No. 100135-5

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ZACHERY KYLE MEREDITH,

Appellant.

RESPONDENT'S ANSWER TO BRIEF OF AMICI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON STATUTES

OTHER AUTHORITIES

I. INTRODUCTION

The consensual or permissive nature of a citizen-police encounter has long been recognized as a potential defining factor in determining whether a law enforcement contact is constitutional. It has frequently arisen in the context of social contacts where the court has analyzed the effect of the contact on a reasonable person. A reasonable person understands that when entering a train or other barrier-free transit they may be asked to show proof of payment. When a person knowing such a request is forthcoming and opts to enter the transit system anyway, the person consents to a limited and narrow contact for the sole purpose of presenting proof of their fare. Such a request does not constitute a non-consensual seizure.

Community Transit conducts fare enforcement by checking every rider on a bus. There is no opportunity for selectively requiring proof of payment from some riders

but not others permitting an entry point for selective enforcement and implicit bias. A request for proof of payment is made of all riders on the bus equally.

II. ISSUES

The issues presented by the brief of amici can be summarized as follows:

1. Was the defendant seized when Deputy Dalton stated "proof of payment or ORCA card"?

2. Under Article I, Section 7, may a person consent to a law enforcement contact even if such contact would otherwise constitute an unlawful seizure?

3. Did the defendant validly consent to a limited contact for the purpose of checking whether he paid the fare?

4. Should the court allow citizens to consent to fare checks?

III. STATEMENT OF THE CASE

A detailed set of facts is set out in the Brief of Respondent at pages 1–3 and essential facts are discussed in the Supplemental Brief of Respondent.

IV. ARGUMENT

A. THE DEFENDANT HAS FAILED TO ESTABLISH FACTS CONSTITUTING A SEIZURE.

When analyzing police-citizen interactions, the court must first determine whether a warrantless search or seizure has taken place. State v. O'Neill, 148 Wn.2d 564, 574, 62 P.3d 489 (2003). The person who claims that a seizure has occurred bears the burden of proving it. State v. Thorn, 129 Wn.2d 347, 354, 917 P.2d 108 (1996). In the present case, no lower court found that Mr. Meredith was seized by the request for "ORCA card or proof of payment."

A "seizure" occurs when an officer, by physical force or by show of authority, restrains an individual's freedom of movement. United States v. Mendenhall, 466 U.S. 544,

553, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980). "A person is 'seized' within the meaning of the Fourth Amendment of the United States Constitution only when restrained by mean of physical force or a show of authority." State v. Thorn, 129 Wn.2d 347, 352, 917 P.2d 108 (1996). "The court must look to the totality of circumstances to determine whether a seizure has occurred." Id., citing Florida v. Bostick, 501 U.S. 426, 437, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991). Article I, Section 7 and Fourth Amendment analysis are generally the same for determining whether a seizure occurred. State v. Carriero, 8 Wn. App. 2d 641, 654, 439 P.3d 679 (2019) (acknowledging the analysis differs only when defendant does not yield to authority of officer who has taken action to seize defendant).

Washington courts have regularly held that a request for identification does not rise to the level of a seizure unless an officer takes possession of the

identification and removes it from its owner's presence. State v. Thomas, 91 Wn. App. 195, 955 P.3d 420 (1998); State v. Dudas, 52 Wn. App. 822, 834, 764 P.2d 1012 (1989); see State v. Hansen, 88 Wn. App. 575, 994 P.2d 855 (2000).

The record produced at the suppression hearing identified one statement made by Deputy Dalton relevant to the question of whether the defendant was seized: "proof of payment or ORCA card." CP 95–96. This request was made in a conversational tone. CP 95–96; slip op. at 1. Similar to a request for identification, this request alone does not rise to the level of a seizure. In response to the officer's request, the defendant immediately began searching for his proof of payment or ORCA card but appeared unable to produce it. CP 107–08. Nothing in the record indicates anything other than voluntary action on the defendant's part.

