No. 454009

COURT OF APPEALS DIVISION II

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

MAKSIM V. BURICH, Appellant

APPEAL FROM THE SUPERIOR COURT

OF PIERCE COUNTY

THE HONORABLE JUDGE STANLEY RUMBAUGH

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

A. The trial court erred when it entered Finding of Fact No. 2: "That Mr. Blackmer had seen a young white male wearing a light grey hoodie and light grey pants enter his residence through a sliding glass door." CP 190.

B. The trial court erred when it entered Finding of Face No. 3: "That on October 8, 2012, at approximately 3:00 am Katherine Evans looked out her upstairs bedroom window and saw a young white male with short light brown hair wearing a light grey hoodie and jeans in her backyard next to the living room window." CP 190.

C. The trial court erred when it entered Resolution of Legal Issues No. 1: "That there were sufficient suspicious circumstances which supported reasonable suspicion to stop the defendant pursuant to a Terry or investigatory stop." (CP 194).

ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Did the officer have a reasonable, articulable suspicion that Mr. Burich was involved in criminal activity sufficient to justify a *Terry* stop?

II. STATEMENT OF FACTS

Maksim Burich was charged by information with burglary in the first degree, unlawful possession of a firearm in the second degree, theft of

a firearm, residential burglary and attempted residential burglary. CP 4-6. He waived a jury trial and the matter proceeded to a bench trial. CP 117-118. (Vol. 4RP 65).

At 2:26 a.m., on October 8, 2013, Officer Stringfellow of the Fife police department responded to a dispatch report of a burglary in progress in a nearby neighborhood. (Vol. 1RP 66). Dispatch advised the intruder "was unknown race, gray-hooded sweatshirt." (Vol. 1RP 91). The homeowner, Mr. Blackmer, told Stringfellow that he had fallen asleep in front of the TV and awoke to a noise. Mr. Blackmer saw the intruder for approximately 3 to 5 seconds and could not describe the intruder's face. (Vol. 1RP 68; Vol. 4RP 5). Mr. Blackmer yelled at the intruder who promptly left. (Vol. 1RP 68). Stringfellow's report, after talking with Mr. Blackmer, included the following:

> "I contacted Blackmer who advised me that he had
> been sleeping on his couch. When he heard a noise near the back sliding glass door, Blackmer looked and saw a slender subject in a light gray hoodie opening the door…"

(Vol. 1RP 92).

The report did not change the dispatch description except to add the word "slender". (Vol. 1RP 92). Stringfellow's report concluded that

based on his conversation with Mr. Blackmer, it was possibly a case of a mistaken apartment. (Vol. 1RP 105).

At 3:05 a.m. Officer Gilbert of the Fife police department got a dispatch call regarding a possible burglary in progress at the home of Ms. Evans. (Vol. 1RP 8-10). The description was "unknown race" male, possibly a teen, wearing a light colored hoodie and jeans. (Vol. 1RP 11). Gilbert drove to the residential area where the burglary had been reported and about 12 minutes later, saw a red car driving about 5 mph or less with its headlights off. (Vol. 1RP 17). The officer testified that when he saw the car: "I thought it was pretty weird, but I thought 'this is someone who doesn't want to be seen and is sneaking around the neighborhood. So, I stopped him.'" (Vol. 1RP 60).

The driver stopped his car about 30 feet away from the patrol car. (Vol. 1RP 20). Using the patrol car headlights and take-down lights, the officer later testified, "… there was a male inside of the car that matched the individual that I was looking for." (Vol. 1RP 17). The officer testified the dispatch description matched in two respects: the driver was a male and he wore a light-colored hoodie. The officer could not see if the driver was wearing jeans. (Vol. 1RP 40).

The officer ordered him to show his hands and asked for his driver's license. (Vol. 1RP 20-21). Mr. Burich said he did not have a

license. The officer ordered him out of the car. (Vol. 1RP 20-21;25). He placed him in handcuffs and "double locked" them. The officer advised him he was "just being detained, that he was not under arrest, and that I was investigating a crime" ..."a burglary suspect." (Vol. 1RP 21). The driver gave his name as Maksim Burich. (Vol 1RP 21-22).

When Gilbert asked why he did not have the headlights on Mr. Burich explained he had gone to a gas station to buy a Gatorade and was lost. He said the car belonged to his friend, Brian; Mr. Burich was on his way to meet Brian at a Motel 6 in Fife. (Vol. 1RP 23-24). Gilbert ran the car's license plate, but never followed up on the registered owner information. (Vol. 1RP 57-59). Soon after, another officer determined that Brian Hunter was the registered owner of the car. (Vol. 1RP 149-150).

Gilbert testified that without entering the car, he peered in through the open driver's side door. (Vol. 1RP 25). He testified he looked in to see if there was a Gatorade in the vehicle; although he later stated he had no recollection if he saw evidence of a drink in the car and his police report made no mention of looking in the car for a drink. (Vol. 1RP 55). After the car had been impounded and searched, a plastic bag and Gatorade bottle were among the items found on the floor of the car. (Vol. 1RP 137).

