SUPREME COURT NO. 96651-6

NO. 49998-3-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LARRY SMITH, JR.,

Petitioner.

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

The Honorable Elizabeth Martin, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Larry Smith, Jr., asks this Court to grant review of the court of appeals' unpublished decision in State v. Smith, No. 49998-3-II, filed October 2, 2018 (Appendix A). The court of appeals denied Smith's motion for reconsideration on November 14, 2018 (Appendix B).

B. ISSUES PRESENTED FOR REVIEW

1. Is this Court's review warranted under all RAP 13.4(b) criteria to resolve a conflict in the case law as to whether citizen informants are presumptively reliable for Terry[1] stop purposes?

2. Is this Court's review warranted under RAP 13.4(b)(2), (3), and (4) to determine whether the majority opinion in Smith's case conflicts with this Court's prior decisions and to clarify what circumstances may establish the reliability of a citizen informant's report of criminal activity?

3. Should this Court remand for the $200 criminal filing fee and $100 DNA fee to be stricken from the judgment and sentence under State v. Ramirez, __Wn.2d__, 426 P.3d 714 (2018)?

C. STATEMENT OF THE CASE

Smith was convicted of unlawful possession of a stolen vehicle at a stipulated facts bench trial after losing a CrR 3.6 motion to suppress.

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

1. Motion to Suppress

Pierce County Sheriff's Deputy Kohl Stewart was dispatched to an apartment complex in Tacoma, Washington, around 3:50 p.m. on August 2, 2016. 2RP 6-8. An unknown citizen called 911 to report a suspicious black and maroon Dodge Ram truck occupied by three people. 2RP 8-11; Ex. 1. The informant believed the individuals were "casing the area" around Building E of the complex and that they had been responsible for recent vehicle prowls. 2RP 10-11, 33; Ex. 1.

The CAD (computer aided dispatch) report noted the caller provided a name (Jay Johnson) and phone number, but asked to remain anonymous. 2RP 11-12, 32; Ex. 1. The report further noted the informant's location had been verified. 2RP 11-12; Ex. 1. Stewart did not know the caller and did not speak with him. 2RP 26-27. Stewart later learned the caller lived at the apartment complex, but had given a false name to the dispatcher. 2RP 26-27, 32.

Stewart arrived at the apartment complex about 10 minutes after the dispatch. 2RP 12. Stewart explained he was familiar with the apartments because of history of stolen cars and vehicle prowls there. 2RP 8. He acknowledged, however, there was "[n]othing immediately specific" that had occurred at the complex. 2RP 8, 27.

Upon arriving, Stewart saw at least two people in a black and maroon Dodge truck that was backing into a parking space in front of building H, rather than building E. 2RP 12. He acknowledged he did not see anything suspicious. 2RP 30-31. Nevertheless, Stewart parked his vehicle approximately 15 feet away from the truck and contacted the driver, later identified as Smith. 2RP 13, 29. He noted there were three men, including Smith, inside. 2RP 14-15.

Stewart asked Smith what they were doing at the apartment complex. 2RP 14-15. Smith said they were there to see someone named Mark. 2RP 15. Steward asked Smith to turn off the truck because it was loud. 2RP 14. Stewart then asked for Smith's name, ran the truck license plate, and discovered it had been reported stolen the day before. 2RP 15-16.

Stewart called for backup and asked Smith to step out of the vehicle, but Smith refused. 2RP 16-17. After a scuffle, the officers removed Smith from the vehicle and placed him under arrest. 2RP 17-18. Stewart discovered the truck ignition had been punched. 2RP 18.

Before trial, Smith moved to suppress all the evidence obtained as a result of Stewart's seizure.[2] CP 5-20. Smith argued the seizure was not

[2] The State agreed at the CrR 3.6 hearing that Smith was seized "right from the get-go." 2RP 38; CP 58. Inconsistent with its position at the CrR 3.6 hearing, the State argued for the first time on appeal that Smith was not seized until Deputy Stewart asked him to exit the vehicle following the records check. Br. of Resp't, 16. The court of appeals declined to consider the State's argument,

supported by reasonable, articulable suspicion under Terry. CP 14-17. Specifically, Smith asserted the citizen informant's tip did not bear sufficient indicia of reliability to give rise to reasonable suspicion. CP 14-17. The 911 caller did not give a factual basis for his conclusion that the truck was casing the area and Stewart did observe any suspicious behavior before seizing Smith. CP 14-17.

The trial court denied Smith's motion to suppress, concluding Stewart conducted a valid Terry stop. 2RP 59; CP 50-51. The court reasoned that Stewart identified the described truck and observed it "to be in motion in a manner that arguably could be innocuous but also consistent with criminal activity of vehicle prowling." 2RP 59. The court explained this was a "corroborating factor" that justified the stop. 2RP 61.

The court entered the following relevant conclusions of law:

> 3) A known citizen informant who provided his name, address and phone number, which was verified by 911 dispatch, provided the basis for the deputy's contact with the defendant.
>
> 4) This known citizen's tip regarding suspected criminal activity was presumptively reliable.
>
> 5) The 911 caller provided sufficient facts that allowed the deputy to believe, based upon a totality of the circumstances, that the defendant and other occupants of the Dodge Ram truck were engaged in criminal activity.

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noting "[t]he trial court specifically concluded the stop was a Terry stop. We analyze the issue accordingly." Majority, 4 n.3.

> 6) The deputy observed the vehicle in motion, which was consistent with possible criminal behavior, and was a corroborating factor of criminal activity.

