SUPREME COURT NO. 96872-1

NO. 76901-4-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

NICOLAS VAN DUREN

Petitioner.

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

The Honorable George F.B. Appel, Judge
The Honorable Richard T. Okrent, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Nicholas Van Duren, the appellant below, asks this Court to grant review pursuant to RAP 13.4 of the Court of Appeals unpublished decision in State v. Van Duren, ___ Wn. App. ___, ___ P.3d ___, 2019 WL 295930 (No. 76901-4-I, filed January 22, 2019).[1]

B. ISSUE PRESENTED FOR REVIEW

Review is warranted under RAP 13.4(b)(1), (b)(2) and (b)(3) because the warrantless seizure of Van Duren was based on an anonymous tip that fails to satisfy the requisite indicia of reliability, the facts known to the officer who seized Van Duren are insufficient to support a reasonable individualized suspicion of criminal activity, Division One's opinion conflicts with precedent from this Court and other Court of Appeals precedent, and the case involves significant questions of Constitutional law.

C. STATEMENT OF THE CASE[2]

Arlington police officer Pendleton Cook responded to a 911 call reporting a residential burglary near the Gleneagle Golf Course. 1RP[3] 49. The homeowners observed surveillance video of someone in their house and

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[1] A copy of the opinion is attached as Appendix A.

[2] Van Duren presented a more detailed statement of facts in the Brief of Appellant (BOA), at pages 2-12, which he incorporates by reference.

[3] The index to the citations to the record is found in the BOA at 3, n.1.

contacted a neighbor who then called police. 1RP 49; Ex 1. Police found a broken window and several items that were scattered inside the house. 1RP 49-50. No one was inside the house. 1RP 49-51, 58. Cook did not watch the surveillance video from inside the home. 1RP 70.

About one hour later, Cook stopped a red Toyota Corolla around one mile away from the reported burglary. 1RP 54-56, 72. Van Duren was a passenger in the car. The car contained items reported missing by the homeowners. 2RP 109-12.

Van Duren moved to suppress evidence related to the search of the car on the basis that Cook lacked reasonable suspicion to stop the car. CP 123-34, 135-53; 1RP 104-06, 109, 113-18. Cook was the only witness called during the suppression hearing. See 1RP 49-124.

Cook explained that at the scene of the burglary a woman showed him a photograph on a cell phone. The photograph showed a man in a gray jacket with a black backpack walking "from the vicinity of the [burglarized] residence to a car." 1RP 50, 63. Cook believed the car was a red "2005-ish Toyota Corolla." 1RP 59. No evidence presented at the suppression hearing revealed that anyone saw the man in the photograph get into the car. See 1RP 50, 52-53, 63-64, 97.

Cook could not recall the name of the woman or what exactly she had told him. 1RP 58. Cook also could not recall how the woman obtained

the photograph, when it was taken, or whether the cell phone containing the photograph belonged to her. 1RP 50-51, 57, 61-63. Cook nonetheless speculated the woman was a neighbor with "some kind of relationship" with the house owner. 1RP 52, 57-58. Cook based that theory on "[j]ust time and location that people would be there on a scene, and I wouldn't imagine someone being that quick on scene driving from a different location." 1RP 58.

Cook opined the car depicted in the photograph matched the description of a car Officer Brian DeWitt had contacted earlier in the day. As Cook explained, DeWitt had contacted a red car parked in the Gleneagle Country Club parking lot. 1RP 50-54, 59-60. Cook did not know how far the parking lot was from the burglarized house. Cook nonetheless opined that the residence could be seen from the country club parking lot. 1RP 60-61.

DeWitt did not testify at the suppression hearing. Thus, the only source of the information DeWitt learned from the earlier contact with the car was through Cook's own suppression testimony. Cook did not testify as to the specific description of the car that DeWitt gave him.

Cook did not know whether the car had been the subject of a specific report or whether DeWitt had contacted it on his own accord. 1RP 66. Cook was not personally involved with the contact. 1RP 59. DeWitt told Cook

that he spoke with the female driver of the car. 1RP 50, 52, 96. No one else was inside the car. DeWitt told Cook he believed someone had been sleeping in the car because the front passenger seat was reclined back. 1RP 52-53. DeWitt recorded the license plate of the car. Cook knew that DeWitt had "cleared" the scene without making any arrest. 1RP 66-67. It was unclear at what time DeWitt contacted the driver. CP 229 (finding 8).

Cook could "not specifically" identify the make, model, or license plate of the car depicted in the photo. 1RP 59, 61, 76, 90-91, 94. DeWitt however, had entered the license plate into the police database. 1RP 68.

Cook decided to drive around the area and look for the car that DeWitt had previously cleared. 1RP 54. About one mile from the house, Cook saw a red 2005 Toyota Corolla. 1RP 54. There were several other cars driving between Cook and the Corolla. 1RP 55. Cook pulled behind the Corolla and confirmed that the license plate matched the car that DeWitt had previously cleared. 1RP 54.