Gilbert saw a stereo system on the front passenger seat and a .22 caliber rifle in the backseat. (Vol. 1RP 25;26). He testified the rifle "was just sticking up and was in plain view." He had no difficulty seeing it. (Vol. 1RP 27). He moved Mr. Burich away from the vehicle and toward the patrol car. (Vol. 1RP 27). Without providing any Miranda warnings, he told Mr. Burich he was investigating a burglary, he matched the description and he asked Mr. Burich about the gun. (Vol. 1RP 56).

After learning that Mr. Burich was not legally allowed to have a firearm he placed him under arrest, read him his Miranda rights, searched him, and placed him in the back of the patrol car. (Vol. 1RP 28). He did not ask him any questions after giving him his Miranda warnings because "—the question I would have asked him I'd already asked him prior to him being arrested for the gun." (Vol. 1RP 48).

Officer Stringfellow showed up at the scene and he also peered into the car. (Vol. 5RP 77). Stringfellow testified that he saw the Gatorade bottle and stereo on the front seat. He did not initially see the rifle, as it was not entirely visible in the backseat. (Vol. 5RP 105).

Between 7:57 and 8:21 a.m., Detective Nolta interviewed Mr. Burich at the police station. (Vol. 1RP 114-115). After the interview, Nolta heard about another dispatch call about a .22 rifle, a Sony playstation, and a red/black bag taken from an apartment in the same

vicinity as the previous two incidents. (Vol. 1RP 108;116;124-125). Those items were later found in the vehicle.

After a CrR 3.5 and 3.6 hearing, the court entered a conclusion of law: "That there were sufficient suspicious circumstances which supported reasonable suspicion to stop the defendant pursuant to a Terry or investigatory stop." CP 194. The court further ruled that all evidence and statements were admissible. CP 196.

The court found Mr. Burich guilty on the first four counts, with the fifth count being guilty of a lesser-included charge, criminal trespass in the second degree. (Vol. 7RP 4). Mr. Burich makes this timely appeal. CP 155.

III. ARGUMENT

A. SEIZURE OF AN INDIVIDUAL, ABSENT PARTICULARIZED SUSPSION THAT HE IS ENGAGED IN CRIMINAL ACTIVITY, IS UNLAWFUL AND THE FRUIT OF THE SEIZURE MUST BE SUPPRESSED.

On review of a motion to suppress, findings of fact are reviewed to determine whether substantial evidence supports them and whether the findings support the conclusions of law. *State v. Stevenson,* 128 Wn.App. 179, 193, 114 P.3d 699 (2005). *State v. Carlson,* 143 Wn.App. 507, 519, 178 P.3d 371 (2008). Substantial evidence is evidence sufficient to persuade a fair-minded, rational individual of the finding's truth.

Stevenson, 128 Wn. App. at 193. A trial court's conclusions of law following a suppression hearing are reviewed *de novo. State v. Bailey,* 154 Wn.App. 295, 299, 224 P.3d 852, *rev. denied,* 169 Wn.2d 1004, 236 P.3d (2010). The question of whether an investigatory stop, or warrantless seizure, is constitutional is a question of law and reviewed *de novo. State v. Rankin,* 151 Wn.2d 689, 92 P.3d 202 (2004).

Article 1, § 7 of the Washington Constitution, protects individuals against unlawful government intrusions into private affairs, that is, from unlawful search and seizure[1]. *State v. Williams,* 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). A warrantless seizure is considered per se unreasonable and the State bears the burden of showing that a warrantless seizure falls with an exception to the rule. *Id.* at 736. Such exceptions are jealously guarded and carefully drawn. *Id.*

One exception to the warrant requirement is the *Terry* stop. *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 is connected to actual or potential criminal activity. *State v. Garvin,* 166 Wn.2d 242, 250, 207 P.3d 1266 (2009). (Emphasis added); *State v. Sieler,* 95 Wn.2d 43, 46, 621 P.2d 1272 (1980). "In justifying the particular intrusion, the police

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[1] No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

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. The standard for articulable suspicion is "a *substantial* possibility that criminal conduct has or is about to occur. *State v. Kennedy,* 107 Wn.2d 1, 6, 726 P.2d 445 (1986). (Emphasis added). A *Terry* stop must be reasonable and the States bears the burden to show by clear and convincing evidence that the *Terry* stop was justified. *Garvin,* 166 Wn.2d at 250.