CP 50-51.

2. Court of Appeals' Decision

Smith advanced the same arguments on appeal. The court of appeals' resolution of the case resulted in a fractured decision. A majority of the panel upheld the trial court's denial of the motion to suppress. Majority, 10. A dissenting judge, Chief Judge Maxa, believed the Terry stop was unlawful and the evidence discovered as a result of the stop should have been suppressed. Dissent, 14. The panel disagreed on every point of law.

First, the majority concluded citizen informants are presumptively reliable, including the previously unknown citizen caller in Smith's case. Majority, 6-7. The majority acknowledged the informant gave a false name, but noted he also provided a verified phone number and location. Majority, 7. The dissent disagreed, emphasizing "[o]ther courts have not presumed that a named but unknown citizen informant was presumed to be reliable." Dissent, 11.

Second, the majority concluded the record also established the reliability of the informant's tip. Majority, 7-8. The majority noted the caller provided a description and location of the vehicle, and stated it

appeared to be casing the apartment complex. Majority, 8. The dissent again disagreed, asserting the caller "did not offer any factual basis to support his allegations" that the truck was "casing" the complex or that the occupants were responsible for recent vehicle prowls. Dissent, 12. The dissent further reasoned the "innocuous facts" of the truck's description and location, as the majority had relied on, failed to "provide a factual basis for the informant's allegation that a crime was being committed." Dissent, 13.

Third, and finally, the majority held Deputy Stewart corroborated the informant's tip by observing the truck backing into a parking spot at the complex. Majority, 8-9. The majority reasoned "[m]ovement by the vehicle corroborates the caller's report that the occupants of the vehicle appeared to be casing the area." Majority, 9. On this final point, the dissent again diverged: "Simply backing into a parking spot does not show or even suggest the presence of criminal activity, even when the truck had been seen in a different part of the parking lot. This is the type of innocuous activity that cannot serve as corroboration." Dissent, 14.

A majority of the court thus upheld Smith's conviction, concluding "[t]he officer's observations corroborated suspicious activity and the citizen informant's 911 tip demonstrated sufficient indicia of reliability." Majority, 10. Chief Judge Maxa warned in his dissent, however, "[u]nder the majority's analysis, any vehicle driving through an apartment complex

would be subject to a Terry stop simply because a caller alleged without any factual basis that the occupants were up to no good." Dissent, 14.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. THIS COURT SHOULD GRANT REVIEW TO DETERMINE WHETHER CITIZEN INFORMANTS ARE PRESUMPTIVELY RELIABLE AND WHETHER SMITH'S CASE IS IN CONFLICT WITH Z.U.E. AND SIELER.

A valid Terry stop requires reasonable, articulable suspicion that the individual is engaged in criminal activity. State v. Doughty, 170 Wn.2d 57, 62, 239 P.3d 573 (2010). When an officer bases his or her suspicion on an informant's tip, the State must show the tip bears some indicia of reliability under the totality of the circumstances. State v. Z.U.E., 183 Wn.2d 610, 618, 352 P.3d 796 (2015). There must be either "(1) circumstances establishing the informant's reliability or (2) some corroborative observation, usually by the officers, that shows either (a) the presence of criminal activity or (b) that the informer's information was obtained in a reliable fashion." Id. The observations "must corroborate more than just innocuous facts, such as an individual's appearance or clothing." Id. at 618-19.

a. This Court's review is warranted to resolve a conflict in the case law as to whether citizen informants are presumptively reliable.

Smith contended below that the trial court erroneously concluded the 911 caller was a "known citizen informant" and therefore his "tip regarding

suspected criminal activity was presumptively reliable." CP 50; Br. of Appellant, 9-11. Smith asserted an identified but previously unknown informant, like the caller here, is not presumptively reliable. Br. of Appellant, 9.

This issue split the court of appeals panel, with two judges believing a citizen informant is presumptively reliable, citing this Court's decision in State v. Gaddy, 152 Wn.2d 64, 93 P.3d 872 (2004), and State v. Kennedy, 107 Wn.2d 1, 726 P.2d 445 (1986). Majority, 6-7. The dissenting judge disagreed, citing this Court's decisions in Z.U.E. and State v. Sieler, 95 Wn.2d 43, 621 P.2d 1272 (1980). Dissent, 11-12.

The Gaddy court stated "[c]itizen informants are deemed presumptively reliable." 152 Wn.2d at 73. The court explained "[i]f the identity of an informant is known—as opposed to being anonymous or professional—the necessary showing of reliability is relaxed." Id. at 72.

However, as Chief Judge Maxa pointed out below, the "citizen" informant in Gaddy was the Washington State Department of Licensing (DOL). Id. at 73; Dissent, 12. The Gaddy court accorded DOL "the status of a citizen informant" (i.e., presumptive reliability), because "DOL is governed by extensive statutes and provisions and the Washington Administrative Code, which establishes its reliability." Id. at 73. The court

emphasized "[t]here are many statutes in place that mandate DOL to maintain current and accurate information." Id.

Thus, DOL was not truly a citizen informant, but a heavily regulated governmental agency required by law to keep accurate records. The Gaddy court's statement about presumptive reliability is arguably dictum.

The Kennedy court held only that a citizen informant's tip does not require the same degree of reliability as a "professional" informant. 107 Wn.2d at 8. As Chief Judge Maxa emphasized, however, "the court in Kennedy did not apply a presumption of reliability." Dissent, 12; Kennedy, 107 Wn.2d at 8 (looking for other corroboration of the informant's tip).

