67509-5

67509-5

67509-5

No. 67556-7-I
King County Superior Court No. 10-1-08297-9 KNT

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,
Plaintiff-Appellee,
v.

MICHAEL MARTINEZ COPOL,
Defendant-Appellant.

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

The Honorable John P. Erlick, Judge

APPELLANT'S OPENING BRIEF

Suzanne Lee Elliott
Attorney for Appellant
1300 Hoge Building
705 Second Avenue
Seattle, WA 98104
(206) 623-0291

TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR 1

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

III. STATEMENT OF THE CASE 1

A. PROCEDURAL HISTORY 1

B. FACTS RELATED TO THE SEIZURE OF COPOL AND HIS VEHICLE 2

C. FACTS RELATED TO THE WEAPSONS ENHANCEMENT..... 4

IV. ARGUMENT 5

A. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE JURY'S FINDING THAT COPOL WAS ARMED WITH A DEADLY WEAPON AT THE TIME OF THE CRIMES 10

V. CONCLUSION..... 11

TABLE OF AUTHORITIES

Cases

In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).....10

Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979) 10

State v. Bailey, 154 Wn. App. 295, 224 P.3d 852, *review denied*, 169 Wn.2d 1004, 236 P.3d 205 (2010) 6

State v. Diluzio, 162 Wn. App. 585, 254 P.3d 218, *review denied*, 272 P.3d 850 (2011) 8, 9

State v. Doughty, 170 Wn.2d 57, 239 P.3d 573 (2010).....5, 7, 8, 10

State v. Garvin, 166 Wn.2d 242, 207 P.3d 1266 (2009) 5, 6

State v. Gatewood, 163 Wn.2d 534, 182 P.3d 426 (2008) 6, 9

State v. Glover, 116 Wn.2d 509, 806 P.2d 760 (1991).....5

State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980).....10

State v. Henry, 80 Wn. App. 544, 910 P.2d 1290 (1995).....9

State v. Kennedy, 107 Wn.2d 1, 726 P.2d 445 (1986).....5

State v. Ladson, 138 Wn.2d 343, 979 P.2d 833 (1999).....5

State v. Pam, 98 Wn.2d 748, 659 P.2d 454 (1983), *overruled in part on other grounds by State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988) 10

State v. Pierce, 155 Wn. App. 701, 230 P.3d 237 (2010) 11

State v. Recuenco, 163 Wn.2d 428, 180 P.3d 1276 (2008) 10

State v. Williams, 102 Wn.2d 733, 689 P.2d 1065 (1984).....5

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

Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) 10

Statutes

RCW 9.41.010 ..... 1, 10

Constitutional Provisions

Const., art. I, section 7 (Search & Seizure) 5

U.S. Const., amend. XIV (Due Process) 10

U.S. Const., amend. IV (Search & Seizure) 5

I.
ASSIGNMENTS OF ERROR

1. The trial court erred in failing to suppress all of the evidence seized after the traffic stop that resulted in Copol's arrest.

2. There was insufficient evidence to support the jury's finding that Copol was armed with a firearm.

II.
ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is a vague description of "three Asian males", staring at an officer's vehicle, and proceeding away from the officer late at night in an area near where a stolen car has been abandoned sufficient to justify a *Terry* stop of a vehicle and the arrest of all three occupants?

2. Where the state failed to prove that the seized weapon was capable of firing a projectile, was there sufficient evidence to support a firearm enhancement in this case?

III.
STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Michael Copol was charged with first degree burglary, first degree rape, and first degree robbery. CP 8-10. As to each count the State alleged that Copol or one of his co-defendants was "armed with a handgun, a firearm as defined in RCW 9.41.010." *Id.*

He was convicted only of the burglary and robbery counts. CP 80, 81, Supp. CP ___ and ___, Sub. Nos. 55 (Special Verdict Form C) and 57 (Verdict Form C-1). He was sentenced to 41 months on the underlying charges. CP 203-210. In addition, the court imposed a term of 120 months on the two firearm enhancements to be served consecutively. His total sentence is 161 months. *Id.*

B. FACTS RELATED TO THE SEIZURE OF COPOL AND HIS VEHICLE

On the night of August 11, 2010, C.H. reported that three men broke into her house and raped and robbed her.[1] 18 RP 119-187. The rape occurred at 6422 South 131st Skyway. At 2:55AM she called 911. After the deputies interviewed C.H. in person, she said that her attackers were 3 Asian males, all dressed in black. 16 RP 170. They had two handguns and had driven away in her black BMW. *Id.*

When Copol was arrested, the police seized a black and silver gun from his car. Exhibit 81. At trial, C.H. was shown the gun. 19 RP at 46.