The record does not reveal whether individuals were permitted to leave the bus as law enforcement entered while the bus was stopped. Although it is plain that individuals could not leave while the bus was moving, such restraint would have existed whether officers were present or not. The fact of a moving bus does not create a seizure where one does not otherwise exist. Bostick, 501 U.S. at 435–36.

Amici do not highlight any additional facts which would lead to the prerequisite conclusion that the defendant established facts which constitute a seizure. Because the defendant fails to establish that a seizure occurred, the arguments of amici should not be reached.

B. WASHINGTON COURTS HAVE LONG RECOGNIZED THAT INDIVIDUALS MAY VALIDLY CONSENT TO LAW ENFORCEMENT CONTACT.

Amici argue that consent is not an exception to the warrant requirement in the context of the seizure of an individual. Brief of Amici at 9, n.2. The argument likely

derives from the largely semantic distinction over whether consent is an "exception" which must be proved after a seizure has been established or whether the existence of consent means that no seizure occurred whatsoever.

This court has ordinarily addressed consent within the concept of determining whether a seizure has occurred. For example, ordinarily, an officer's request of identification from a passenger must be supported by a reasonable articulable suspicion of wrongdoing by the passenger. State v. Rankin, 151 Wn.2d 689, 92 P.3d 202 (2004). However, where such a conversation is deemed to have been consensual in nature, it does not constitute a seizure. State v. Mennegar, 114 Wn.2d 304, 309–10, 787 P.2d 1347 (1990).

In Mennegar, the driver of a stopped vehicle was discovered to be under the influence of intoxicants. Id. at 309. To avoid potential impound of the vehicle, the passenger of the vehicle was asked whether he was

willing to drive the vehicle away from the scene. Id. To ensure that the passenger was able to drive the vehicle, the officer asked him to produce his his identification. Id. at 312.

The court noted that such requesting identification of a passenger would ordinarily have been prohibited, citing State v. Larson, 93 Wn.2d 638, 611 P.2d 771 (1980). Nevertheless, because the conversation in Mennegar was voluntary and consensual, "it did not constitute a seizure." Id. at 314. This was true even though the vehicle would likely have been impounded if the passenger had not produced identification, leaving the passenger without his chosen mode of transportation. Id. at 312.

Similarly in the context of social contacts, the court has found that when one consents to law enforcement contact, that contact does not amount to a seizure. An encounter between a citizen and the police is consensual

or permissive if a reasonable person under the totality of the circumstances would feel free to walk away. United States v. Mendenhall, 446 U.S. 544, 554, 100 S. Ct. 1870, 64 L. Ed.2d 497 (1980); State v. Mennegar, 114 Wn.2d 304, 310, 787 P.2d 1347 (1990). The focus of the test is on what a reasonable person would feel. The test is objective, not subjective. "[T]he 'reasonable person' test presupposes an innocent person." Bostick, 501 U.S. at 438.

A reasonable rider knows that aboard a barrier-free transit system a fare inspection may be forthcoming. At the time of entering the transit system, a reasonable (fare-paying) rider is free to walk away and not consent to a potentially forthcoming request for fare. The rider is free to call a friend for a ride, rent a scooter, use a bike, or hail a cab or ride-share vehicle. The decision to enter transit is freely and voluntarily made knowing that a request may be forthcoming. The decision to enter the bus in the face

of such understanding can only be understood as consent to that condition of entry. See Farkas v. Williams, 823 F.3d 1212, 1216 (9th Cir. 2016) (noting typical trappings of a military base "puncture any reasonable expectations of privacy" and result in "implied consent").