In contrast to Gaddy, this Court in Sieler held "[t]he reliability of an anonymous telephone informant is not significantly different from the reliability of a named but unknown telephone informant." 95 Wn.2d at 48. The Sieler court refused to presume reliable a named, but previously unknown citizen informant who claimed to have witnessed a drug sale. Id. at 47-48. The majority opinion below did not account for Sieler, despite the dissent's reliance on it. Dissent, 11.

Even more recently, in Z.U.E., this Court applied no presumption of reliability to a named but previously unknown 911 caller. 183 Wn.2d at 622-23. There was little reason to doubt the caller's veracity—a citizen eyewitness who provided her name and contact information. Id. at 622. Yet

the caller's assertion of criminal activity could not sustain a Terry stop because she failed to provide any factual basis for her allegation. Id. at 622-23. Like Sieler, the majority did not account for Z.U.E., again despite the dissent's emphasis on it. Dissent, 11.

It is easy to see how the three court of appeals judges reached two different conclusions on the reliability of identified but previously unknown citizen informants. The case law is in conflict.[3] Gaddy states citizen informants are presumptively reliable, while Sieler holds and Z.U.E. implies they are not. This Court's review is warranted under all RAP 13.4(b) criteria to resolve this conflict and provide guidance to police, courts, and practitioners across the state.

b. Review is further warranted because the court of appeals' majority opinion conflicts with this Court's decisions in *Z.U.E.* and *Sieler*.

Review is warranted under RAP 13.4(b)(2), (3), and (4) for the additional reason that the majority opinion conflicts with this Court's decisions in Z.U.E. and Sieler on two key points. First, as the dissent reasoned, even if there were some indicia of the caller's reliability, the caller failed to provide any factual basis for his allegations. Second, the deputy

[3] Court of appeals decisions on this issue are likewise in conflict. Compare State v. Z.U.E., 178 Wn. App. 769, 780, 315 P.3d 1158 (2014), aff'd, 183 Wn.2d 610 (2015) (no presumption), and State v. Hopkins, 128 Wn. App. 855, 863-64, 117 P.3d 377 (2005) (no presumption), with State v. Conner, 58 Wn. App. 90, 96, 791 P.2d 261 (1990) (presumption).

failed to "independently corroborate" the presence of criminal activity. Z.U.E., 183 Wn.2d at 623.

Though this Court decided Z.U.E. relatively recently, there are no other recent decisions from this Court on point. Smith's case presents an opportunity for this Court to clarify and expand on what may, or may not, constitute sufficient indicia of reliability under the totality of the circumstances. The disagreement among the three court of appeals judges below demonstrates the need for this Court to do so.

In Z.U.E., a 911 caller who identified herself as Dawn reported she saw a 17-year-old female hand off a gun to a shirtless man, who then carried the gun through a park. 183 Wn.2d at 614. Dawn gave dispatch a detailed description of the girl's appearance and clothing, but did not reveal why she believed the girl to be 17 years old. Id. The girl's age was the only "fact" that potentially made her possession of the gun unlawful. Id. at 622.

This Court noted several factors "tend[ed] to bolster the reliability of [Dawn's] tip." Id. For instance, Dawn was a citizen eyewitness who made a contemporaneous report "to the unfolding of the events." Id. She likewise called the "emergency 911 line rather than the police business line," and provided her name and contact information. Id.

However, Dawn "did not offer any factual basis in support of [the] allegation" that the girl was 17 years old. Id. As such, "the officers could not ascertain how the caller knew the girl was 17 rather than, say, 18 years old." Id. at 622-23. "The officers knew nothing about Dawn (aside from her contact information), Dawn's relationship with the female, or why Dawn suspected that the girl had committed a crime in the first place." Id. Although this Court presumed Dawn reported honestly, "the officers had no basis on which to evaluate the accuracy of her estimation." Id. at 623. And, at most, the officers were able to verify a female matching the given description was located in the general area. Id. "But corroboration of an innocuous fact, such as appearance, is insufficient." Id. Dawn's 911 call therefore did not create a sustainable basis for a Terry stop. Id.

Similarly, in Sieler, James Tuntland reported a possible drug transaction in a high school parking lot. 95 Wn.2d at 44-45. He described the vehicle and license plate number, but gave no details of the transaction. Id. at 45. The police believed it was not unusual for such transactions to occur during the noon hour in the high school parking lot. Id.

This Court held the subsequent Terry stop was unlawful because it was "based upon an informant's bare conclusion unsupported by any factual foundation known to the police." Id. at 49. The court explained:

> Some underlying factual justification for the informant's conclusion must be revealed so that an assessment of the probable accuracy of the informant's conclusion can be made. It simply makes no sense to require some indicia of reliability that the informer is personally reliable but nothing at all concerning the source of his information. This additional requirement helps prevent investigatory detentions made on the basis of a tip provided by an honest informant who misconstrued innocent conduct. It also reduces such detentions when an informant, who has given accurate information in the past, decides to fabricate an allegation of criminal activity.

Id. at 48-49 (internal quotation marks omitted) (citation omitted). This Court further held "police observation of a vehicle which substantially conforms to the description given by an unknown informant does not constitute sufficient corroboration to indicate that the informant obtained his information in a reliable fashion." Id. at 49-50.

