

FILED
January 9, 2013
Court of Appeals
Division III
State of Washington

No. 30983-5-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

MARISA M. FUENTES,

Defendant/Appellant.

APPELLANT'S BRIEF

DAVID N. GASCH
WSBA No. 18270
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
Attorney for Appellant

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR.....5

B. ISSUE PERTIANING TO ASSIGNMENTS OF ERROR.....5

C. STATEMENT OF THE CASE.....5

D. ARGUMENT.....7

 The officer’s stop of Ms. Fuentes’ car was illegal because the police did not have a reasonable suspicion of criminal activity arising from specific and articulable facts.....7

E. CONCLUSION.....14

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Alabama v. White</u> , 496 U.S. 325, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990).....	11
<u>Delaware v. Prouse</u> , 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979).....	9
<u>Dunaway v. New York</u> , 442 U.S. 200, 99 S.Ct. 2248, 2260, 60 L.Ed.2d 824 (1979) (White, J., concurring).....	8
<u>Gerstein v. Pugh</u> , 420 U.S. 103, 95 S.Ct. 854, 863, 43 L.Ed.2d 54 (1975).....	8
<u>Illinois v. Gates</u> , 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983).....	10, 11

<u>Illinois v. Wardlow</u> , 528 U.S. 119, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000).....	10
<u>Mapp v. Ohio</u> , 367 U.S. 643, 81 S.Ct. 1684, 1687, 6 L.Ed.2d 1081, 84 A.L.R.2d 933 (1961).....	8
<u>Terry v. Ohio</u> , 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).....	8
<u>State v. Apodaca</u> , 67 Wn. App. 736, 839 P.2d 352 (1992).....	7
<u>State v. Armenta</u> , 134 Wn.2d 1, 948 P.2d 1280 (1997).....	9, 10
<u>State v. Broadnax</u> , 98 Wn.2d 289, 654 P.2d 96 (1982).....	8
<u>State v. Doughty</u> , 170 Wash. 2d 57, 239 P.3d 573, 575 (2010).....	12, 13
<u>State v. Duncan</u> , 146 Wn.2d 166, 43 P.3d 513 (2002).....	9
<u>State v. Garvin</u> , 166 Wash.2d 242, 207 P.3d 1266 (2009).....	9
<u>State v. Henry</u> , 80 Wn.A pp. 544, 910 P.2d 1290 (1995).....	9
<u>State v. Kennedy</u> , 107 Wn.2d 1, 726 P.2d 445 (1986).....	9, 10, 12
<u>State v. Lee</u> , 147 Wn. App. 912, 199 P.3d 445 (2008).....	10
<u>State v. Mendez</u> , 137 Wn.2d 208, 970 P.2d 722 (1999).....	8
<u>State v. Mennegar</u> , 114 Wn.2d 304, 787 P.2d 1347 (1990).....	7
<u>State v. Richardson</u> , 64 Wn. App. 693, 825 P.2d 754 (1992).....	11
<u>State v. Rowe</u> , 63 Wn. App. 750, 822 P.2d 290 (1991).....	10
<u>State v. Samsel</u> , 39 Wn. App. 564, 694 P.2d 670 (1985).....	10
<u>State v. Takesgun</u> , 89 Wn. App. 608, 949 P.2d 845 (1998).....	9
<u>State v. Thompson</u> , 93 Wash.2d 838, 613 P.2d 525 (1980).....	11

State v. Thornton, 41 Wn. App. 506, 705 P.2d 271 (1985).....10
State v. Williams, 102 Wn.2d 733, 689 P.2d 1065 (1984).....10

Constitutional Provisions

U.S. Constitution Fourth Amendment.....8, 9
U.S. Constitution Fourteenth Amendment.....8
Washington State Constitution Article I, Section 7.....9

A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Ms. Fuentes' motion to suppress evidence that was illegally seized.

2. The trial court erred in concluding in its written conclusions of law that "the facts present a reasonable suspicion of criminal activity by this defendant." CP 80.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Was the officer's stop of Ms. Fuentes' car illegal, where the police did not have a reasonable suspicion of criminal activity arising from specific and articulable facts?

C. STATEMENT OF THE CASE

Police paid a visit to an apartment in Kennewick after midnight in hopes of locating a person wanted on an outstanding warrant. RP¹ 4-5.

The occupant of the apartment was a known drug dealer and drugs had been found during a search of the apartment 11 months earlier. RP 6, 24.

As the police approached the apartment, two people sitting on the steps went inside and shut the door. Police knocked on the door but no one would answer so the police left. RP 8.

¹ "RP" refers to the transcript of the suppression hearing held 2/29/12.

The police returned to the apartment around 10 p.m. that same night and set up surveillance to look for various individuals wanted by law enforcement. Over the next 1 ½ to 2 hours the police observed at least ten different people arrive at the apartment, stay for 5-20 minutes then leave. RP 8. Shortly after midnight a car arrived. Police saw Ms. Fuentes get out of the car and enter the apartment. She returned to her car five minutes later, opened the trunk, took out a plastic grocery bag that appeared to contain something about the size of a Nerf football, and reentered the apartment. She returned to her car a few minutes later with the same plastic bag that now appeared empty. She put the bag in the trunk and drove away. RP 10-14.

