SUPREME COURT NO. 97573-6
COA NO. 51284-0-II

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL WAYNE HICKMAN,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITSAP COUNTY

The Honorable Anna Laurie, Judge
The Honorable Sally F. Olsen, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Michael Hickman asks the Supreme Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Hickman requests review of the decision in State v. Michael Wayne Hickman, Court of Appeals No. 51284-0-II (slip op. filed July 23, 2019), attached as appendix A.

C. ISSUE PRESENTED FOR REVIEW

Whether the police officer that stopped petitioner's vehicle without a warrant lacked reasonable suspicion to conduct an investigative detention, thereby violating petitioner's constitutional right to privacy and requiring suppression of the evidence obtained from the illegal seizure, because general proximity to a crime scene late at night on a public road does not equal individualized suspicion for criminal activity?

D. STATEMENT OF THE CASE

1. CrR 3.6 Suppression Hearing

The State charged Hickman with first degree trafficking in stolen property. CP 138. Hickman moved to suppress evidence obtained from a

warrantless seizure initiated by police, arguing the officer's Terry[1] stop was unsupported by reasonable suspicion of criminal activity. CP 86-98.

Evidence produced at the hearing showed that on May 21, 2012, Mrs. McQueary called 911 at about 5 a.m. and reported that she could hear trees being cut with a chainsaw on her property. CP 141 (FF I);[2] 2RP[3] 11-12, 14. Deputy Langguth of the Kitsap County Sherriff's Office responded but did not hear or see anything of significance. CP 141 (FF I); 2RP 10, 14. Later that day, Deputy Watson explored the McQueary property with Mr. McQueary and saw several maple trees had been cut. CP 141-42 (FF II); 2RP 34-36. The deputy noticed tire tracks and brush that had been run over. CP 142 (FF II); 2RP 36. The tracks indicated the tree cutter likely gained access to the McQueary property by getting through or around a locked gate on Apex Road, which was located behind the McQueary property. CP 142 (FF II).

On May 22 at about 2 a.m., Mrs. McQueary again reported to the sheriff's office that she heard chainsaws on her property. CP 142 (FF III); 2RP 14-15. Deputy Langguth arrived on Apex Road at 2:28 a.m. and

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[1] Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).
[2] The trial court's written findings of fact and conclusions of law entered pursuant to CrR 3.6 are attached as appendix A.
[3] The verbatim report of proceedings is cited as follows: 1RP - 9/23/13; 2RP - 11/19/13; 3RP - two consecutively paginated volumes consisting of 11/25/13, 11/26/13, 1/27/13, 12/2/13; 4RP - 12/6/17.

heard an axe being used in the wooded area. CP 142 (FF IV); 2RP 13, 16; Pre-Trial Ex. 2. He parked his patrol vehicle on Apex Road at a point below the location of the access gate. CP 142 (FF IV); 2RP 13, 15-16. Specifically, he parked next to a housing development located about 120 feet from a driveway, which turned out to be the driveway leading to Scott Yoder's residence. CP 142 (FF IV); 2RP 63-64; Pre-Trial Ex. 2.[4] The officer's location was at the corner of Apex Road and Dickey Road. 2RP 22-24, 26. A map of the area was admitted into evidence as Pre-Trial Exhibit 3. 2RP 24. There is a residential area along Apex Road consisting of about 60 houses. 2RP 13. At one end, Apex Road leads to an airport runway. CP 142 (FF IV); 2RP 13.

A short time later, the deputy saw a pickup truck driving on Apex Road, from the direction of the area where the sound originated. CP 142 (FF V); 2RP 15-16, 26. There was no other traffic on the road. 2RP 17. The deputy drove behind the truck and used the emergency lights to cause the truck to stop. CP 142 (FF VI); 2RP 17, 63. The truck pulled into Yoder's driveway. CP 142 (FF V); 2RP 17, 29-30. As the deputy approached the truck, he got a closer look and saw little white flowers all over the truck, consistent with the truck being in a brushy area. CP 142

[4] Pre-Trial Exhibit 3 is attached as Appendix B.

(FF V); 2RP 17-18. The deputy peered under the canopy covering the back of the pickup and saw cut wood. CP 142 (FF VI); 2RP 18, 56.

The deputy spoke to the men inside the truck, Yoder and Hickman, for a few minutes. CP 142 (FF VII); 2RP 18-19. He questioned them about their knowledge of the tree cutting. CP 142-43 (FF VII); 2RP 20-21. They admitted they were up there cutting trees. 2RP 21. The deputy let them go on their way. CP 143 (FF VII); 2RP 21.

Defense counsel argued individualized reasonable suspicion did not justify the Terry stop. 2RP 68-75, 79-80. The trial court denied the suppression motion. CP 143-44 (CL IV). It concluded:

> Deputy Langguth had a reasonable suspicion based on articulable facts, that the truck he saw coming down Apex Road from the direction of the suspect gate and the illegal cutting, on a road lightly used, and on that morning not being used by any other vehicle at that time, might be connected with the wood cutting. The coincidence of the time, location and very recent tree cutting made it reasonable and appropriate for the deputy to engage the truck, and the defendant, in a brief stop to make inquiries concerning his suspicions. The flowers on the truck that the deputy saw immediately after the stop were consistent with the truck having very recently been in a brushy area. The cut wood in the back of the truck was also consistent with someone having been in the woods cutting wood. CP 143-44.

2. Trial

The McQueary property, which is a little over seven acres, has second growth fir, alder and maples on it. 3RP 114-15. Anderson Hill

Road runs in front of the McQueary property; Apex Road runs behind it. 3RP 114, 117. Scott Delhaute's property, which is much larger, lies between McQueary's property and Apex Road. 3RP 116-19, 228-29. Two maps of the area were admitted as Exhibit 33 at trial, with the hand drawn square representing McQueary's property.[5] 3RP 117-20.

Trees were cut down on the McQueary property. 3RP 121, 125-32, 145. Delhaute believed trees were cut down on his property as well. 3RP 236-39. Yoder rented property from Delhaute. 3RP 230-31. Delhaute gave permission for Yoder to cut firewood on his property if the trees were already down. 3RP 231. He did not give permission to Yoder or Hickman to cut standing trees on his property. 3RP 232-33, 239. Jeff Grose testified that he helped Yoder cut down two maple trees on Delhaute's property. 3RP 251-53, 255-56.

Deputy Langguth's trial testimony was consistent with his CrR 3.6 testimony. 3RP 158-69. After stopping the truck, the deputy asked Yoder if he was cutting maple trees. 3RP 169. Yoder said they cut down two trees at 5 a.m. the day before and then went back to retrieve them the following night. 3RP 169-70, 183-84. Hickman nodded his head as Yoder said this. 3RP 184. The deputy asked Hickman why he was cutting trees and Hickman replied that he was just helping Yoder. 3RP 184.

[5] Trial Exhibit 33 is attached as appendix C.

Yoder said the property belonged to his boss, Delhaute, that Delhaute knew Yoder cut wood on his property, and that he had a key to the locked gate on Delhaute's property. 3RP 187.