Here, the majority concluded the record established the informant's reliability. Majority, 8. The majority pointed to the 911 caller's "detailed description of the truck" and its location, along with the caller's claim "that there were three occupants in the truck who were acting suspiciously and appeared to be casing the apartment complex parking lot in an area where there were prior vehicle prowls." Majority, 8. The majority believed "[t]hese facts present a more compelling case for reliability than in Z.U.E." Majority, 8.

As Chief Judge Maxa pointed out in his dissent, however, this conclusion is actually contrary to Z.U.E. Dissent, 12-13. The caller stated only that the truck appeared to be "casing" the complex and he believed the occupants were responsible for recent vehicle prowls. 2RP 10-11, 33. The informant did not offer any factual basis for these allegations. He did not describe what the truck or its occupants were doing. Nor did he explain why he believed the truck's occupants were vehicle prowlers. For instance, the informant did not say the truck was driving around slowly, the individuals were looking in car windows, or that he had seen the same individuals engaging in similar behavior on an earlier date.

As Chief Judge Maxa emphasized, Deputy Stewart could therefore "not ascertain how the caller knew that the truck was 'casing' rather than simply looking for a particular apartment or a parking space." Dissent, 13. And, contrary to the majority opinion, Z.U.E. and Sieler clearly hold corroboration of innocuous facts—such as the truck's description and location—cannot establish an informant's reliability.

Chief Judge Maxa summarized the majority's error well:

> The key fact here, as in Z.U.E., is that the caller was not an eyewitness to an obvious crime. The analysis would be different if the caller had witnessed the truck's occupants actually breaking into another vehicle. In that situation, the factual basis would be his observation of a crime. But here the caller only observed some ambiguous behavior that he interpreted as a precursor to criminal

> activity. Like a person's age in Z.U.E., whether a vehicle is casing an area is a very subjective determination. When a caller merely believes that a crime might be committed based on an ambiguous and subjective observation and there is no information about the basis for the caller's belief, under Z.U.E. the caller's assertion cannot create a sustainable basis for a Terry stop.

Dissent, 13 (citing Z.U.E., 183 Wn.2d at 622-23). This discussion demonstrates the majority opinion's conflict with both Z.U.E. and Sieler.

The majority further concluded Deputy Stewart independently corroborated criminal activity. Majority, 9. Like the trial court, the sole fact the majority relied on was the identified truck backing into a parking spot: "Movement by the vehicle corroborates the caller's report that the occupants of the vehicle appeared to be casing the area." Majority, 9.

The dissent again got it right. Dissent, 13-14. Deputy Stewart acknowledged he did not see any suspicious behavior or activity before contacting Smith. 2RP 30-31. Chief Judge Maxa emphasized "[s]imply backing into a parking spot does not show or even suggest the presence of criminal activity, even when the truck had been seen in a different part of the parking lot." Dissent, 14. Under Z.U.E., "[t]his is the type of innocuous activity that cannot serve as corroboration." Dissent, 14.

The majority also went wrong in concluding Deputy Stewart corroborated criminal activity based on the "history of stolen cars and vehicle prowls at the complex." Majority, 9. This line of reasoning is in

direct conflict with Sieler and other cases that hold "the presence of the defendants in an area where drug transactions were known to occur could not by itself give rise to a reasonable suspicion that they were engaged in criminal activity." 95 Wn.2d at 49; see also Doughty, 170 Wn.2d at 62 ("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."). The majority also neglected to mention Deputy Stewart's acknowledgment that "[n]othing immediately specific" had occurred at the complex. 2RP 8, 27.

The majority decision is in conflict with this Court's holdings in Z.U.E. and Sieler, warranting review under RAP 13.4(b)(2). The validity of a Terry stop also presents a significant question of constitutional law, warranting review under RAP 13.4(b)(3). Lastly, this case involves an issue of substantial public interest, warranting review under RAP 13.4(b)(4). As Chief Judge Maxa warned, "[u]nder the majority's analysis, any vehicle driving through an apartment complex would be subject to a Terry stop simply because a caller alleged without any factual basis that the occupants were up to no good." Dissent, 14. This type of broad, unwarranted intrusion in citizens' private lives is certainly an issue of public concern.

2. THIS COURT SHOULD REMAND FOR COSTS TO BE STRICKEN UNDER RAMIREZ.

This Court decided Ramirez on September 20, 2018, long after all the briefing was completed in Smith's case. In Ramirez, 426 P.3d at 722, this Court held House Bill (HB) 1783, which took effect on June 7, 2018, applies prospectively to cases on direct appeal. The court of appeals issued its decision in this case on October 2, 2018, less than two weeks after Ramirez.

Smith moved to reconsider based on Ramirez, because the trial court imposed the $200 criminal filing fee and $100 DNA fee, despite Smith's multiple prior felony convictions. CP 24-25. The court of appeals denied the motion, without calling for an answer from the State, "because appellant raised this issue for the first time after the court filed its opinion." Appendix B.

Ramirez indisputably applies to Smith's case because it is still pending on direct appeal and Smith was indigent at the time of sentencing. CP 39-40, 43-44. Smith respectfully requests that this Court exercise its discretion and remand for the trial court to strike the $200 filing fee and $100 DNA fee under Ramirez, even if this Court does not grant review on the substantive issues presented.

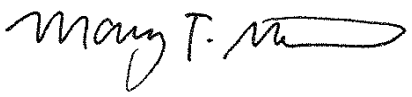
E. CONCLUSION

This Court should accept review under all RAP 13.4(b) criteria, reverse the court of appeals, and remand for the trial court to dismiss Smith's conviction with prejudice. This Court should also remand for the $200 criminal filing fee and $100 DNA fee to be stricken.