---

[1] Copol has used the same number system for the verbatim report as used by co-appellant Khann. There are 26 volumes of the verbatim report of proceedings. The verbatim report of proceedings are cited as follows: 1RP refers to the verbatim report of proceedings for 2/11/2011; 2RP—2/18/2011; 3RP—3/1/2011; 4RP—3/4/2011; 5RP—3/25/2011; 6RP—6/7/2011; 7RP—6/8/2011; 8RP—6/9/2011; 9RP—6/13/2011; 10RP—6/14/2011; 11RP—6/15/2011; 12RP—6/16/2011; 13RP—6/17/2011; 14RP—6/20/2011; 15RP—6/21/2011; 16RP—6/27/2011; 17RP—6/28/2011; 18RP—6/29/2011; 19RP—6/30/2011; 20RP—7/5/2011; 21RP—7/6/2011; 22RP—7/7/2011; 23RP—7/11/2011; 24RP—7/12/2011; 25RP—7/13/2011; 26RP—7/14/2011 and 7/29/2011.

She stated that the gun "looked like" the one used by her assailants. 19 RP at 47.

At 2:55 a.m. Deputy Murphy was informed of the search for the three Asian males. At 4:13 a.m. he observed a Cadillac containing three Asian/Pacific Islander males at South 188th and Des Moines Drive. State's Pretrial Exhibit 116. The three were dressed in dark clothing. 6 RP 72. Deputy Murphy observed all 3 "stare" at him. He stated that in his 7 years as an officer he had never had anyone stare at him in that way. *Id.* Murphy began to follow the Cadillac. A records check on the license plate came back "clear." 6 RP 77. Eventually, Deputy Murphy put on his emergency lights and stopped the Cadillac. 6 RP 99.

Based upon this testimony the Court found:

> At this time of day, around 4:13 a.m., there were very few people on the roads on foot and in vehicles. This vehicle was the only vehicle Deputy Murphy observed on the road during the time he was checking the area for suspects. The behavior of the suspects within the vehicle was contrary to what Deputy Murphy had observed in his seven years of law enforcement experience. The way they started [sic] at him from their vehicle, and moved around within their vehicle heightened Deputy Murphy's suspicions. Further, The [sic] vehicle tried to duck into the neighborhood, appearing to attempt to evade Deputy Murphy. The occupants of this vehicle matched C.H.'s description of her assailants, even though the description was vague. The intersection of S. 118th St. and Des Moines Memorial Drive is within approximately 10 blocks, less than a mile of the Chevron where C.H.'s vehicle was abandoned. Deputy Murphy first observed the vehicle within approximately thirty minutes of C.H.'s vehicle being reported as abandoned by the gas station attendant.

CP 15-16.

The Court concluded that based upon these facts, the "*Terry*" stop conducted by Deputy Murphy was reasonable. CP 17.

C. FACTS RELATED TO THE WEAPSONS ENHANCEMENT

The police seized a gun from the Cadillac. Exhibit 81. It was submitted to the crime lab. 21 RP 34. There was no testimony that any weapon was discharged during the incident. But, during trial, C.H. was asked to view the gun seized from Copol's vehicle during the arrest. She stated that the gun "looked like" the same gun.

During trial, the defendants moved to dismiss the firearm allegation because the State had failed to prove that Exhibit 81 was capable of firing bullets. 22 RP 17-18, 22. The state argued that, because the gun seized from Copol's car contained a magazine and bullet, there was sufficient evidence that it met the statutory definition of a firearm. 22 RP 45. But, the State argued that if the trial court was concerned about the issue, it should be allowed to reopen the State's case or amend the charges to seek a deadly weapon enhancement. *Id.* The trial judge denied the motions and permitted the issue to be submitted to the jury. 22 RP 171. The jury was instructed that, for purposes of the firearm enhancement: "A 'firearm' is a weapon or device form which a projectile may be fired by an explosive such as gunpowder." CP 152.