Deputy Watson's trial testimony was consistent with his CrR 3.6 testimony. 3RP 193-200. Watson spoke with Yoder as part of the ensuing investigation. 3RP 203-04. Watson saw maple woodblocks at Yoder's residence that appeared to have been processed for sale. 3RP 205-06. After arresting Yoder, the deputy contacted Hickman. 3RP 206. Hickman told the deputy that he helped Yoder cut maple on Delhaute's property and on the property north of Anderson Hill Road. 3RP 209. He was going to sell the wood for Yoder. 3RP 209. The deputy recovered a chainsaw from Hickman's residence, which Hickman said he used to cut the wood. 3RP 217-18. When asked if he knew the wood was stolen, Hickman denied it. 3RP 224. The jury found Hickman guilty. CP 172.

3. Appeal

On appeal, Hickman argued the trial court erred in denying the suppression motion because the police officer lacked reasonable suspicion to stop the vehicle. The Court of Appeals disagreed, concluding, "the deputy's knowledge of recent criminal activity, the sound of chopping in the location of the known criminal activity, the proximity of the truck to the area where the criminal activity occurred close in time to when the

deputy heard the chopping, and the lack of other vehicle traffic at the time — was sufficient to establish a reasonable suspicion that the truck was involved in the unlawful tree cutting." Slip op. at 11.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. WHETHER REASONABLE SUSPICION SUPPORTS THE WARRANTLESS SEIZURE PRESENTS A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW WARRANTING REVIEW.

The specific and articulable facts known to the officer at the inception of the traffic stop did not provide a reasonable suspicion that the truck's occupants had engaged in criminal wrongdoing. Under the Court of Appeals reasoning, police have reasonable suspicion to seize anyone traveling on a public road late at night who happens to be in the general proximity of a non-violent crime committed on private property. Whether the Court of Appeals is right is a significant of constitutional law warranting review under RAP 13.4(b)(3).

a. The specific and articulable facts known to the officer at the inception of the seizure do not amount to reasonable suspicion that Hickman had engaged in criminal activity.

"A traffic stop is a seizure for purposes of constitutional analysis." State v. Doughty, 170 Wn.2d 57, 62, 239 P.3d 573 (2010). As a general rule, a warrantless seizure is per se unlawful under both the Fourth Amendment and article I, section 7 unless it falls within one or more

specific exceptions to the warrant requirement. State v. Ross, 141 Wn.2d 304, 312, 4 P.3d 130 (2000). "The Terry stop — a brief investigatory seizure — is one such exception to the warrant requirement." Doughty, 170 Wn.2d at 61-62 (citing Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)).

"A Terry stop requires a well-founded suspicion that the defendant engaged in criminal conduct." Id. at 62. "[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Terry, 392 U.S. at 21. A reasonable, articulable suspicion means that there "is a substantial possibility that criminal conduct has occurred or is about to occur." State v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). "In reviewing the propriety of a Terry stop, a court evaluates the totality of the circumstances." State v. Snapp, 174 Wn.2d 177, 198, 275 P.3d 289 (2012).

Article I, section 7 provides greater protection than the Fourth Amendment because it focuses on the disturbance of private affairs rather than unreasonable searches and seizures. State v. Harrington, 167 Wn.2d 656, 663, 222 P.3d 92 (2009). Although the reasonable suspicion standard under either constitutional analysis requires that the suspicion be grounded in "specific and articulable facts," the Washington Constitution "generally

requires a stronger showing by the State." State v. Z.U.E., 183 Wn.2d 610, 617-18, 352 P.3d 796 (2015). "The State must show by clear and convincing evidence that the Terry stop was justified." Doughty, 170 Wn.2d at 62.

For a Terry stop to be valid, "an officer must have 'reasonable suspicion of criminal activity based on specific and articulable facts known to the officer at the inception of the stop.'" State v. Weyand, 188 Wn.2d 804, 811, 399 P.3d 530 (2017) (quoting State v. Fuentes, 183 Wn.2d 149, 158, 352 P.3d 152 (2015)). As a threshold matter, the Court of Appeals correctly disregarded the officer's observation of flowers on the truck in deciding whether reasonable suspicion supported the stop. Slip op. at 7-8. That observation was made after the stop was initiated. 2RP 17-18. What police learn after the unlawful seizure takes place cannot be used to retroactively justify the seizure. State v. Mendez, 137 Wn.2d 208, 224, 970 P.2d 722 (1999), abrogated on other grounds, Brendlin v. California, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007). Regardless of whether the Court of Appeals correctly interpreted the trial court's conclusion of law on this point, it reached the right result.

The trial court concluded the "coincidence of the time, location and very recent tree cutting made it reasonable and appropriate for the deputy to engage the truck, and the defendant, in a brief stop to make inquiries

concerning his suspicions." CP 143-44. The Court of Appeals similarly believed the seizure was justified because Deputy Langguth heard criminal activity and "knew that the truck was coming from the area where the criminal activity was occurring at an unusual time and there were no other vehicles around." Slip op. at 11.

When properly analyzed, these facts do not amount to reasonable suspicion because they show nothing more than coincidental physical and temporal proximity to criminal activity. What is lacking, and what is needed to justify the seizure, are specific facts tying the individuals in the truck to that illegal activity.

Hickman and Yoder were not doing anything inherently suspicious before they were seized. See State v. Armenta, 134 Wn.2d 1, 13, 948 P.2d 1280 (1997) (although vehicle occupants fir officer's "perception of likely drug dealers, they were not doing anything illegal or inherently suspicious when they were seized."). No wood was seen sticking up out of the truck bed before the stop. They were not speeding or driving in any way out of the ordinary. They were driving on a public road. Yes, it was late at night with no other traffic. But Apex Road runs alongside a residential area. 2RP 13. This is significant because it provides a basis for residents who live in the area to be on that road late at night while returning home from some innocent, late night activity. The trial court found there are a

"limited number" of homes on Apex Road. CP 142 (FF IV). "Limited" is a relative concept. The evidentiary basis for that finding is that there were nearly 60 houses along the road. 2RP 13. Deputy Langguth was parked next to a residential development, near where Yoder and Hickman lived. 2RP 17, 29-30, 58-59. Apex Road is not some lonely country thoroughfare out in the middle of nowhere. Apex Road runs right through a residential area.

A person driving on that road late at night could easily be coming home from visiting a neighbor. People drive home after other innocent, late night activities as well. Apex Road dead ends at the airstrip, but before it does so, multiple roads branch off and provides access to other areas. Pre-Trial Ex. 3; Trial Ex. 33. Further, many people do not work 9 to 5 jobs. They go to and from work late at night and use a public roadway to do so. Driving in an ordinary manner on a public road late at night is an innocuous fact.

The Court of Appeals opined "although there are numerous innocent reasons a vehicle may be travelling a road in the early morning hours, 'officers do not need to rule out all possibilities of innocent behavior before they make a stop.'" Slip op. at 11 (quoting Fuentes, 183 Wn.2d at 163). Innocuous facts, however, do not support reasonable suspicion. Weyand, 188 Wn.2d at 815 ("one could conclude that looking

around at 2:40 in the morning is an innocuous act, which cannot justify an intrusion into a person's private affairs").[6] The Court of Appeals' transmutation of innocuous facts into incriminating facts gives too much deference to law enforcement. Weyand, 188 Wn.2d at 815 n.5. When innocuous facts are used to build reasonable suspicion, the danger is that all seemingly innocent activity renders citizens vulnerable to seizure.

b. The officer lacked individualized suspicion.