The police stopped the car based on what they believed to be a reasonable suspicion of drug activity. RP 17. The detective who stopped the car had Ms. Fuentes get out of the car and sit in the police car to talk with him. He read her Miranda warnings. She was not free to leave. He accused her of taking something into the apartment. She eventually confessed to delivering marijuana. RP 15, 52-59.

The police did not see Ms. Fuentes or her car during their first visit to the apartment. She was not one of the two people observed sitting on the steps to the apartment. RP 18-21. The police did not recognize Ms.

Fuentes when she got out of her car and she was not one of the people with warrants that the police were looking for at the apartment. RP 28-29.

Prior to trial, Ms. Fuentes moved to suppress her confession as fruits of an illegal stop. CP 3-13. The Court denied the motion finding the stop was based on a reasonable suspicion of criminal activity. CP 80-81.

Ms. Fuentes was subsequently convicted of delivery of a controlled substance, marijuana, following a stipulated facts trial. CP 103. This appeal followed. CP 114.

D. ARGUMENT

The officer's stop of Ms. Fuentes' car was illegal because the police did not have a reasonable suspicion of criminal activity arising from specific and articulable facts.

Standard of Review. In reviewing a trial court's findings of fact following a suppression hearing, the reviewing court makes an independent review of all the evidence. State v. Apodaca, 67 Wn. App. 736, 739, 839 P.2d 352 (1992), (citing State v. Menegar, 114 Wn.2d 304, 310, 787 P.2d 1347 (1990)). Findings of fact on a motion to suppress are reviewed under the substantial evidence standard. Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. Conclusions of law in an order pertaining to suppression of

evidence are reviewed *de novo*. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

Substantive Argument. The Fourth Amendment, made applicable to the states by way of the Fourteenth Amendment, guarantees the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. Mapp v. Ohio, 367 U.S. 643, 647, 81 S.Ct. 1684, 1687, 6 L.Ed.2d 1081, 84 A.L.R.2d 933 (1961). Its "key principle," or "ultimate standard," is one of "reasonableness." Dunaway v. New York, 442 U.S. 200, 219, 99 S.Ct. 2248, 2260, 60 L.Ed.2d 824 (1979) (White, J., concurring). This key principle has many specific applications. Of those involving the detention of persons, undoubtedly the most fundamental is that it is reasonable for an officer to detain a person indefinitely, e.g., for appearance in court or prosecution, only if the officer has probable cause to believe the person has committed a crime. Gerstein v. Pugh, 420 U.S. 103, 114, 95 S.Ct. 854, 863, 43 L.Ed.2d 54 (1975); State v. Broadnax, 98 Wn.2d 289, 293, 654 P.2d 96 (1982).

Another, narrower application is that even in the absence of probable cause, it is reasonable for an officer to detain a person briefly, for investigation, if the officer harbors a reasonable suspicion, arising from specific and articulable facts, that criminal activity is afoot. Terry v. Ohio,

392 U.S. 1, 21, 88 S.Ct. 1868, 1879, 20 L.Ed.2d 889 (1968); State v. Kennedy, 107 Wn.2d 1, 5-6, 726 P.2d 445 (1986). A police officer's act of stopping a vehicle and detaining its occupants constitutes a seizure. State v. Takesgun, 89 Wn. App. 608, 610, 949 P.2d 845 (1998) (*citing Delaware v. Prouse*, 440 U.S. 648, 653, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979)). To be lawful, it must have been justified at its inception and reasonable in scope. State v. Henry, 80 Wn.A pp. 544, 549-50, 910 P.2d 1290 (1995). The State must show by clear and convincing evidence that the Terry stop was justified. State v. Garvin, 166 Wash.2d 242, 250, 207 P.3d 1266 (2009).

A warrantless, investigatory stop must be reasonable under the Fourth Amendment and article I, section 7 of the Washington State Constitution. State v. Duncan, 146 Wn.2d 166, 171, 43 P.3d 513 (2002). The State must prove an investigatory stop's reasonableness. Id. An investigatory stop is reasonable if the arresting officer can attest to specific and objective facts that provide a reasonable suspicion that the person stopped has committed or is about to commit a crime. State v. Armenta, 134 Wn.2d 1, 10, 948 P.2d 1280 (1997). An investigatory stop occurs at the moment when, given the incident's circumstances, a reasonable person

would not feel free to leave. Armenta, 134 Wn.2d at 10, 948 P.2d 1280; State v. Williams, 102 Wn.2d 733, 739, 689 P.2d 1065 (1984).

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, 726 P.2d 445. However, there must be sufficient articulable facts supporting a reasonable suspicion of criminal activity to justify a temporary investigative stop. See State v. Thornton, 41 Wn. App. 506, 705 P.2d 271 (1985); State v. Samsel, 39 Wn. App. 564, 694 P.2d 670 (1985).

