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STATE OF OREGON v. GARY WILLIAM WARNER

284 Ore. 147 (1978)

**Topic: Article 1 Section 9**

**Facts:** On November 7, 1976, two Rogue River policemen were patrolling in a marked police car in Rogue River, a small community located about eight miles from Grants Pass. One, Officer Myers, who had been a reserve officer for about three months, was in uniform, while the other, Officer Beasley, was off duty and in civilian clothes. At approximately 11:00 p.m. Officer Myers received a dispatch on his radio indicating the following information: (1) There had been an armed robbery at the Owl Club in Grants Pass; (2) Two male suspects were involved; (3) One was armed with a shotgun; (4) One suspect wore plaid pants, while the other wore purple pants; (5) Both suspects wore ski masks; and (6) Money was taken. The dispatch did not contain any of the following information: (a) a physical description of either of the two male suspects; i.e., height, weight, race, etc.; (b) the amount of money taken or the amount or denomination of coins or bills; (c) a description of a vehicle involved in the robbery or that any vehicle was involved; or (d) the exact time the robbery took place. At about 11:10 p.m. Officers Myers and Beasley saw an automobile pull up to the front of the Homestead Bar in Rogue River. The officers saw two men getting out of the car and entering the bar. The officers waited outside for about ten minutes and then decided to enter the bar for a "routine check." They parked their car at the rear of the tavern, entered, sat down at one end of the bar and ordered two cups of coffee. Officer Myers proceeded to walk to the rear of the bar "to check on individuals in the bar." Other than the two officers, only three male patrons, one female patron and the bartender were present. As Officer Myers returned, a man named Carlin sitting at the other end of the bar, who, as it turned out, was with the Warner, asked Officer Myers in a casual, conversational tone, if he had been keeping busy. Officer Myers replied that he was trying to and returned to his seat next to Officer Beasley. At that time Officer Myers asked the bartender if anybody had been flashing any money or acting suspiciously. The bartender answered in the negative, but two or three minutes later the bartender returned to where Officer Myers was sitting and asked him to step into a back room, where the bartender told him that one of the two men at the far end of the bar (Carlin) had "just pulled out a wad of money, the size he'd never seen before." At this point Officers Myers and Beasley began observing the two men at the far end of the bar more closely. Neither man wore clothes similar to those described in the dispatch. Officer Myers testified that they were "talking in very low tones of voice, looking at us, looking at each other, looking back at us." Officer Myers went out to his police car and requested more information on the robbery and suspects, but none was available. Officer Myers returned to the bar and continued to observe the two men. Sometime later he went back to his police car, advised the dispatcher that he had two possible suspects in the armed robbery under surveillance and advised the dispatcher to call Chief Hinrich and Sergeant Ring of the Rogue River Police Department and to send county sheriff backup units. Officer Myers then entered the bar for the third time, advised Officer Beasley of what he had done, and went back out the front door to observe the automobile in which, he believed, the two men had arrived. As Officer Myers began to shine his flashlight into the front seat of the automobile, he observed the two suspects walking out of the front door of the bar. At this point the testimony differs somewhat. Officer Myers testified: "On seeing the two gentlemen walking out of the front door, I felt that I had need to ask questions of the two gentlemen so I *asked* them to return to the inside of the bar, remove their wallets from their pockets, take their ID out and place them on the table in front of them." The two men complied. Myers further testified concerning this "street encounter" as follows: "Q. You stopped Mr. Carlin and Mr. Warner as they had finished their drinks and were leaving, is that correct?" A. That's correct." Q. Where did you stop