"The suspicion must be individualized to the person being stopped." Weyand, 188 Wn.2d at 812. The Court of Appeals pointed to the fact that there were no other vehicles on the road, but did not explain why that fortuity matters. Slip op. at 11. The happenstance of being the only vehicle on a public road at a given time and place does not change the fact of coincidental geographic and temporal proximity to criminal activity, which is not enough to show reasonable suspicion. Suppose the officer in this case saw not one but two or three vehicles traveling the public roadway late at night, coming from the general direction of the

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[6] Citing Armenta, 134 Wn.2d at 13 (large sums of cash in suspect's pocket was innocuous fact); State v. Tijerina, 61 Wn. App. 626, 629, 811 P.2d 241, review denied, 118 Wn.2d 1007 (1991) (presence of soap in the car was innocuous fact); State v. Moreno, 173 Wn. App. 479, 491, 294 P.3d 812, review denied, 177 Wn.2d 1021, 304 P.3d 115 (2013) (suspect's location, driving speed, and passenger's shirt were innocuous facts insufficient to justify the stop); State v. Santacruz, 132 Wn. App. 615, 618, 133 P.3d 484 (2006) (dilated pupils alone was innocuous fact).

criminal activity. Under the logic employed by the Court of Appeals, police could still lawfully seize each one of those vehicles and investigate whether the occupants committed a crime. If the "coincidence of the time, location and very recent tree cutting" (CP 143-44) made the stop lawful, then any vehicle driving on that road at that time could have been lawfully seized by the officer. This is dragnet logic. If a crime occurs, then everyone in the vicinity is seized and investigated, including those who live in the area and are just going about their everyday lives. That is not individualized suspicion. That is grasping suspicion latching upon anyone who happens to come along.

"[A]n assessment of the whole picture must yield a particularized suspicion is the concept that the process . . . must raise a suspicion that the particular individual being stopped is engaged in wrongdoing." United States v. Cortez, 449 U.S. 411, 418, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981). Merely associating with a place where criminal activity has occurred "does not strip away" individual constitutional protections. State v. Broadnax, 98 Wn.2d 289, 296, 654 P.2d 96 (1982), abrogated on other grounds, Minnesota v. Dickerson, 508 U.S. 366, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993). Comparison with drug house cases is instructive because they address proximity to criminal activity and what is or is not reasonable suspicion for a stop in that context.

In Doughty, the defendant approached a suspected drug house at 3:20 a.m., stayed for two minutes, and then drove away. Doughty, 170 Wn.2d at 60. Although officers did not see what Doughty may have done in the house, they stopped Doughty for suspicion of drug activity. Id. The Terry stop was unlawful: "A person's presence in a high-crime area at a 'late hour' does not, by itself, give rise to a reasonable suspicion to detain that person." Id. at 62. More importantly, "a person's 'mere proximity to others independently suspected of criminal activity does not justify the stop.'" Id. (quoting State v. Thompson, 93 Wn.2d 838, 841, 613 P.2d 525 (1980)).

Doughty requires Terry stops to be based on individualized suspicion, not simply association with a location where suspected criminal activity takes place at a late hour. See also Weyand, 188 Wn.2d at 817 ("walking quickly and looking around, even after leaving a house with extensive drug history at 2:40 in the morning, is not enough to create a reasonable, articulable suspicion of criminal activity justifying a Terry stop."). The facts relied on by the deputy in Hickman's case show Hickman was near a location where criminal activity had taken place shortly before the stop occurred. Under Doughty, that is not enough to justify a warrantless seizure.

The Court of Appeals distinguished Doughty on the ground that the officer in that case did not apprehend any actual criminal activity in the area, whereas Deputy Langguth heard evidence of a crime and thus "there was more than a physical relationship to potential criminal activity." Slip op. at 9. This is a difference but not a dispositive one. Each case must be evaluated on its own facts. Weyand, 188 Wn.2d at 814.

Comparison with Fuentes provides further guidance. In Fuentes, officers surveilled an apartment where illegal drugs were sold. Fuentes, 183 Wn.2d at 156. On the night of the arrest, police saw 10 people enter and leave the apartment within two hours, each staying inside for between 5 and 20 minutes. Id. Officers testified that this behavior indicated narcotics activity was taking place in the residence. Id. Around midnight, officers saw Fuentes park her car outside the apartment, enter the apartment, stay about five minutes, and return to her car. Id. Fuentes then removed a plastic bag from her trunk, reentered the apartment, stayed for 5 minutes, and returned to her car with a bag that had noticeably less content in it than before. Id. at 156-57. Based on those observations, officers conducted a Terry stop. Id. at 157. A bare majority of the Court held reasonable suspicion justified the stop. Id. at 157, 164.

In Fuentes, the reasonable inferences drawn from specific facts showed criminal drug activity was presently taking place at the residence,

the defendant went into the house where that activity was occurred, and there was a substantial possibility the defendant participated in that illegal activity, as shown by the altered bag she carried upon leaving the house.

Compare those circumstances with Hickman's case. Similar to Fuentes, police knew criminal activity had recently occurred. But unlike Fuentes, Hickman was not seen entering or leaving the specific location where that criminal activity occurred. Police did not see Hickman on the McQueary property or in the woods. Police did not see Hickman leaving the access gate. At best, the deputy could say he saw the truck driving down Apex Road from the direction of the access gate and the illegal cutting. That is mere proximity. Coming from that "direction" is a loose connection between the truck and criminal activity.

Unlike in Fuentes, where the defendant's movements were pinpointed to the location of the illegal activity, maps of the area show a large geographic area from which the truck could have come from. Pre-Trial Ex. 3; Trial Ex. 33. Apex Road ultimately dead ends at a private airstrip, but before it does so, multiple roads branch off and provide access to other areas. Pre-Trial Ex. 3; Trial Ex. 33. And Apex Road runs alongside a residential area. Id.; 2RP 13. From an objective standpoint, a vehicle traveling along Apex Road that night need not have come from the woods.

Comparison with Kennedy further illustrates what is missing in Hickman's case. In Kennedy, the officer went to investigate neighbor complaints early in the morning about short-stay foot traffic going in and out of Rob Smith's house. Kennedy, 107 Wn.2d at 3. The officer had information from a reliable informant that Smith used this house to sell drugs, Kennedy bought marijuana from Smith at this house, and Kennedy drove a maroon car. Id. Based on this information, the officer stopped Kennedy on suspicion of purchasing marijuana after seeing Kennedy leave the house and get into a maroon car. Id. at 3, 8. The Supreme Court held reasonable suspicion supported the stop. Id. at 8-9.

In Kennedy, the police officer saw the suspect enter and then leave the house associated with illegal activity and knew that the defendant himself had a history of engaging in criminal activity at that location. No comparative evidence is present in Hickman's case. The deputy did not know who he was stopping. The deputy did not see the truck enter or leave the woods where the criminal activity took place.