When reviewing the merits of an investigatory stop, a court must evaluate the totality of circumstances presented to the investigating officer. *State v. Doughty,* 170 Wn.2d 57, 62, 239 P.3d 573 (2010). The focus is on what the officer knew at the time of the stop, subsequent events or circumstances cannot retroactively justify a stop. *State v. Lee,* 147 Wn.App. 912, 917, 199 P.3d 445 (2008); *State v. Mendez,* 137 Wn.2d 208, 224, 970 P.2d 722 (1999) *abrogated on other grounds by Brendlin v. California,* 551 U.S. 240, 255, 259 n.5, 127 S.Ct. 2400, 168 L.Ed.2d 132 (2007).

For example, a person's presence in a high-crime neighborhood at a late hour does not, by itself, give rise to a reasonable suspicion sufficient to detain that person. *Doughty,* 170 Wn.2d at 62. In *Doughty,* the Court noted that the *Terry*-stop threshold was created to stop police from acting

on mere hunches. *Id.* at 63. In that case, *Doughty* visited a home about which police had received complaints was a drug house. Officers observed Doughty enter the home sometime after 3 a.m., his visit lasted less than two minutes. Suspicious that Doughty had been involved in drug activity, officers stopped him as he drove away from the home. During the investigation, officers also ran a record check and, subsequently arrested Doughty for driving with a suspended license. During a search incident to arrest, a pipe containing methamphetamine was seized from his vehicle and methamphetamine was found in his shoe. *Doughty,* 170 Wn.2d at 60.

On appeal, the Court concluded the officer's actions were based on his own incomplete observations: "Police never saw any of Mr. 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.* The Court reasoned that the officer didn't know if Doughty knocked and no one answered, or he had simply gone to the wrong house. The Court ruled the investigative seizure was unlawful. *Id.* at 64.

Similarly, in *Diluzio,* Division Three held that a police officer lacked a reasonable suspicion to stop a defendant and investigate whether he had solicited a prostitute. *State v. Diluzio,* 162 Wn.App. 585, 254 P.3d

218 (2011). There, the officer saw a vehicle stopped in a lane of traffic on a street known to be a prostitution area. Diluzio conversed with a woman standing on the sidewalk, who then got into the passenger side of his vehicle. The officer did not overhear any conversation between the two, nor did he see an exchange of money. Even with the officer's 13 years of experience, the location of the stop and the lack of nearby open businesses or residences, the Court concluded there were only incomplete observations which did not provide the basis for a *Terry* stop. *Diluzio,* 162 Wn. App, at 593.

The facts presented here are even less substantial than the facts in *Doughty* and *Diluzio.* The officer reported he saw a red car moving slowly down the street. The headlights were off. The officer's candid and articulated reason for stopping Mr. Burich was:

> "I thought it was pretty weird, but I thought 'this is someone who doesn't want to be seen and is sneaking around the neighborhood. So, I stopped him.'"

An officer's suspicion must relate to a particular crime rather than a generalized suspicion that the person detained is "up to no good." *State v. Bliss,* 153 Wn.App. 197, 204, 222 P.3d 107 (2009). The officer did not, by any stretch, articulate a reasonable suspicion of criminal activity.

Similar to *Doughty* and *Diluzio*, the officer here acted on an incomplete observation. Like the Court's reasoning in *Doughty*, the officer did not know if, as Mr. Burich later explained, he borrowed the car from a friend, went to buy a Gatorade, and became lost in a neighborhood on his way to the Motel 6 in Fife. Even reasonable articulable suspicion that a traffic infraction had occurred which justified an exception to the warrant requirement for an ordinary traffic stop did not justify a stop for a criminal investigation. *State v. Ladson,* 138 Wn.2d 343, 349, 979 P.2d 833 (1999). Moreover, the State presented no evidence that Mr. Burich was cited for driving without his lights on or driving without a driver's license.

The trial court here entered findings of fact that Blackmer and Ms. Evans had seen "a young white male" trying to enter their respective homes. (CP 190). However, the record shows that at the time of the stop, the only information the officer had from dispatch was that an "unknown race" male, wearing a grey hoodie and jeans, had attempted to enter a nearby apartment. Under Washington law, the focus is on what the officer knew at the time of the stop, subsequent events or circumstances cannot retroactively justify a stop. *Lee,* 147 Wn.App. at 917.

The facts here do not justify the officer's intrusion into Mr. Burich's private affairs. Because no legal basis existed for the Terry stop,

the stop was unlawful. If the initial Terry stop was unlawful, the exclusionary rule mandates the suppression of the evidence gathered through unconstitutional means. *Doughty,* 170 Wn.2d at 65. As the *Ladson* court stated, "Exclusion provides a remedy for the citizen in question and saves the integrity of the judiciary by not tainting our proceedings by illegally obtained evidence. *Ladson,* 138 Wn.2d at 359. Mr. Burich's convictions should be reversed.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Burich respectfully asks this Court to reverse his conviction and dismiss with prejudice all counts.

Dated this 30th day of April 2014.

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CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for MAKSIM BURICH, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the Appellant's brief was mailed by USPS, postage prepaid, first class, on April 30, 2014, to:

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