them; was that inside the Homestead? "A. No, sir, they were outside the front door of the Homestead." Carlin testified that as he and the Warner were walking toward the door Officer Myers entered the bar and stated, "I want to know who you are, show me your ID." Warner corroborated the location of this initial encounter. Officer Myers then testified that he accompanied the two back into the bar, asked them to put their ID's on a table near the door, told them of the armed robbery in Grants Pass and said he would like to ask them some questions. He neither told them that they were under arrest nor that they were free to leave, but said: "I told them as soon as possible we would clear this matter up and they would be on their way." After looking at the ID's of the two suspects, Officer Myers, according to his own testimony, "asked" them to walk out the back door to his police car so he could run Division of Motor Vehicles and warrant checks on them. The two complied. Carlin testified that after looking at their ID's Officer Myers said, "I don't want any trouble in here, we're investigating an armed robbery. Step to the rear of the building." In any case they complied, and the group proceeded out the rear door of the bar to the police car in back. Officer Myers testified that it was the money which made him suspicious, although he did not know the denominations or sum which Carlin had. Apparently, on their way through the bar, Officer Myers asked Carlin about the "wad" of money. Officer Myers testified as follows: "Q. Now, you inquired about the wad of money? "A. About the wad of money. "Q. You asked why they had money or what the purpose of the money was? "A. I did." Q. What was the response? "A. Mr. Carlin advised me he was a poker dealer in the city of Phoenix, which seemed entirely normal. He could very well have been a poker dealer. "Q. So at that point, the wad of money was explained to your satisfaction; you were no longer suspicious about it? "A. About the money, that's correct." Myers conceded that from the time he was satisfied with the explanation about the money he was "fishing": "Q. You had no reason to stop them, you were just continuing --"A. Just continuing with preliminary investigation to find out if they were in fact who they say they are, if there were any warrants on them. There were no warrants on either of the two subjects. "Q. Just sort of a fishing expedition to see if you could find -- "A. That's right." Officer Myers testified that in response to a question the two told him they had been in Grants Pass 45 minutes before. Officer Myers then entered the car, while Officer Beasley remained outside with Warner and Carlin. Officer Myers contacted the dispatcher and gave him the driver's license numbers of the two. At this point, which was five to ten minutes from the first direct encounter, Chief Hinrich and Officer Ring, who had parked their individual cars in the front of the bar, arrived at the police car at the rear of the bar. Officer Myers asked the Chief to get Warner's automobile license number, which he did. Officer Myers reported it to the dispatcher and learned that the vehicle was properly registered to the Warner. Chief Hinrich had been contacted at his home at approximately 11:30 p.m. and arrived at the Homestead Bar about five minutes later. At the time he arrived, Chief Hinrich knew only what the dispatcher had told him -- that Officers Myers and Beasley had two possible armed robbers at the Homestead and required a backup. He was not aware of the armed robbery in Grants Pass. When Chief Hinrich returned with the license number, he got in Myers' vehicle and was told of the details of the earlier dispatch -- but nothing of the men's allegedly suspicious behavior or the wad of money. After acquiring this information, Chief Hinrich got out of the vehicle, approached the two and, as he put it, "asked if they'd mind emptying their pockets on the hood of the car." Carlin testified that Chief Hinrich walked up and said, "All right, empty your pockets." In any case, both complied. By this time, two more uniformed police officers from the county sheriff's department arrived in separate police cars. Thus, the two were confronted by six officers and three marked police cars. The chronology of the next series of events is somewhat confused, but from the record as a whole it appears that Carlin first emptied his pockets on the hood of the police car. His first handful produced a large amount of paper money; the second, a large amount of change and several .38-caliber hollow point bullets. At that point, Chief Hinrich told the two to "freeze" and drew his

handgun. When asked why he took this action, Chief Hinrich testified that he recognized the bullets produced by Carlin as a kind ordinarily used by police officers and designed specifically for stopping power. "Q. At this point, was Mr. Carlin and Mr. Warner free to leave? "A. I would assume so at this time, yes, sir." With respect to that point in time, the Chief testified (apparently to dispel any thought that Warner and Carlin were being detained) as follows: "Q. \* \* \* When you ordered the two Warners to freeze at that point, were they free to leave? "A. Yes. "Q. So you ordered them to freeze. If they'd walked away, you would not have stopped them? "A. I would have tried to pat them down. "Q. As they're walking?" The court sustained an objection to the last question as being argumentative. When Officer Myers heard Chief Hinrich yell "freeze," he immediately "exited" his police car and drew his weapon. Chief Hinrich then conducted a patdown frisk and found no weapons, whereupon both officers holstered their guns. After the patdown, the Warner and Carlin continued to empty their pockets. When their pockets were empty, there were two .20-gauge shotgun shells on the hood of the car. Warner denied the shells were his, as did Warner's companion. Both Chief Hinrich and Officer Myers testified they did not see where the shells had come from. At that point Chief Hinrich testified he asked Warner's permission to search the interior of his automobile. Officer Myers testified that Warner replied, "The doors are open, help yourself." Carlin testified he was in a position to hear such an exchange and did not hear it. Warner flatly denied giving Chief Hinrich consent to search his automobile.