The Court of Appeals reasoned "Unlike in Doughty, where there was merely the defendant's presence at a suspected drug house, there was, as there was in Fuentes and Kennedy, evidence of a crime actually being committed contemporaneous to the stop." Slip op. at 11. By that logic, anyone walking down the street near a drug house late at night where

criminal activity is known to presently take place would, without more, be subject to police seizure, just as a person driving on a public road contemporaneous with and in general proximity to criminal activity taking place. But that's not what Fuentes stands for. The tipping fact in Fuentes was that the defendant entered the drug house with a bag and returned five minutes later with a bag that had noticeably less content than before. Fuentes, 183 Wn.2d at 156-57; see Weyand, 188 Wn.2d at 819 (González, J., concurring) ("the only detail distinguishing Fuentes from [the companion case where there was no reasonable suspicion] was an officer's observation of Fuentes carrying a filled bag into the house and leaving shortly thereafter"). The tipping fact in Kennedy was that the defendant had bought drugs at a known drug house, thus linking the person to criminal activity at that location. Kennedy, 107 Wn.2d at 3, 8-9. There is no such individualized suspicion connecting Hickman to the crime.

"The available facts must substantiate more than a mere generalized suspicion that the person detained is 'up to no good.'" Z.U.E., 183 Wn.2d at 618 (quoting State v. Bliss, 153 Wn. App. 197, 204, 222 P.3d 107 (2009)). A hunch does not warrant police intrusion into people's everyday lives. Doughty, 170 Wn.2d at 63. When the standard for showing individualized, reasonable suspicion is not strictly enforced by requiring specifically articulated facts to justify a seizure, the exception

swallows the rule and "the risk of arbitrary and abusive police practices exceeds tolerable limits." Thompson, 93 Wn.2d at 843 (quoting Brown v. Texas, 443 U.S. 47, 52, 99 S. Ct. 2637, 2640, 61 L. Ed. 2d 357 (1979)). Coincidental proximity to a location associated with criminal activity late at night is insufficient to support a reasonable suspicion that the detained person is engaged in criminal activity. The deputy did not have reasonable suspicion to seize Hickman.

b. The evidence gathered because of the unlawful stop must be suppressed, requiring reversal of the conviction.

"The exclusionary rule mandates the suppression of evidence gathered through unconstitutional means." State v. Duncan, 146 Wn.2d 166, 176, 43 P.3d 513 (2002). Evidence obtained directly or indirectly from an unlawful search or seizure, including inculpatory statements of the defendant, must be suppressed under the fruit of the poisonous tree doctrine. State v. Mayfield, 192 Wn.2d 871, 888-89, 434 P.3d 58 (2019); Wong Sun v. United States, 371 U.S. 471, 485-86, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

Here, the unlawful stop provided the basis for tying Hickman to the crime. Because of the seizure, Deputy Langguth observed cut wood in the back of the truck and obtained incriminating admissions from Hickman and Yoder that they had cut down the wood. 3RP 169-70, 183-

84. This, in turn, led to further police investigation by Deputy Watson, which yielded incriminating statements from Hickman that he cut the wood for sale and the discovery of cut maple blocks from Yoder's residence. 3RP 203-09, 217-18. Without the evidence uncovered as a result of the unlawful seizure, there is no remaining evidence that identifies Hickman as the perpetrator. Admission of evidence obtained in violation of either the federal or state constitution is a constitutional error requiring reversal unless the State proves the error is harmless beyond a reasonable doubt. State v. Keodara, 191 Wn. App. 305, 317-18, 364 P.3d 777 (2015). The State has not, and could not, argued the error is harmless.

F. CONCLUSION

For the reasons stated, Hickman requests that this Court grant review.

DATED this 22nd day of August 2019.

Respectfully submitted,

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APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

July 23, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MICHAEL WAYNE HICKMAN, Appellant.	No. 51284-0-II UNPUBLISHED OPINION

CRUSER, J. — Michael Wayne Hickman appeals from his jury trial conviction for first degree trafficking in stolen property. We hold that (1) there was sufficient individualized suspicion to justify the investigatory stop that led to Hickman's arrest, (2) Hickman was not entitled to a unanimity instruction requiring the jury to determine which of two people owned the stolen property, (3) the trial court lacked the authority to order forfeiture of property, and (4) under *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018), Hickman is entitled to reexamination of his legal financial obligations (LFOs). Accordingly, we affirm Hickman's conviction but remand for the trial court to strike the forfeiture order in the judgment and sentence and to reexamine the LFOs under the current law.

FACTS

I. BACKGROUND

On May 21, 2012, at approximately 5:00 AM, Beverly McQueary called 911 to report hearing the sound of someone cutting trees with a chain saw on her property. Kitsap County

Sheriff's Office (KCSO) Deputy Alan Langguth responded to the call, but he did not notice anything unusual when he arrived.

Later that same day, KCSO Deputy Lee Watson explored the McQuearys' property with Gregory McQueary. Watson and Gregory[1] discovered that some maple trees had been cut down and found tire tracks on Sterling Scott Delhaute's neighboring property that led from a gate on Apex Road to the area where the cut maples were found.

Around 2:00 AM the following morning, Beverly contacted the sheriff's office and reported again hearing chainsaws on the McQuearys' property. Beverly spoke to Deputy Langguth and relayed what Deputy Watson had discovered the previous day. She also told Langguth that the entrance to the property was likely at the gate on Apex Road.

About a half an hour later, Deputy Langguth arrived at the gate on Apex Road and parked below the gate, near the entrance to a housing development, to await backup. The deputy could hear the sound of someone cutting wood with an axe coming from the wooded area.

A short time later, a pickup truck approached the deputy on Apex Road from the direction the sounds had originated. The driver turned into Scott Yoder's nearby driveway. Deputy Langguth pulled in behind the truck with his emergency lights activated, and the driver stopped the truck. As Langguth approached the truck, he could see flowers on the truck that suggested the truck had been driven in a wooded or brushy area, and he noticed that the back of the truck contained cut wood.

[1] Because Beverly and Gregory McQueary share the same last name, we refer to them by their first names for clarity. We intend no disrespect.

Deputy Langguth spoke to the truck's occupants while they remained in the truck. Hickman was driving the truck; Yoder was the passenger. In response to Langguth's questioning, Yoder said that they had cut down two trees early the previous morning and that they had returned that night to retrieve the wood. Yoder stated that the property on which he was cutting the trees belonged to his boss, Delhaute. Hickman said that he had just been helping Yoder. After asking them a few questions, Langguth allowed Yoder and Hickman to leave.

Later that day, after learning of Deputy Langguth's contact with Hickman and Yoder, Deputy Watson contacted Delhaute. After talking to Delhaute, Watson contacted Yoder. When the deputy arrived at Yoder's, he saw "maple woodblocks" that "appear[ed] to have been processed for sale" in a shed on Yoder's property. 2 Verbatim Report of Proceedings (VRP) at 205. Watson arrested Yoder.

Deputy Watson, then drove to Hickman's home. Hickman admitted that he had helped Yoder cut up the maple wood, but he asserted that the wood was from Delhaute's property. Hickman also said that he was selling the wood for Yoder.