The request for proof of fare was both a limited and foreseeable action to be expected by any reasonable person entering Community Transit's barrier-free transit system. A reasonable bus passenger would expect that they could be asked for proof of payment as this has been the law of Washington since at least the early 20th century. Loy v. N. Pac. Ry. Co., 68 Wash. 33, 39, 122 P. 372, 374 (1912). RCW 36.57A.235(2)(b)(i) permits only a request of proof of payment from passengers and RCW 36.57A.230(2)(b) recognizes this long-standing duty of passengers to produce the requested proof of payment.

The defendant entered the SWIFT bus. Since a reasonable person would understand what this decision

entailed, it indicated his consent to a limited interaction of requesting proof of his fare. The defendant was not seized or, in other words, any seizure was justified by his consent.

C. SHOULD THE COURT PERMIT INDIVIDUALS TO CONSENT TO REQUESTS FOR PROOF OF FARE?

1. Barrier-Free Transit Systems Supported By Requests For Proof Of Fare Enable Transit Authorities To Meet The Important Government Interest Of Providing Efficient And Reliable Transit Services.

Amici argues that requests for proof of fare made by fare ambassadors or contracted law enforcement are ineffective tools to achieve the State's interest. This is not so for two reasons: (1) amici rely on the wrong measure of effectiveness, and (2) documents relied upon by amici demonstrate that fare enforcement is effective at achieving specific levels of farebox recovery or the amount of overall revenue brought in through fares.

First, amici judge the effectiveness of fare enforcement by relying on the wrong measure, how much

money is paid in penalties. Brief of Amici at 6. This is similar to judging the effectiveness of criminal prosecution based on how much is paid in legal financial obligations. The proper measure of effectiveness of fare enforcement is the deterrence of fare evasion.

Amici's own submission identifies that, as to Sound Transit, fare enforcement inspection rates are set at 8% in order to achieve the goal of limiting the evasion rate to the 3% target.[1] These levels are consistent with other barrier-free transit systems' goals which average an inspection rate of 9.6% to achieve an average evasion rate of 3.8%.[2] Relying on the proper measure, Sound Transit's fare

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[1] Sound Transit Fare Enforcement Policy Update at 14. (available at https://www.soundtransit.org/st_sharepoint/download/sites/PRDA/FinalRecords/2019/Presentation%20-%20Fare%20Enforcement%20Procedure%20Updates%20191003.pdf)

[2] Transit Cooperative Research Program Synthesis 96 – Off-Board Fare Payment Using Proof-of-Payment Verification, 2012 at 16 (available at: https://ssti.us/wp-

enforcement mechanisms (which are substantially similar to Community Transit's practices) achieve a lower-than average evasion rate with a lower-than average inspection rate. Id. Potential deterrence as measured by the evasion rate is the proper measure of the effectiveness of the program. This measure demonstrates that Washington's barrier-free transit systems effectively deter fare evasion with a narrow and limited interaction. This enables transit authorities to provide higher-quality transit services at a lower cost than transit systems which include barriers.

2. The Court Should Decline To Apply The Doctrine Of Unconstitutional Conditions.

Amici argue that the court should apply the doctrine of unconstitutional conditions. Amici identify no basis in Washington law for this doctrine and suggest no test or limits on when or where it should apply. This court has

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content/uploads/sites/1303/2012/03/Proof-of-payment-TRB.pdf)

been skeptical of such passing treatment of the doctrine. In re Dyer, 175 Wn.2d 186, 203, 283 P.3d 1103 (2012).

The doctrine of unconstitutional conditions has been subject to substantial debate regarding its philosophical underpinnings and uneven application. Richard A. Epstein, Unconstitutional Conditions, State Power, and the Limits of Consent, 102 Harv. L. Rev. 4 (1988); Sullivan, Kathleen M., Unconstitutional Conditions, 102 Harv. L. Rev. 1416–17 (1988). As acknowledged by the above scholars, the potential impacts of such a doctrine could be widespread and detrimental if there are no well-defined limits. The case upon which amici rely does not invalidate all pre-trial release conditions, but only those which exceed some scope. See United States v. Scott, 450 F.3d 863 (9th Cir. 2006). Kathleen Sullivan, upon which amici also rely, further acknowledges that certain exceptions are necessary to develop a workable doctrine. Unconstitutional Conditions, at 1503–05.