DATED this 14th day of December, 2018.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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Appendix A

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. LARRY EUGENE SMITH, JR., Appellant.	No. 49998-3-II UNPUBLISHED OPINION

LEE, J. — Larry Eugene Smith, Jr. appeals his conviction for unlawful possession of a stolen vehicle, arguing that the trial court erred in denying his CrR 3.6 motion to suppress evidence discovered when a police officer stopped him. Because the police officer's encounter with Smith was a valid investigative stop, we affirm.

FACTS[1]

An apartment complex resident called 911 to report a suspicious black and maroon Dodge Ram truck in the parking lot with three occupants inside who appeared to be casing the complex. The 911 caller reported that the subjects in the Dodge truck were currently parked in the parking lot in front of his apartment in Building E. The 911 caller further stated that he believed that the occupants of the truck were responsible for recent vehicle prowls. The 911 dispatcher verified the

[1] The following facts are taken primarily from the trial court's unchallenged CrR 3.6 findings of fact, which are verities on appeal. *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003).

caller's name, which he reported as Jay Johnson; the caller's location; and the caller's phone number. It was later learned that the caller did not use his real name.

Pierce County Sheriff's Deputy Kohl Stewart responded to the call. He arrived at the apartment complex approximately 10 minutes after being dispatched. Deputy Stewart was familiar with the apartment complex because there had been a history of stolen cars and vehicle prowls at the complex.

When he arrived at the apartment complex, Deputy Stewart located a black and maroon Dodge Ram truck that had moved from Building E and was backing into a parking spot near Building H of the apartment complex. The truck matched the description provided by the 911 caller.

Deputy Stewart parked his patrol car approximately 10-15 feet away from the Dodge truck, but did not activate the emergency lights or siren on his patrol car, and he did not park his patrol car in a way that would have prevented the driver of the truck from pulling out of the parking spot. Deputy Stewart got out of his patrol car, walked towards the truck, and saw that there were three occupants as the 911 caller had reported.

Deputy Stewart approached the driver side of the truck. Because the truck was idling loudly, Deputy Stewart asked the driver, Smith, to turn off the engine. Deputy Stewart then asked Smith what he was doing at the complex. Smith told the officer he was there to talk to someone. Deputy Stewart asked for Smith's name and then returned to his patrol car. This contact lasted for approximately two minutes.

Deputy Stewart ran Smith's name and the truck's license plate number through his computer system in his patrol car. The deputy learned Smith's license was suspended and the truck was previously reported stolen.

Deputy Stewart retuned to the truck and asked Smith to step out of the truck. Smith refused. A second deputy arrived and assisted Deputy Stewart with removing Smith. Smith actively resisted the officers and was eventually tased.

The State charged Smith with unlawful possession of a stolen vehicle and resisting arrest. Smith filed a motion to suppress all evidence, arguing that the initial encounter between him and Deputy Stewart was unlawful.

The trial court denied the motion, concluding that:

> 3) A known citizen informant who provided his name, address and phone number, which was verified by 911 dispatch, provided the basis for the deputy's contact with the defendant.
>
> 4) This known citizen's tip regarding suspected criminal activity was presumptively reliable.
>
> 5) The 911 caller provided sufficient facts that allowed the deputy to believe, based upon a totality of the circumstances, that the defendant and other occupants of the Dodge Ram truck were engaged in criminal activity.
>
> 6) The deputy observed the vehicle in motion, which was consistent with possible criminal behavior, and was a corroborating factor of criminal activity.
>
> 7) The deputy conducted a valid stop of the defendant pursuant *Terry v. Ohio,* supra.
>
> 8) The defendant's motion to suppress evidence is denied. That evidence is admissible at the defendant's trial.

Clerk's Papers (CP) at 50-51.

The trial court dismissed the resisting arrest charge and the matter proceed to a stipulated facts trial on the remaining charge. The trial court found Smith guilty of unlawful possession of a stolen vehicle. Smith appeals.

ANALYSIS

Smith contends the trial court erred when it failed to suppress evidence following an unconstitutional seizure. He contends Deputy Stewart acted on an unreliable citizen informant tip and, therefore, seized him without the reasonable suspicion required by *Terry*.[2] We disagree.[3]

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

[3] The State argues that the deputy's initial contact with Smith would be more analogous to a social contact than a *Terry* stop. Our review, however, is focused on the trial court's conclusions of law. *State v. Roden*, 179 Wn.2d 893, 898, 321 P.3d 1183 (2014). The trial court specifically concluded the stop was a *Terry* stop. We analyze the issue accordingly.

Nevertheless, we note that a social contact "occupies an amorphous area in our jurisprudence, resting someplace between an officer's saying 'hello' to a stranger on the street and, at the other end of the spectrum, an investigative detention." *State v. Harrington*, 167 Wn.2d 656, 664, 222 P.3d 92 (2009). Police officers may "engage persons in conversation and ask for identification even in the absence of an articulable suspicion of wrongdoing." *State v. Young*, 135 Wn.2d 498, 511, 957 P.2d 681 (1988). Moreover, police officers may run computer checks of license plate numbers without any suspicion of criminal activity. *State v. McKinney*, 148 Wn.2d 20, 60 P.3d 46 (2002); *see also State v. Jorden*, 160 Wn.2d 121, 130, 156 P.3d 893 (2007) (law enforcement may "randomly run checks of the license plates" of parked vehicles outside motels).