II. PROCEDURE

A. CHARGES AND SUPPRESSION MOTION

The State charged Hickman with first degree trafficking in stolen property. Hickman moved to suppress the evidence obtained following the stop of the truck, arguing that the initial warrantless stop of the truck was not supported by reasonable suspicion or probable cause.

Based on the facts set out above,[2] the trial court denied the motion to suppress and entered the following written conclusions of law:

> II.
>
> That on May 22nd, 2012 Deputy Langguth was aware that at 5:00 AM on May 21st, 2012 and again at 2:00 AM, May 22nd, 2012, someone had been using a chainsaw to cut maple trees on the property of the McQueary[s] without permission. The deputy was also aware, through the investigation of Deputy Watson that the person's [sic] doing the cutting were likely using a vehicle, and that they were obtaining access to the McQueary property by means of a gate and road off of Apex Road.
>
> III.
>
> That at about 2:30 AM, May 22nd, 2012 Deputy Langguth again responded to Apex Road and he could hear the sounds of an axe being used in the woods. He was also aware that there were a limited number of homes in the area. At 2:30 AM, the only vehicle he saw was the defendant's vehicle, coming down Apex Road from the direction of the gate on Apex which the tree cutters were likely using. It is not likely that in the dark the deputy was able to see any sawdust, or flowers, on the truck before he stopped the truck. The flowers on the truck that the deputy saw immediately after the stop were consistent with the truck having very recently been in a brushy area. The cut wood in the back of the truck was also consistent with someone having been in the woods cutting wood.
>
> IV.
>
> That Deputy Langguth had a reasonable suspicion that on May 21st and May 22nd, 2012 someone was accessing the gate and the road off Apex Road to enter onto property belonging to the McQueary[s] to cut and steal their maple trees. Deputy Langguth had a reasonable suspicion based on articulable facts, that the truck he saw coming down Apex Road from the direction of the suspect gate and the illegal cutting, on a road lightly used, and on that morning not being used by any other vehicle at that time, might be connected with the wood cutting. The coincidence of the time, location and very recent tree cutting made it reasonable and appropriate for the deputy to engage the truck, and the defendant, in a brief stop to make inquiries concerning his suspicions. The flowers on the truck that the deputy saw immediately after the stop were consistent with the truck having very recently been in a brushy area. The cut wood in the back of the truck was also consistent with someone having been in the woods cutting wood. The stop was in fact very brief and involved minimal interference in the activities of the defendant on May 22nd, 2012.
>
> V.

[2] Hickman does not challenge the trial court's findings of fact. Accordingly, they are verities on appeal. *State v. Broadaway*, 133 Wn.2d 118, 131, 942 P.2d 363 (1997).

> That the motion of the defendant to suppress evidence obtained through the stop under CrR 3.6 is denied.

Clerk's Papers (CP) at 143-44.

B. TRIAL AND SENTENCING

At trial, there was testimony that the cut trees were on either the McQuearys' property or Delhaute's property. Gregory and Delhaute both testified that no one had permission to cut any standing trees on their respective properties.

Neither party requested, and the trial court did not provide, a unanimity instruction requiring the jury to determine whether the stolen property belonged to the McQuearys or to Delhaute. In closing argument, the State argued that regardless of whether the trees were on the McQuearys' or Delhaute's property, Hickman had no authority to cut the trees. In its rebuttal argument, the State argued, "The issue is not whether the stolen property came from a particular victim or not. The issue is was the property stolen." 2 VRP at 310.

The jury found Hickman guilty of first degree trafficking in stolen property.

At the sentencing hearing, the trial court did not discuss LFOs or any forfeiture. But in the judgment and sentence, the trial court imposed a $200 filing fee and a $100 deoxyribonucleic acid (DNA)/biological sample fee. Additionally, without citation to any statutory authority, the trial court ordered Hickman to forfeit "all seized property referenced in the discovery."[3] CP at 194.

Hickman appeals his conviction, the forfeiture order, the $200 criminal filing fee, and the $100 DNA fee. The trial court found him indigent for purposes of appeal.

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[3] The record does not show what, if any, property had been seized.

ANALYSIS

I. VALID INVESTIGATORY STOP

Hickman first argues that the trial court erred when it denied his suppression motion. Challenging conclusions of law III and IV, he argues that there was insufficient individualized suspicion to justify the initial investigatory stop. We disagree.

A. LEGAL PRINCIPLES

When reviewing the denial of a motion to suppress, we review the trial court's conclusions of law de novo and the findings of fact used to support those conclusions for substantial evidence. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). Hickman does not challenge any findings of fact, thus they are verities on appeal.

Both the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution provide that officers may not generally seize a person without a warrant. *Garvin*, 166 Wn.2d at 249. One exception to the warrant requirement is the *Terry*[4] investigative stop. *Garvin*, 166 Wn.2d at 249. Under this exception, an officer "may briefly stop and detain an individual for investigation without a warrant if the officer reasonably suspects the person is engaged or about to be engaged in criminal activity." *Garvin*, 166 Wn.2d at 250. We evaluate the reasonableness of the officer's suspicion by examining the totality of the circumstances known to the officer. *State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 760 (1991). Whether an officer had reasonable suspicion is an objective standard, and the officer's suspicion must be based on specific

[4] *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

and articulable facts known to the officer at the inception of the stop. *State v. Gatewood*, 163 Wn.2d 534, 539-40, 182 P.3d 426 (2008).

Additionally, the officer's reasonable suspicion must be individualized to the person being stopped. *State v. Thompson*, 93 Wn.2d 838, 841, 613 P.2d 525 (1980). The key question is "whether the specific facts that led to the stop would lead an objective person to form a reasonable suspicion that [the detainee] was engaged in criminal activity" based on "the facts known at the inception of the stop." *State v. Weyand*, 188 Wn.2d 804, 812, 399 P.3d 530 (2017). When the activity is consistent with criminal activity but also consistent with noncriminal activity, it may still justify a brief detention. *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). "It is generally recognized that crime prevention and crime detection are legitimate purposes for investigative stops or detentions." *Kennedy*, 107 Wn.2d at 5-6 (citing *Terry*, 392 U.S. at 21).

B. Reasonable Suspicion

Hickman argues that the trial court's conclusion that there was reasonable suspicion that he was engaged in criminal activity was incorrect because the evidence known to Deputy Langguth at the time of the stop established only a coincidental proximity to criminal activity, not individualized suspicion. We disagree.

1. Scope of Evidence

As a preliminary matter, we clarify what evidence we rely on when examining the trial court's reasonable suspicion finding. Hickman argues that the trial court erred by relying on facts discovered by Deputy Langguth immediately after the stop, specifically the flowers on the truck and the cut wood in the back of the truck. Hickman misreads the trial court's conclusion of law.

Although the trial court refers to the flowers and the cut wood in its conclusions of law, the trial court does not mention those facts until after it concludes that Deputy Langguth had reasonable suspicion justifying the initial stop. As such, the presence of the flowers and the discovery of the wood are relevant only to whether the continued detention was appropriate, not whether the initial stop was proper, and we do not consider these facts in our reasonable suspicion analysis.