No such test has been proposed by the defendant, amici, or has previously been set forth by the court. California has adopted the unconstitutional conditions doctrine but with limits, including a modified reasonable relation test. The governmental entity seeking to impose such a condition must establish that:

> (1) the conditions reasonably relate to the purposes sought by the legislation which confers the benefit;
>
> (2) the value accruing to the public from imposition of those conditions manifestly outweighs any resulting impairment of constitutional rights; and
>
> (3) there are no alternative means less subversive of constitutional rights, narrowly drawn so as to correlate more closely with the purposes contemplated by conferring the benefit.

Parrish v. Civil Serv. Comm'n, 66 Cal. 2d 260, 271, 425 P.2d 223, 230-31, 57 Cal. Rptr. 623, 630-31 (1967).

Were this court to fashion a similar test including such limits, the requirement that one consent to being asked for proof of fare and consent to producing such fare would not be a prohibited condition. A request for proof of

fare has a very reasonable relationship to the provision of transit services. Fare enforcement keeps fare evasion at reasonable targets, thereby ensuring revenue burdens are shared by those using transit at a designated level.

Ensuring that fares are paid results in a substantial value to the public: an increased amount of high-quality transit services for a cost significantly less than in transit systems with barriers. "Barrier-free transit systems can cost 20–30 times less than systems that contain barriers to entry." State v. Carter, 472 Md. 36, 46, 244 A.3d 1041, 1047 (2021). Efficiencies in allowing passengers to board at any door enable faster transit times with a reduced number of coaches. There is a significant government interest in providing fast, predictable, and reliable public transportation to residents, particularly those who rely on that system to get to work or other important places.

This public value is balanced against the burden on an individual of having one's fare requested. First, having

one's fare requested is a brief interaction that is fully expected by every reasonable passenger who boards a train or any other barrier-free transit system. Nor are there effective alternative means in providing barrier-free transit services. Any provision of transit services with the efficiency of a barrier-free transit systems must be supported by a mechanism designed to keep fare evasion at a workable level. All such mechanisms include some form of request that riders produce proof of payment.

RCW 36.57A.235 places narrow limits on the extent of this interaction minimizing any potential impingement on transit riders. A person designated to check fares is only statutorily permitted to request proof of payment. Only if payment is not provided may a request for identification be made. RCW 36.57A.235(2)(b)(ii). There are simply no alternative means that could less impair a transit rider's privacy while still permitting a transit

authority to provide the level and efficiency of service associated with a barrier-free transit system.

Providing transit services on the condition that a rider allow a check of whether the rider has paid fare for such transit services is not a "governmental end-run" on constitutional rights. The request for proof of fare is an essential and expected element of providing high-quality, low-cost, barrier-free transit. It is strictly tailored and effective at achieving this goal.

V. CONCLUSION

The defendant has failed to carry his burden of establishing that he was seized when Deputy Dalton asked for proof of his fare. Amici have highlighted no additional facts as to this prerequisite determination. A necessary component in determining whether the defendant was seized is whether the contact was consensual. A reasonable transit rider expects such a fare inspection and consents to that limited interaction by

deciding to enter the transit system. Statutory authority permits an exceedingly narrow interaction strictly tailored to the goal of keeping fare evasion at sustainable levels. Such a condition is a special need which would be permissible even with the adoption of an "unconstitutional conditions" doctrine.

This brief contains 2,766 words (exclusive of appendices, title sheet, table of contents, table of authorities, certificate of service, signature blocks, and pictorial images).

Respectfully submitted on January 24, 2022.

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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SIGNED IN SNOHOMISH, WASHINGTON, THIS 24th DAY OF JANUARY, 2022.

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