IV.
ARGUMENT

The Fourth Amendment to the United States Constitution and Article I, section 7 of the Washington Constitution protect against unlawful searches and seizures and the State bears the burden of demonstrating that a warrantless seizure falls into a narrow exception to the rule. *State v. Doughty*, 170 Wn.2d 57, 61-62, 239 P.3d 573 (2010); *State v. Williams*, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). A brief investigatory seizure is an exception to the warrant requirement. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *Doughty*, 170 Wn.2d at 61-62. A *Terry* stop requires a well-founded suspicion that the defendant engaged in criminal conduct. *Id.* at 21; *State v. Garvin*, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009). "[I]n justifying the particular intrusion the police officer must be able to point to the specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry*, 392 U.S. at 21. A traffic stop is a seizure for purposes of constitutional analysis. *State v. Ladson*, 138 Wn.2d 343, 350, 979 P.2d 833 (1999).

A *Terry* stop must be reasonable. *State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986). When reviewing the merits of an investigatory stop, the trial court must evaluate the totality of circumstances presented to the investigating officer. *State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 760 (1991), citing *United States v. Cortez*, 449 U.S. 411, 418, 101 S.Ct.

690, 66 L.Ed.2d 621 (1981). The State must show by clear and convincing evidence that the *Terry* stop was justified. *Garvin*, 166 Wn.2d at 250. A *Terry* stop must be supported by articulable suspicion, which arises when "there is a substantial possibility that criminal activity has occurred or is about to occur." *Kennedy*, 107 Wn.2d at 6. The officer's suspicion must be well-founded (i.e., based on specific and articulable facts that the individual has committed a crime) and reasonable. *Terry*, 392 U.S. at 21; *Kennedy*, 107 Wn.2d at 4-5. The *Terry* stop must be justified at its inception. *State v. Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008).

The *Terry* stop threshold was created to stop police from interfering with people's everyday lives and to stop police from acting on mere hunches. "Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction." *Terry,* 392 U.S. at 22.

The question of whether an investigatory stop is constitutional is a question of law reviewed de novo. *State v. Bailey*, 154 Wn. App. 295, 299, 224 P.3d 852, *review denied*, 169 Wn.2d 1004, 236 P.3d 205 (2010).

In this case the trial judge cited the fact that the defendants met the "vague" description provided by the victim. Here, a stop based upon the victim's description would be unreasonable. The report on the race of the

assailants was ambiguous. Moreover, there was no report of the assailants driving a Cadillac. When Murphy ran a records check related to the car, it came back "clean." Thus, if this Court were to accept that the description provided to Deputy Murphy was sufficient, then it would give the police the ability to simply stop anyone who matched the race of a perpetrator of any crime.

Being near the scene of reports of criminal activity is not enough. In *State v. Doughty*, supra, the Supreme Court ruled the police lacked a reasonable suspicion for a *Terry* stop where the defendant approached a suspected drug house, stayed for two minutes, and then drove away. *Doughty*, 170 Wn.2d at 59. The defendant was subsequently stopped on suspicion of drug activity and found to be driving while his license was suspended in the third degree. A search of the car incident to arrest revealed methamphetamine. *Id.* The Supreme Court ruled the police lacked reasonable suspicion to stop Mr. Doughty's car:

> Here, police never saw any of Doughty's interactions at the house. He may not have even interacted with anybody there. As far as Officer Bishop knew, maybe Doughty knocked and nobody answered. Maybe Doughty even had the wrong house. The two-minute length of time Doughty spent at the house – albeit a suspected drug house – and the time of day do not justify the police's intrusion into his private affairs.
>
> A more apt analogy rests with *State v. Gleason*, 70 Wn. App. 13, 851 P.2d 731 (1993). Based on the totality of the circumstances, the Gleason court held it improper to seize a person merely for exiting an apartment complex that had a history of drug sales. *Id.* at 18, 851, P.2d 731. The court

> reasoned that "this was the first time the defendant had been seen in the area, the officers did not know what occurred inside the apartment and neither officer saw him involved in the purchase of drugs. Further, there was no evidence Mr. Gleason was acting suspiciously, he was not carrying any unusual objects." *Id.* (citation omitted). That statement describes the events in Doughty's chronology almost exactly.

Doughty, 170 Wn.2d at 64-65.

Similarly, in *State v. Diluzio*, 162 Wn. App. 585, 589, 254 P.3d 218, *review denied*, 272 P.3d 850 (2011), police watched as the driver of a car stopped and talked to a female pedestrian through the passenger window. The officer stopped in the lane of traffic behind the car and watched as the woman got into the front passenger seat. There were no bus stops at the location, and the area was known for high levels of prostitution activity. The officer stopped the car suspecting that solicitation of prostitution was occurring. The driver was arrested on a warrant and the search of his car revealed methamphetamine. *Id.* Relying on the decision in *Doughty*, supra, the Court of Appeals ruled the officer lacked reasonable suspicion for the traffic stop:

> The facts in Mr. Diluzio's case are similar to those in *Doughty* and provide even less justification for a stop. Here, as in *Doughty*, the investigatory stop was based on the officer's observation. The officer saw Mr. Diluzio having a conversation with a woman who got into the passenger side of his vehicle. There was no police informant and the police officer did not see any money change hands and did not overhear any conversations between the two individuals. Neither individual was known to have been involved in prostitution or solicitation

> activities. These incomplete observations do not provide the basis for a *Terry* stop.