2. INDIVIDUALIZED SUSPICION

Hickman argues that the remaining facts are not sufficient to establish reasonable suspicion to conduct the initial investigatory stop because mere temporal and physical proximity to criminal activity do not demonstrate an individualized suspicion and the deputy did not observe Hickman or Yoder "doing anything inherently suspicious before they were seized." Br. of Appellant at 17. He asserts that the trial court did no more than associate Hickman to a place where criminal activity had occurred. We disagree.

Hickman argues that this case is like *State v. Doughty*, 170 Wn.2d 57, 239 P.3d 573 (2010). In *Doughty*, the defendant approached a suspected drug house in the early morning hours, stayed for two minutes, and then drove away. 170 Wn.2d at 60. Our Supreme Court held that a person's mere presence in a high crime area at that time of day was not sufficient to establish a reasonable suspicion that that person was engaged in illegal activity. *Doughty*, 170 Wn.2d at 62-63. Hickman asserts that this case is like *Doughty* because all the deputy knew at the inception of the stop was that the truck was present in a location where suspected criminal activity had occurred at an unusual time.

Here, unlike in *Doughty*, where the officer knew only that the place Doughty entered was a suspected drug house and did not apprehend any actual criminal activity in the area, there was more than a physical relationship to potential criminal activity. Deputy Langguth did not merely suspect evidence of a crime being committed close in time and place to when he observed the truck, he heard evidence of such a crime. Additionally, there was very little traffic, so there was a higher probability that the truck was related to the currently occurring, known illegal activity. Thus, *Doughty* is not instructive here.

Hickman further argues that to establish reasonable suspicion there needs to have been a more overt, individualized connection between the vehicle and the suspected criminal activity than in this case. He cites to *State v. Fuentes*, 183 Wn.2d 149, 352 P.3d 152 (2015), and *Kennedy* as examples of the kind of connection to criminal activity that must exist.

In *Fuentes*, the officers (1) observed a residence of a known drug dealer, (2) "knew about past drug activity" at the residence, (3) watched approximately 10 people enter the residence and stay for very short periods of time before leaving suggesting current, ongoing drug activity, and (4) saw the defendant enter the apartment, return to her car and retrieve a plastic bag containing something, return to the apartment, and then leave the apartment a short time later with the bag containing noticeably less than when the defendant entered the residence. 183 Wn.2d at 156-57, 162. Our Supreme Court held that these facts, including the change in the bag's contents, which tied the defendant to the ongoing drug activity in the house, were sufficient to establish a reasonable suspicion of criminal activity to justify the seizure. *Fuentes*, 183 Wn.2d at 162-63.

Hickman argues that because the deputy did not actually observe the truck leaving the wooded area, the individualized connection to criminal activity present in *Fuentes* is missing here.

Hickman is correct that the facts linking the truck and Hickman to the crime are more attenuated than the facts linking the defendant to the crime in *Fuentes*. But that alone does not mean that there was insufficient evidence of criminal activity to justify the stop here; we must examine the totality of the circumstances, not just one specific factor that may have supported reasonable suspicion.

In *Kennedy*, an officer was investigating complaints from a neighbor about short-stay foot traffic in and out of a neighbor, Rob Smith's, home. 107 Wn.2d at 3. The officer also knew from an informant that Kennedy purchased drugs from Smith, Kennedy only went to Smith's house to buy drugs, and the types of vehicles Kennedy drove. *Kennedy*, 107 Wn.2d at 3. The officer observed one of the vehicles Kennedy was known to drive and saw Kennedy go in and out of Smith's house and then leave. *Kennedy*, 107 Wn.2d at 3. Although the officer had not directly observed any crime and did not see anything in Kennedy's hands, the officer stopped Kennedy's vehicle to investigate whether Kennedy had purchased marijuana. *Kennedy*, 107 Wn.2d at 3. When Kennedy stopped, the officer observed Kennedy lean forward and place something under the front seat. *Kennedy*, 107 Wn.2d at 3. Our Supreme Court held that the officer had reasonable suspicion of criminal activity based on the information from the informant, the neighbor's complaint, the officer's experience with drug investigations, and his eyewitness corroboration of some of the information others had reported. *Kennedy*, 107 Wn.2d at 8-9.

Hickman argues that *Kennedy* is distinguishable because here Deputy Langguth did not know who he was stopping and did not see the truck enter or leave the woods where the illegal activity occurred. Although the officer in *Kennedy* had specific information about the person the officer detained, *Kennedy* does not require such specific information to justify every stop. Instead,

Kennedy emphasizes that we must examine the totality of the circumstances known to the officer at the time of the stop. 107 Wn.2d at 6. Although Deputy Langguth did not directly observe the criminal activity, he heard it. And although he did not have information about Hickman or Yoder, the deputy knew that the truck was coming from the area where the criminal activity was occurring at an unusual time and there were no other vehicles around. This was sufficient to justify a short investigatory stop of the truck.

The evidence supporting an individualized suspicion in this case falls closer to that in *Fuentes* and *Kennedy* than in *Doughty*. Unlike in *Doughty*, where there was merely the defendant's presence at a suspected drug house, there was, as there was in *Fuentes* and *Kennedy*, evidence of a crime actually being committed contemporaneous to the stop. And although there are numerous innocent reasons a vehicle may be travelling a road in the early morning hours, "officers do not need to rule out all possibilities of innocent behavior before they make a stop." *Fuentes*, 183 Wn.2d at 163.

We conclude that the facts that were present—the deputy's knowledge of recent criminal activity, the sound of chopping in the location of the known criminal activity, the proximity of the truck to the area where the criminal activity occurred close in time to when the deputy heard the chopping, and the lack of other vehicle traffic at the time—was sufficient to establish a reasonable suspicion that the truck was involved in the unlawful tree cutting. Accordingly, the trial court did not err when it concluded that the deputy had reasonable suspicion and denied the motion to suppress.

II. NO UNANIMITY INSTRUCTION REQUIRED

Hickman next argues that he was denied his right to a unanimous verdict because the trial court did not give the jury a unanimity instruction requiring the jury to decide who the theft victim was—the McQuearys or Delhaute. We disagree.[5]

The Washington Constitution gives criminal defendants the right to a unanimous jury verdict. CONST. art. I, § 21. In cases where the State presents evidence of multiple criminal acts and any one of these acts could constitute the crime charged, the jury must unanimously agree on the same act that constitutes the crime in order to convict the defendant. *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984), *overruled in part on other grounds by State v. Kitchen*, 110 Wn.2d 403, 405-06, 756 P.2d 105 (1988). To ensure jury unanimity in "multiple acts" cases, either the State must elect the particular criminal act on which it will rely for conviction or the trial court must instruct the jurors that all of them must agree that the same underlying criminal act has been proved beyond a reasonable doubt. *Petrich*, 101 Wn.2d at 572.

Hickman argues that this is a multiple acts case because there were two theft victims, the McQuearys and Delhaute. But the victim of trafficking in stolen property is not the victim of the completed theft, it is the potential buyer of the stolen property. *State v. Walker*, 143 Wn. App. 880, 891, 181 P.3d 31 (2008) (intended victim of first degree trafficking in stolen property is the person to whom the defendant intended to sell the stolen property). So the fact there were potentially two theft victims does not establish that this is a multiple acts case.