Warner was accompanied by Chief Hinrich, Officer Myers, and Officer Ring through the bar to the front where Warner's automobile was parked. Chief Hinrich opened the door, searched the interior and found several rolls of coins, a green coin tray, a gold-colored money bag, two pairs of shoes and two ski hats with two holes cut in each. At this point, as Chief Hinrich testified, he "figured [he] had enough probable cause for arrest." Warner was informed he was under arrest and was handcuffed. There is some dispute in the state's evidence about what happened next. Officer Myers testified that one of the police officers asked if they could look in the trunk of the automobile, to which Warner replied, "I don't give a @%\*&, the keys are in my pocket." Then, according to Officer Myers' testimony, one of the sheriff's deputies took the keys from Warner's pocket and opened the trunk. The trunk was opened and searched. A shotgun, a pair of purple pants, a pair of plaid pants, and a bag of money were found. Chief Hinrich appeared to testify that the trunk was opened without seeking or obtaining Warner's consent. Warner denied giving consent to search the trunk. Carlin was arrested, and both Warner and his companion were charged with robbery. Warner separately moved for the suppression of all of the items seized as a result of the warrantless searches of his person (shotgun shells) and his automobile interior and trunk. His motion was denied. He was tried before a jury, the evidence in question was admitted against him, and he was convicted of robbery in the first degree.

**Issue:** Whether a trial court's finding of voluntariness bind subsequent courts to the same ruling? Whether stopping an individual on the street without reasonable suspicion, or valid consent constitutes a valid "street encounter."

**Case History:** Warner was convicted by a jury of robbery in the first degree after the trial court denied his motion to suppress evidence seized by the police in a warrantless search of his person and automobile. Warner appealed to the Court of Appeals, which affirmed the conviction. The Oregon Supreme Court reversed Warner's conviction and remanded for further proceedings.

**Arguments:** The State argues that Warner voluntarily identified himself to the police officers. That there was no detention of any kind of Warner prior to the time the Chief said "freeze." The state further insisted that it was not relying upon "reasonable suspicion" prior to the time that the

ammunition was placed on the hood of the police car. The state asserts that until that time this was merely a street encounter; namely, "questioning without any restraint of liberty (mere conversation), requiring no justification."

**Holding:** First the court noted that neither the appellate court nor it was bound by the implicit conclusion of the trial court that Warner's compliance with a police officer's request for identification was voluntary when the historical facts upon which such findings are based are insufficient to meet constitutional standards of due process. The Oregon Supreme Court found that there was no testimony by the Chief as to the words he claims to have actually used when he "asked" the two men to do certain things. His "request" may have been either the most imaginably polite solicitation to act, at one end of the spectrum, to the most arrogant order ("command?") to perform at the other, or, of course, something in between. Furthermore, where the police operate without a warrant the state has the burden of proof (when relying upon a "consent search") that consent was voluntarily given. In regards to the issue of street encounters there are three generally recognized categories of street encounters between policeman and citizen. In descending order of justification, they are: (1) arrest, justified only by probable cause; (2) temporary restraint of the citizen's liberty (a "stop"), justified by reasonable suspicion (or reliable indicia) of the citizen's criminal activity; and (3) questioning without any restraint of liberty (mere conversation), requiring no justification. The court does not agree with the State's argument that Warner fell under the third type of encounter "mere conversation." The court held that all the circumstances showed that Warner was seized because there was a temporary restraint of his liberty by the police officer, there was no valid consent to that restraint, and because it was not based upon reasonable suspicion on the part of the police officer.