Diluzio, 162 Wn. App. at 593.

Staring at the officer is not enough. In *State v. Gatewood*, supra, the Supreme Court held that police officers did not have a reasonable suspicion that defendant committed or was about to commit a crime even though defendant widened his eyes when he saw patrol car when he was in a bus shelter. He even twisted to his left like he was trying to hide something, departed the bus shelter as the police circled the block, and crossed the street in middle of block. But because the officer, who saw defendant twist, did not see what, if anything, that defendant was hiding and because the defendant's act of walking away from bus shelter did not constitute fleeing, there was no basis to seize the defendant. Similarly, startled reactions to seeing the police do not amount to reasonable suspicion. *State v. Henry*, 80 Wn. App. 544, 552, 910 P.2d 1290 (1995) (nervousness is not sufficient for *Terry* stop).

Here, Deputy Murphy simply did not have enough to stop Copol's vehicle and arrest him. An aggregation of perfectly innocent behavior does not become "suspicious" or evidence of a crime simply because a deputy testifies that the occupants of a vehicle acted in a way that he did not expect them to act. Thus, any evidence obtained in connection with this illegal "*Terry* stop" must be suppressed as fruit of the poisonous tree.

Wong Sun v. United States, 371 U.S. 471, 487, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); *Doughty*, 170 Wn.2d at 65.

A. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE JURY'S FINDING THAT COPOL WAS ARMED WITH A DEADLY WEAPON AT THE TIME OF THE CRIMES

The due process clause of the Fourteenth Amendment to the United States Constitution requires the prosecution to prove beyond a reasonable doubt every fact necessary to constitute the crime charged. *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980).

For purposes of a sentencing enhancement, a firearm "means a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder." RCW 9.41.010(7). And the jury was so instructed in this case. Under this definition, the State must prove that a firearm must be "operable." *See, e.g., State v. Pam*, 98 Wn.2d 748, 659 P.2d 454 (1983), *overruled in part on other grounds by State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988); *State v. Recuenco*, 163 Wn.2d 428, 437, 180 P.3d 1276 (2008) ("We have held that a jury must be presented with sufficient evidence to find a firearm operable under this definition in

order to uphold the enhancement."); *see also State v. Pierce*, 155 Wn. App. 701, 714 n. 11, 230 P.3d 237 (2010) (Where the firearm is not presented as evidence, there must be "other evidence of operability, such as bullets found, gunshots heard, or muzzle flashes.").

Here, there was evidence only that Exhibit 81 "looked like" the gun the assailant saw when she was attacked. Moreover, there was no evidence that the gun was capable of firing a projectile. The mere fact that bullets were found in the gun does not mean it was capable of firing the bullets. The State had seized Exhibit 81 and submitted it for forensic testing but never tried to fire the weapon. Thus, the trial judge erred in failing to dismiss the firearm allegation during trial. And, there was insufficient evidence supporting the jury's verdict on this issue.

V.
CONCLUSION

This Court should reverse the trial court's order denying the defendants' motion to suppress all of the evidence seized as a result of the illegal seizure of Copol and the Cadillac. In addition, this Court should find that there was insufficient evidence to support the firearm sentencing enhancements imposed in this case.

DATED this 25th day of April, 2012.

Respectfully submitted,

Suzanne Lee Elliott

Suzanne Lee Elliott, WSBA #12634
Attorney for Michael Martinez Copol

CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by First Class United States Mail, postage prepaid, one copy of this brief on the following:

King County Prosecutor's Office
Appellate Unit
516 Third Avenue, W554
Seattle, WA 98104

Mr. Michael M. Copol #352082
Washington State Penitentiary
1313 North 13th Avenue
Walla Walla, WA 99362

Mr. Eric Nielsen
Nielsen, Broman and Koch
1908 East Madison Street
Seattle, WA 98122-2842

Ms. Susan Wilk
Washington Appellate Project
1511 Third Ave. Suite 701
Seattle WA 98101-3635

04/25/2012
Date

William Hackney