[5] For purposes of this analysis, we presume, without deciding, that we may review this issue under RAP 2.5(a)(3).

Furthermore, the jury was not required to consider the identity of the owner of the stolen property. Here, the jury was instructed that to prove first degree trafficking in stolen property, the State had to prove that Hickman "knowingly trafficked in stolen property." CP at 164; RCW 9A.82.050. It was further instructed that "'[t]raffic' means to sell, transfer, distribute, dispense, or otherwise dispose of stolen property to another person, or to buy, receive, possess, or obtain control of stolen property, with intent to sell, transfer, distribute, dispense, or otherwise dispose of the property to another person." CP at 160. These instructions show that it is status of the property as stolen property that is relevant, not the source of the stolen property. Because the jury was not required to consider who owned the stolen property, the fact there were two potential theft victims was irrelevant and a unanimity instruction was not required.

III. FORFEITURE NOT AUTHORIZED

Hickman next argues that the trial court erred in ordering the forfeiture of "all seized property referenced in the discovery" without statutory authority. Br. of Appellant at 29. The State concedes error.

Because the trial court failed to refer to any statutory authority authorizing the forfeiture, and the State does not assert there was a statutory basis for the forfeiture, we accept the State's concession. *State v. Roberts*, 185 Wn. App. 94, 96, 339 P.3d 995 (2014) (reversing forfeiture provision because the State failed to provide statutory authority for the forfeiture and the

sentencing court did not provide any statutory authority for its forfeiture order). Accordingly, we remand for the trial court to strike the forfeiture clause from Hickman's judgment and sentence.[6]

IV. LFOs

Finally, Hickman argues that under recent amendments to the LFO statutes that apply to him, the trial court cannot impose the $200 filing fee or the $100 DNA fee. The State concedes that "discretionary costs must be stricken pursuant to [*Ramirez*]." Br. of Resp't at 26.

In 2018, our legislature amended several statutes addressing LFOs. LAWS OF 2018, ch. 269, § 17. Our Supreme Court has held that these amendments apply prospectively and are applicable to cases, like this one, that are pending on direct review and not final when the amendment was enacted. *Ramirez*, 191 Wn.2d at 747. In light of these legislative changes, we remand for the trial court to review Hickman's LFOs under the current law. On remand, the trial court must determine whether Hickman was indigent under RCW 10.101.010(3)(a) through (c) before imposing the $200 filing fee and whether Hickman had a DNA sample collected based on a prior conviction before imposing the $100 DNA fee.[7] RCW 10.01.160(3); RCW 43.43.7541, *see State v. Catling*, 193 Wn.2d 252, 258, 438 P.3d 1174 (2019).

---

[6] The State argues that this is a scrivener's error and that we should remand for a ministerial correction of the judgment and sentence. But a scrivener's error is a clerical error on a judgment and sentence that does not reflect the sentence the trial court intended and there is no evidence in the record suggesting that ordering the forfeiture was a clerical error rather than an error in the trial court's judgment. Accordingly, remand for the trial court to strike the forfeiture provision, particularly in light of our need to remand for the trial court to redetermine whether to impose the LFOs, is the appropriate remedy.

[7] On remand, the trial court may also examine all of the LFOs and LFO-related provisions that were subject to the 2018 legislative amendments; it is not limited to reexamining only the criminal filing fee and the DNA collection fee.

Accordingly, we affirm the conviction, but we remand for the trial court to strike the forfeiture provision and to reexamine the imposition of Hickman's LFOs.

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 in accordance with RCW 2.06.040, it is so ordered.

CRUSER, J.

We concur:

WORSWICK, P.J.

GLASGOW, J.

APPENDIX B

☐ STATE Exhibit No. 3

☐ PLAINTIFF ☑ DEFENDANT

☐ PETITIONER ☐ RESPONDENT

☐ OTHER _____

Case No. 12-1-01123-9

State of WA vs. Michael Hickman

[√] Admitted [ ] Refused

[ ] Withdrawn [ ] Not Offered

Date of Court's Ruling: 11-19-2013

3.6 hearing

Google earth

feet 1000

meters 400

APPENDIX C

Google

To see all the details that are visible on the screen, use the "Print" link next to the map.