Here, when Deputy Stewart approached the truck, he asked Smith his name and what he was doing at the apartment complex. The deputy then ran the truck's license plate and learned the truck was stolen. These actions alone support admission of evidence that Smith unlawfully possessed a stolen vehicle. As such, we note that additional grounds exist to affirm. *See State v. Norlin*, 134 Wn.2d 570, 582, 951 P.2d 1131 (1998) (we may affirm a trial court's decision as to the admissibility of evidence on any basis supported by the record).

A. STANDARD OF REVIEW

We review a trial court's legal conclusions following a motion to suppress de novo. *State v. Roden*, 179 Wn.2d 893, 898, 321 P.3d 1183 (2014). We also review whether the conclusions of law flow from the findings of fact. *State v. Russell*, 180 Wn.2d 860, 866, 330 P.3d 151 (2014).

B. INVESTIGATIVE STOP

The Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution prohibit a warrantless search and seizure unless the State demonstrates that one of the narrow exceptions to the warrant requirement applies. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). Washington allows a few jealously and carefully drawn exceptions to the warrant requirement, which includes *Terry* investigative stops. *Garvin*, 166 Wn.2d at 249. 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, 239 P.3d 573 (2010).

"To conduct a valid *Terry* stop, 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)). We look to the totality of circumstances known to the officer in deciding whether an officer had a reasonable suspicion that criminal conduct has occurred or is about to occur. *Weyand*, 188 Wn.2d at 811. When the activity is consistent with criminal activity, although also consistent with noncriminal activity, it may justify a brief detention. *Id.* And " '[t]he courts have repeatedly encouraged law enforcement officers to investigate suspicious situations.' " *State v. Lee*, 147 Wn. App. 912, 918, 199 P.3d 445 (2008) (alterations in original) (quoting *State v. Mercer*, 45 Wn. App. 769, 775, 727 P.2d 676 (1986)), *review denied*, 166 Wn.2d 1016 (2009).

"It is generally recognized that crime prevention and crime detection are legitimate purposes for investigative stops or detentions." *State v. Kennedy*, 107 Wn.2d 1, 5-6, 726 P.2d 445 (1986).

An informant's tip can provide police with reasonable suspicion to justify an investigatory *Terry* stop if the tip possesses sufficient " 'indicia of reliability' " under the totality of the circumstances. *State v. Sieler*, 95 Wn.2d 43, 47, 621 P.2d 1272 (1980) (quoting *Adams v. Williams*, 407 U.S. 143, 147, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972)). When deciding whether this indicia of reliability exists, the courts will generally consider a showing of (1) the informant's reliability, or (2) some corroborative observation made by the officer, that "shows either (a) the presence of criminal activity or (b) that the informer's information was obtained in a reliable fashion." *State v. Z.U.E.*, 183 Wn.2d 610, 618, 352 P.3d 796 (2015). If relying on corroboration, the corroboration must be of more than just innocuous facts such as appearance. *Id*. at 618-19. The existing standard does not require all factors to establish indicia of reliability. *Id. at* 620.

1. Reliability of the Informant

"Citizen informants are deemed presumptively reliable." *State v. Gaddy*, 152 Wn.2d 64, 73, 93 P.3d 872 (2004).[4] "[N]eighbors' information does not require a showing of the same degree of reliability as the informant's tip since it comes from 'citizen' rather than 'professional' informants." *Kennedy*, 107 Wn.2d at 8. Moreover, a citizen informant reporting a crime can be "inherently reliable for purposes of a *Terry* stop, even if calling on the telephone rather than

[4] The dissent states that the Supreme Court in *Gaddy* was referring to information obtained from the Department of Licensing (DOL) and "not a citizen informant." Dissent at 1. We disagree with the dissent. The Supreme Court first held that citizen informants are presumptively reliable and then held that "DOL should be accorded the status of a citizen informant." *Gaddy*, 152 Wn.2d at 73.

speaking to the police in person." *State v. Conner*, 58 Wn. App. 90, 96, 791 P.2d 261, *review denied*, 115 Wn.2d 1020 (1990).

Here, the citizen informant called 911 and reported a suspicious black and maroon Dodge Ram truck with three occupants inside who appeared to be casing the apartment complex where the informant lived. The 911 caller stated that he believed that the occupants of the truck were responsible for the recent vehicle prowls. The 911 dispatcher recorded the caller's name, location, and phone number. Although the truck was reportedly parked outside the informant's building when the informant first called, and had moved by the time Deputy Stewart arrived, the truck was still in the apartment complex.

We follow our Supreme Court's guidance in *Gaddy* and presume the citizen informant in this case was reliable. *Gaddy*, 152 Wn.2d at 73. The 911 caller described the truck outside his apartment in detail, the number of occupants, and expressed his concern that they were involved in the recent vehicle prowls. While the 911 caller provided a false name when asked, the caller still provided his phone number and location, which the 911 dispatcher verified. There is no evidence that the 911 caller's information was marred by self-interest. And when Deputy Stewart arrived, the truck was still in the apartment complex parking lot with the same number of occupants as reported by the 911 caller. These facts support that the 911 caller's tip contained sufficient indicia of reliability.