"The reasonableness of the officer's suspicion is determined by the totality of the circumstances known to the officer at the inception of the stop." State v. Lee, 147 Wn. App. 912, 917, 199 P.3d 445 (2008) (citing State v. Rowe, 63 Wn. App. 750, 753, 822 P.2d 290 (1991)); See Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). "[T]he determination of reasonable suspicion must be based on common sense judgments and inferences about human behavior." Id. (citing Illinois v. Wardlow, 528 U.S. 119, 125, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000)).

Reasonable suspicion, like probable cause, is dependant upon both the content of information possessed by police and its degree of reliability. Id. Both factors--quantity and quality--are considered in the "totality of the

circumstances--the whole picture," that must be taken into account when evaluating whether there is reasonable suspicion. Id. (quoting Alabama v. White, 496 U.S. 325, 330, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990)).

A person's presence in a high crime area does not give rise to a reasonable suspicion to stop him. State v. Richardson, 64 Wn. App. 693, 697, 825 P.2d 754 (1992). Similarly, a person's "mere proximity to others independently suspected of criminal activity does not justify the stop." State v. Thompson, 93 Wash.2d 838, 841, 613 P.2d 525 (1980). In Richardson, the defendant was stopped after being observed walking at 2:30 a.m. in an area known for its high drug activity in the company of a person suspected of drug dealing. Richardson, 64 Wn. App. at 694, 825 P.2d 754. The Court of Appeals held that the stop was improper, noting that at the time of the stop the officer "knew only that Mr. Richardson was in a high crime area late at night walking near someone the officer suspected of 'running drugs'. He had not heard any conversation between the men and had not seen any suspicious activity between them." Id. at 697, 825 P.2d 754.

By contrast, in Kennedy, in addition to observing the defendant leave a known drug house, police had reliable information from an informant that the defendant regularly purchased marijuana from the owner

of the drug house and that he only went to that particular house to buy drugs. Kennedy, 107 Wn.2d at 3, 726 P.2d 445. Police also saw the defendant lean forward in his car as if placing something on the front seat. Id.

In State v. Doughty, 170 Wash. 2d 57, 239 P.3d 573, 575 (2010), the police stopped Walter Doughty's car after he briefly visited a suspected drug house at 3:20 a.m. Doughty, 170 Wash.2d at 60, 239 P.3d 573. The information that the house was used to distribute drugs was based on complaints from neighbors and information provided by an informant. Id. The officer arrested Mr. Doughty after a records check revealed that Mr. Doughty's license was suspended. Id. The subsequent search of Mr. Doughty's vehicle revealed a pipe containing methamphetamine residue. Methamphetamine was found in Mr. Doughty's shoe at booking. Id. The trial court denied Mr. Doughty's motion to suppress, and he was convicted of one count of possession of methamphetamine. Id. at 61, 239 P.3d 573.

The Supreme Court concluded that the officer's actions were based on his own "incomplete observations." Doughty, 170 Wash.2d at 64, 239 P.3d 573. The court determined that Doughty is factually similar to Richardson because the officer did not hear any conversations or observe any suspicious activities other than Mr. Doughty leaving a house in the

middle of the night. Id. The court reasoned:

[P]olice never saw any of Doughty's interactions at the 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.

Id.

Likewise, the police in the present case never saw any of Ms. Fuentes' interactions inside the apartment, hear any conversations or observe any suspicious activities other than Ms. Fuentes leaving a house in the middle of the night with an empty grocery bag. They had no knowledge of what was in the grocery bag she took into the apartment or what she did with it. Like Doughty, the police had only their own incomplete limited observation of Ms. Fuentes at the apartment.

Unlike Kennedy, the police did not have any reliable information from another source that Ms. Fuentes regularly delivered marijuana to the owner of the drug house. In fact, the police did not recognize Ms. Fuentes as a known drug dealer or other criminal. Moreover, the police had not seen Ms. Fuentes or her car during their first visit to the apartment earlier that same day. She was not one of the two people observed sitting on the steps to the apartment and she was not one of the people with warrants that the police were looking for at the apartment.

In summation, the totality of the circumstances under these facts did not warrant intrusion into Ms. Fuentes' private affairs. Despite the surrounding circumstances, Ms. Fuentes' behavior could have easily been innocuous. The same is true of the unknown item in the plastic grocery bag. Therefore, the stop was not based on a reasonable suspicion of criminal activity and Ms. Fuentes' confession should have been suppressed.

E. CONCLUSION

For the reasons stated, the conviction should be reversed and the case dismissed.

Respectfully submitted January 9, 2013,

s/David N. Gasch
WSBA #18270
Attorney for Appellant

PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on January 9, 2013, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or e-mailed by prior agreement (as indicated), a true and correct copy of the brief of appellant:

Marisa May Fuentes
407 S Green Place
Kennewick WA 99336

E-mail: prosecuting@co.benton.wa.us
Andrew Kelvin Miller
Benton County Prosecutors Office
7122 W. Okanogan Place, Bldg. A
Kennewick WA 99336-2359

s/David N. Gasch, WSBA #18270
Gasch Law Office
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
FAX: None
gaschlaw@msn.com