in the area, they needed to have an articulable and specific basis in fact for suspecting that Mr. Thomas was engaging in criminal activity.

Here, the police lacked a sufficient justification for the entire detention including the pat down. Accordingly, the district court erred in failing to suppress all evidence and statements obtained as a result of the illegal and unjustified detention of Mr. Thomas.

CONCLUSION

WHEREFORE, for all arguments asserted in Mr. Thomas' Opening Brief and the above reasons, this Court should reverse Mr. Thomas' conviction and remand with directions.

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CERTIFICATE OF SERVICE

I certify that, on January 13, 2009, a copy of this Reply Brief of Defendant-Appellant was hand-delivered to the Colorado Court of Appeals for deposit in the Attorney General's mailbox to the attention of:

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