Smith argues that the 911 caller's tip lacked sufficient indicia of reliability, relying mainly on *Z.U.E.* In *Z.U.E.*, the Court held that an informant's tip was unreliable because the informant failed to allege objective facts indicating criminal activity. 183 Wn.2d at 622-23. The informant alleged facts suggesting the suspect was a minor in possession of a firearm, but the informant failed

to explain how she knew the suspect was a minor, and simply "carrying a gun is not automatically a crime." *State v. Z.U.E.*, 178 Wn. App. 769, 786, 315 P.3d 1158 (2014), *aff'd*, 183 Wn.2d 610 (2015).

The record here establishes the informant's reliability. Unlike the informant in *Z.U.E.*, the caller here provided the 911 dispatcher a detailed description of the truck and specifically stated that the truck was outside the caller's Building E. The 911 caller also stated that there were three occupants in the truck who were acting suspiciously and appeared to be casing the apartment complex parking lot in an area where there were prior vehicle prowls. These facts present a more compelling case for reliability than in *Z.U.E.*

It is well settled that the reasonableness of police action when making an investigatory stop must be reviewed on a case by case basis. *See State v. Lesnick*, 84 Wn.2d 940, 944, 530 P.2d 243 ("*Terry* . . . emphasize[s] that no single rule can be fashioned to meet every conceivable confrontation between the police and citizen. Evaluating the reasonableness of the police action and the extent of the intrusion, each case must be considered in light of the particular circumstances facing the law enforcement officer."), *cert denied*, 423 U.S. 891 (1975). We conclude the 911 caller was a reliable citizen informant under the circumstances here.

2. Corroborative Observation Made By the Officer

While not a required factor, courts also consider whether police corroborated information from the informant's tip. *Z.U.E.*, 183 Wn.2d at 618; *Lee*, 147 Wn. App. at 918. Officers can directly corroborate a tip by observing circumstances that suggest criminal activity. *State v. Saggers*, 182 Wn. App. 832, 841, 332 P.3d 1034 (2014).

Here, the 911 caller reported suspicious behavior by three individuals inside a black and maroon Dodge Ram truck at the caller's apartment complex near his building, Building E. The caller also reported that the individuals appeared to be casing the area and may have been involved in prior vehicle prowls in the area.

Deputy Stewart arrived at the apartment complex approximately 10 minutes after being dispatched. When Deputy Stewart arrived, he observed the black and maroon Dodge Ram truck with three occupants backing into a parking spot near Building H of the apartment complex. Movement by the vehicle corroborates the caller's report that the occupants of the vehicle appeared to be casing the area. Facts that appear innocuous to an average person may appear suspicious to a police officer in light of past experience. *State v. Moreno*, 173 Wn. App. 479, 493, 294 P.3d 812 (2013). Also, Deputy Stewart was familiar with the apartment complex because there had been a history of stolen cars and vehicle prowls at the complex. Accordingly, we conclude sufficient indicia of reliability is also shown by police corroboration.[5]

[5] We note that courts may also consider whether the information was obtained in a reliable fashion. *Lee*, 147 Wn. App. at 918. Here, the informant called 911 from his apartment complex and the 911 dispatcher was able to verify the caller's phone number and location. Deputy Stewart was aware the information was reported through a 911 call and he had no reason to doubt the informant's reliability. Thus, we conclude the information was obtained by reliable means. *See Navarette v. California*, 572 U.S. 393, 134 S. Ct. 1683, 1689-90, 188 L. Ed. 2d 680 (2014) ("[a] 911 call has some features that allow for identifying and tracing callers, and thus provide some safeguards against making false reports with immunity. . . . Given the foregoing technological and regulatory developments . . . a reasonable officer could conclude that a false tipster would think twice before using such a system.").

CONCLUSION

Under the totality of the circumstances, the indicia of reliability in this case demonstrated sufficient reasonable suspicion to support Deputy Stewart's investigatory *Terry* stop of Smith. The officer's observations corroborated suspicious activity and the citizen informant's 911 tip demonstrated sufficient indicia of reliability. We conclude the trial court did not err in denying Smith's CrR 3.6 motion to suppress evidence.[6]

We affirm.

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.

Lee, J.

I concur:

Melnick, J

[6] Smith also states, without argument, that there was insufficient evidence to support his conviction for unlawful possession of a stolen vehicle without the improperly admitted evidence. Because we hold the trial court did not err in denying Smith's motion to suppress, we do not address this argument.

MAXA, C.J. (dissenting) – I disagree with the majority opinion's analysis of the unknown 911 caller's reliability and the officer's corroborative observations. A proper analysis shows that under the totality of the circumstances, the unknown caller's report and the officer's observations were not sufficient to justify a *Terry*[7] stop. Therefore, I dissent.

First, I disagree with the majority's application of a rule that citizen informants are presumptively reliable. I do not believe that such a presumption exists for named but otherwise unknown callers to law enforcement. The Supreme Court in *State v. Z.U.E.*, 183 Wn.2d 610, 352 P.3d 796 (2015) did not apply such a presumption to a 911 caller who gave her name. Instead, the court determined whether the totality of the circumstances established her reliability. *Id*. at 618-23. The court concluded that the citizen informant in that case was not reliable based on the circumstances surrounding her report that she had observed unlawful activity. *Id*. at 622-23.