☒ STATE Exhibit No. 33

☐ PLAINTIFF ☐ DEFENDANT

☐ PETITIONER ☐ RESPONDENT

☐ OTHER _____

Case No. 12-1-01123-9

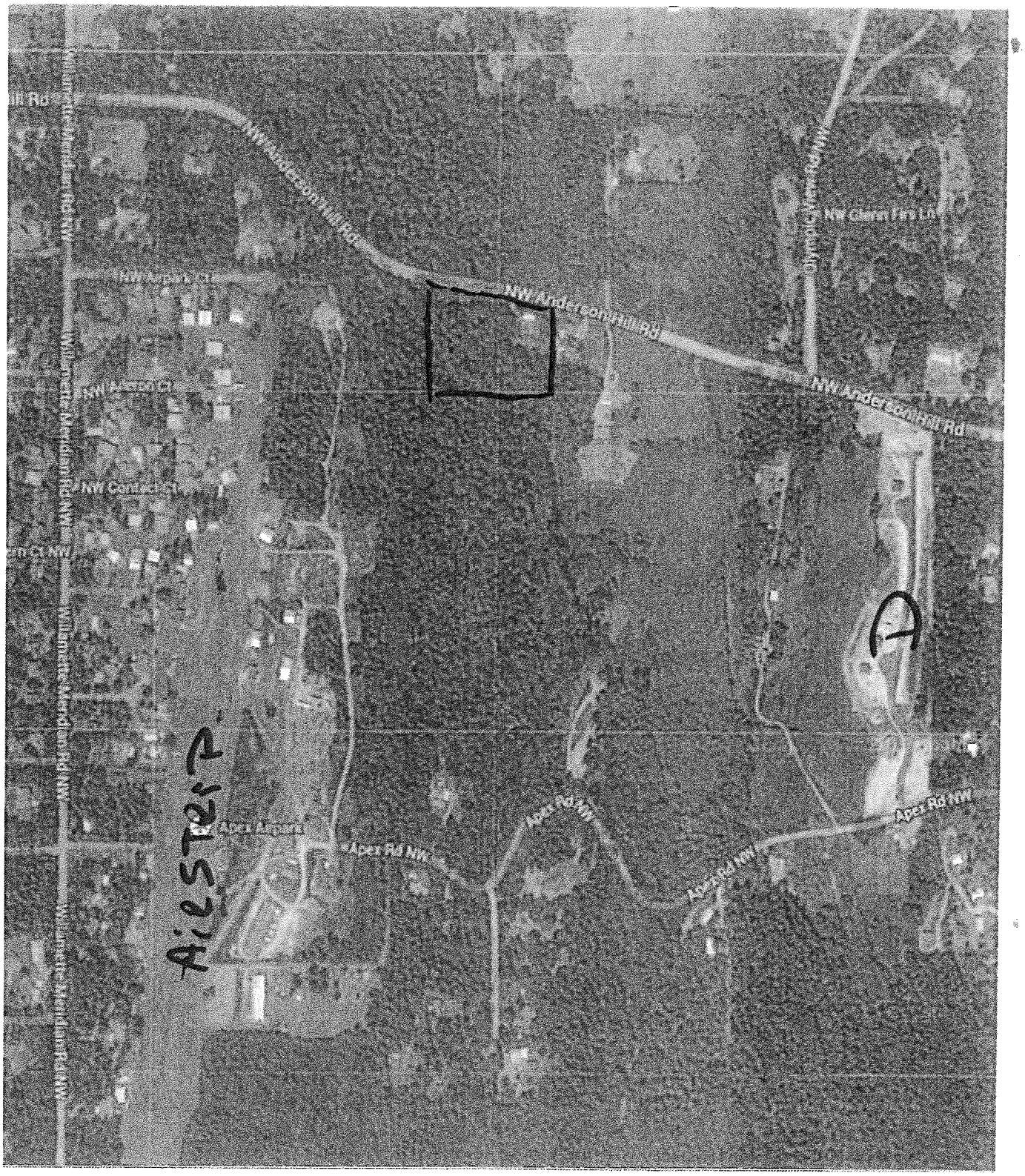
STATE VS HICKMAN

[X] Admitted [ ] Refused

[ ] Withdrawn [ ] Not Offered

Date of Court's Ruling: 11/26/13

To see all the details that are visible on the screen, use the "Print" link next to the map.



APPENDIX D

ORIGINAL

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IN THE KITSAP COUNTY SUPERIOR COURT

STATE OF WASHINGTON, Plaintiff, v. MICHAEL WAYNE HICKMAN, Age: 47; DOB: 02/08/1966, Defendant.	No. 12-1-01123-9 FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR HEARING ON CrR 3.6

THIS MATTER having come on regularly for hearing before the undersigned Judge of the above-entitled Court pursuant to a hearing on CrR 3.6; the parties appearing by and through their attorneys of record below-named; and the Court having considered the motion, briefing, testimony of witnesses, if any, argument of counsel and the records and files herein, and being fully advised in the premises, now, therefore, makes the following–

FINDINGS OF FACT

I.

That on May 21st, 2012 Deputy Langguth of KCSO was contacted through 911 concerning a complaint from Mrs. McQueary at approximately 5:00 AM that she could hear sounds of tree cutting with a chain saw on her property. Deputy Langguth responded to that area but did not see anything useful.

II.

That later on May 21st, 2012 Deputy Lee Watson of KCSO explored the McQueary

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SP

property with Mr. McQueary and came upon several maple trees that had been cut, and tire tracks into the area. The tire tracks indicated that the persons cutting the trees likely gained access to the McQueary property by getting through or around a locked gate on Apex Road behind the McQueary property.

III.

That on May 22nd, 2012 Mrs. McQueary contacted KCSO around 2:00 AM to complain of more chainsaw work being done on the McQueary property. Deputy Langguth spoke to her and learned about the evidence discovered by Deputy Watson the day before, and that entrance to the property was likely through a gate on Apex Road.

IV.

That on May 22nd, 2012, at approximately 2:30 AM Deputy Langguth went to Apex Road and parked below the point on the road where the gate was located, to wait for additional KCSO backup. It was very dark. There are a limited number of homes on Apex Road, which dead ends at the Apex runway. Deputy Langguth could also hear the sounds of an axe being used in the wooded area, but not a chainsaw. The deputy was parked at the entrance to a housing development located approximately 120 ft from Mr Goden's driveway. area where the sounds originated. emd

That within a short period of time Deputy Langguth saw a pickup truck coming down Apex Road, from the direction of the ~~gate~~. ~~The deputy testified that he believed he could see sawdust on the truck~~. The truck turned on to Mr Goden's dirt driveway road. The deputy did turn on his headlights but would only have been able to see the truck in the headlights for a very short period of time, mere seconds. As the deputy was by the truck he could see that what he thought might have been saw dust was actually flowers left on the truck as if it had been driving in a wooded or brushy area. emd

VI.

That deputy drove behind the truck, and using emergency lights, caused the truck to come to a stop. Upon approaching the truck the deputy could see into the back of the pickup by means of his flashlight and see cut wood in the back of the pickup truck.

VII.

That the deputy spoke to the occupants, Scott Yoder and the driver, the defendant Michael Hickman for a few short minutes. Neither of these individuals was made to step out of the truck, nor were they handcuffed. They were not threatened in any way. They were asked a

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few questions about their knowledge of the tree cutting, and after answering the questions were allowed to leave.

CONCLUSIONS OF LAW

I.

That the above-entitled Court has jurisdiction over the parties and the subject matter of this action.

II.

That on May 22nd, 2012 Deputy Langguth was aware that at 5:00 AM on May 21st, 2012 and again at 2:00 AM, May 22nd, 2012, someone had been using a chainsaw to cut maple trees on the property of the McQueary's without permission. The deputy was also aware, through the investigation of Deputy Watson that the person's doing the cutting were likely using a vehicle, and that they were obtaining access to the McQueary property by means of a gate and road off of Apex Road.

III.

That at about 2:30 AM, May 22nd, 2012 Deputy Langguth again responded to Apex Road and he could hear the sounds of an axe being used in the woods. He was also aware that there were a limited number of homes in the area. At 2:30 AM, the only vehicle he saw was the defendant's vehicle, coming down Apex Road from the direction of the gate on Apex which the tree cutters were likely using. It is not likely that in the dark the deputy was able to see any sawdust, or flowers, on the truck before he stopped the truck. The flowers on the truck that the deputy saw immediately after the stop were consistent with the truck having very recently been in a brushy area. The cut wood in the back of the truck was also consistent with someone having been in the woods cutting wood.

IV.

That Deputy Langguth had a reasonable suspicion that on May 21st and May 22nd, 2012 someone was accessing the gate and the road off Apex Road to enter onto property belonging to the McQueary's to cut and steal their maple trees. Deputy Langguth had a reasonable suspicion based on articulable facts, that the truck he saw coming down Apex Road from the direction of the suspect gate and the illegal cutting, on a road lightly used, and on that morning not being used by any other vehicle at that time, might be connected with the wood cutting. The coincidence of

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the time, location and very recent tree cutting made it reasonable and appropriate for the deputy to engage the truck, and the defendant, in a brief stop to make inquiries concerning his suspicions. The flowers on the truck that the deputy saw immediately after the stop were consistent with the truck having very recently been in a brushy area. The cut wood in the back of the truck was also consistent with someone having been in the woods cutting wood. The stop was in fact very brief and involved minimal interference in the activities of the defendant on May 22nd, 2012.

V.

That the motion of the defendant to suppress evidence obtained through the stop under CrR 3.6 is denied.

SO ORDERED this 26 day of November, 2013.

JUDGE

PRESENTED BY–

STATE OF WASHINGTON

KEVIN M. ANDERSON, WSBA NO. 13071
Deputy Prosecuting Attorney

APPROVED ~~FOR ENTRY~~ as to form–

Andrew Yi, WSBA No. 44763
Attorney for Defendant

Prosecutor's File Number–12-125778-4

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