Other courts have not presumed that a named but unknown citizen informant was presumed to be reliable. The court in *Z.U.E.* cited with approval *State v. Sieler*, in which the court found that the father of a high school student who observed a drug sale in a school parking lot lacked sufficient indicia of reliability even though he provided his name. 95 Wn.2d 43, 44-45, 47-48, 621 P.2d 1272 (1980). The court in *Sieler* did not apply a presumption of reliability for a citizen who gave a report in person. *See id.* Similarly, in *State v. Hopkins* this court refused to apply a presumption of reliability to a citizen informant when the State did not otherwise produce any evidence that the informant was reliable. 128 Wn. App. 855, 863-64, 117 P.3d 377 (2005).

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

The majority cites *State v. Gaddy*, 152 Wn.2d 64, 73, 93 P.3d 872 (2004). But that case involved information that officers received from the Department of Licensing, not an unknown citizen informant. *Id*. at 70-73. The majority also cites *State v. Kennedy*, 107 Wn.2d 1, 8, 726 P.2d 445 (1986). But the court in *Kennedy* did not apply a presumption of liability; it stated only that citizen informants do not require the same degree of reliability as professional informants. *Id*.

Second, the majority ignores that even if the caller here had some indicia of reliability, he provided no factual basis for his allegation that the car was "casing" the apartment complex. The absence of any factual basis was the key to the court's holding in *Z.U.E.* 183 Wn.2d at 622-23. In that case, the 911 caller stated that she saw a 17-year-old female hand off a gun to a man. *Id*. at 614. The court noted that if the female had been 17 years old, her possession of a gun would have been unlawful. *Id*. at 622. But the court emphasized that investigating officers had no way of evaluating the informant's statement regarding the female's age.

> [B]ecause the caller did not offer any factual basis in support of that allegation, the officers could not ascertain how the caller knew the girl was 17 rather than, say, 18 years old. . . . Although we presume that [the informant] reported honestly, the officers had no basis on which to evaluate the accuracy of her estimation. We follow our holding in *Sieler* and conclude that this 911 caller's assertion cannot create a sustainable basis for a *Terry* stop.

Id. at 622-23.

The same problem exists here. The caller stated only that a truck appeared to be "casing" the apartment complex parking lot and that he believed that the occupants were responsible for recent vehicle prowls in the complex. But the caller here did not offer any factual basis to support his allegations. He did not describe what the truck was doing. He did not explain why

he believed that the truck's occupants were vehicle prowlers. Therefore, the officers could not ascertain how the caller knew that the truck was "casing" rather than simply looking for a particular apartment or a parking space.

The key fact here, as in *Z.U.E.*, is that the caller was not an eyewitness to an obvious crime. The analysis would be different if the caller had witnessed the truck's occupants actually breaking into another vehicle. In that situation, the factual basis would be his observation of a crime. But here the caller only observed some ambiguous behavior that he *interpreted* as a precursor to criminal activity. Like a person's age in *Z.U.E.*, whether a vehicle is casing an area is a very subjective determination. When a caller merely *believes* that a crime might be committed based on an ambiguous and subjective observation and there is no information about the basis for the caller's belief, under *Z.U.E.* the caller's assertion cannot create a sustainable basis for a *Terry* stop. *Z.U.E.*, 183 Wn.2d at 622-23.

The majority emphasizes the fact that the caller here accurately described the truck, the fact there were three people inside the truck, and the location of a truck in the apartment complex parking lot. But the fact that an informant accurately described innocuous facts is not sufficient to provide a factual basis for the informant's allegation that a crime was being committed. *See id*. at 618-19.

Third, I disagree with the majority's conclusion that the officer sufficiently corroborated the informant's tip. To justify a *Terry* stop when the informant's reliability has not been established, the court in *Z.U.E.* stated that an officer must make some corroborative observation that shows "the presence of criminal activity." *Id*. at 618. "These corroborative observations do not need to be of particularly blatant criminal activity, but they must corroborate more than just

innocuous facts." *Id.* Here, the officer's only observation before making the *Terry* stop was of the truck backing into a parking spot. Simply backing into a parking spot does not show or even suggest the presence of criminal activity, even when the truck had been seen in a different part of the parking lot. This is the type of innocuous activity that cannot serve as corroboration. *See Id.* at 618.

In summary, all the investigating officer knew was that an identified but unknown caller *believed* that a truck was "casing" an apartment complex and that he *believed* that the truck's occupants might be responsible for recent vehicle prowls. But the caller's report was unsupported by facts; he provided absolutely no basis for his belief. And the officer did not observe any activity that would suggest that the truck was "casing" as opposed to merely parking. Under these circumstances, a *Terry* stop was not justified.

Under the majority's analysis, any vehicle driving through an apartment complex would be subject to a *Terry* stop simply because a caller alleged without any factual basis that the occupants were up to no good. I do not believe that *Z.U.E.* supports such a conclusion. I would hold that the officer's *Terry* stop here was unlawful and therefore that the evidence obtained as a result of that stop should have been suppressed.

Maxa, C.J.

Appendix B

Filed
Washington State
Court of Appeals
Division Two

November 14, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. LARRY EUGENE SMITH, JR., Appellant.	No. 49998-3-II ORDER DENYING MOTION FOR RECONSIDERATION

APPELLANT, Larry E. Smith JR., filed a motion for reconsideration of this court's unpublished opinion filed on October 2, 2018. After consideration, it is hereby

ORDERED that the motion for reconsideration is denied because the appellant raised this issue for the first time after the court filed its opinion.

FOR THE COURT

PANEL: Jj. Maxa, Lee, Melnick

, A.C.J.

ACTING CHIEF JUDGE

NIELSEN, BROMAN & KOCH P.L.L.C.

December 14, 2018 - 9:38 AM

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