Cook saw two people in the car. He "assumed" the driver was a woman based on the long hair. 1RP 72-73. He was unable to make any other observations about the car's occupants. 1RP 56, 72. He could not confirm the front seat male passenger matched the man depicted in the photograph shown to him earlier. 1RP 55-56, 72. Cook did not suspect the female driver, later identified as Lauren Kinney, had been inside the house that was

burglarized. 1RP 73. Cook observed no equipment failures on the car and did not see the car speeding or otherwise violating any traffic laws. 1RP 73, 96. As Cook acknowledged,

> There was nothing that I could see that would make me perform a traffic stop on the car, except for the fact that it matched the exact description and the plate was the same that we had for the suspicious call earlier in the day, and that it matched time, location, those things.

1RP 56-57, 73.

Cook nonetheless decided to stop the car so he could identify the people inside. 1RP 56-57, 93-94. The car pulled over immediately. 1RP 55-56, 73, 93.

The trial court denied Van Duren's motion to suppress. CP 228-30. The trial court noted there was no evidence as to how close in time to the burglary the car was contacted by DeWitt. 1RP 122. Cook stopped the car about 50 minutes after the burglary call. 1RP 121. The trial court acknowledged the case depended on the information provided by the anonymous informant who showed the photograph to Cook. 1RP 122. The trial court found there was a sufficient indicia of reasonable suspicion to justify the stop. 1RP 124. The trial court explained:

> Clearly the officer here, based on the corroboration, based upon the informant tip, had a reasonable suspicion. The informant, although the informant is anonymous for this case, clearly provided enough information to link the

> defendants with the red car, and so this was a valid stop. That's what the court will decide in this matter.

1RP 123.

Much later, the trial court entered written findings of fact and conclusions of law, which state in relevant part:

> 3. Based on the informant, Officer DeWitt[4] believed that a man was involved in the burglary and was somehow involved with a red car.
>
> 4. The informant was a neighbor who knew the area, knew the victim, took a picture of the red car, and saw someone get into the red car.
>
> 6. The Glen Eagle parking lot was adjacent from the place that was burglarized.
>
> 9. Officer DeWitt relayed the information that he had learned, listed above, to Officer Cook.
>
> 12. Officer Cook conducted a traffic stop on a red car matching the description of Officer DeWitt and the informant.
>
> ....
>
> 2. Based on the corroboration and the information from the informant, the officer had reasonable suspicion.
>
> 3. Although the informant is anonymous in this case, there was clearly enough information provided to link the defendants with the red car with the burglary. Therefore, the stop was valid.
>
> 5. Here, there is sufficient indicia that there was reasonable suspicion.

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[4] Several findings of fact erroneously cite Officer DeWitt as the person who contacted the anonymous informant.

CP 228-30.[5] Van Duren was subsequently convicted of one residential burglary while on community custody. CP 25-26, 65; 2RP 205-08, 220-21.

On appeal, Van Duren argued the trial court erred in denying his motion to suppress because the anonymous tip and proximity to the burglary did not provide a reasonable articulable suspicion of individualized criminal activity justifying the stop of the car. Brief of Appellant (BOA) at 12-30. Van Duren's argument relied on several cases, including State v. Z.U.E., 183 Wn.2d 610, 618, 352 P.3d 796 (2015), State v. Doughty, 170 Wn.2d 57, 62, 239 P.3d 573 (2010), and State v. Hopkins, 128 Wn. App. 855, 858-59, 117 P.3d 377 (2005). Id.

The Court of Appeals rejected Van Duren's argument, concluding "the totality of the circumstances" justified Cook's reasonable suspicion that the car was connected to the residential burglary. Op. at 8-9. The Court of Appeals held that the anonymous tip and photograph provided an indicia of reliability and necessary reasonable suspicion because it showed the male suspect walking from the "vicinity of the burglarized residence--to a red 2005 Toyota Corolla." Op. at 10.

Van Duren now asks this Court to accept review, reverse the Court of Appeals, and dismiss his conviction for residential burglary.

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[5] A copy of the trial court's written findings and conclusions are attached as Appendix B.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

THIS COURT SHOULD ACCEPT REVIEW UNDER RAP 13.4(b)(1), (b)(2), and (b)(3) BECAUSE WHETHER POLICE HAD A REASONABLE ARTICULABLE SUSPICION OF INDIVIDUALIZED CRIMINAL ACTIVITY BASED ON AN ANONYMOUS TIP IS A SIGNIFICANT QUESTION OF LAW AND THE COURT OF APPEALS OPINION CONFLICTS WITH STATE V. Z.UE. AND STATE V. DOUGHTY.

Review is warranted because this case presents a significant question of constitutional law under RAP 14.3(b)(3). Under the Fourth Amendment and Article I, Section 7, a warrantless seizure is per se unreasonable unless it falls within one of the narrow, carefully delineated, and jealously guarded exceptions to the warrant requirement. Katz v. United States, 389 U.S. 347, 357, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967); State v. Buelna Valdez, 167 Wn.2d 761, 777, 224 P.3d 751 (2009). A Terry[6] stop is one such exception, but it requires officers to have "a well-founded suspicion that the defendant is engaged in criminal conduct." Doughty, 170 Wn.2d at 62.

Review is also warranted under RAP 13.4(b)(1) and (b)(2) because Division One's opinion conflicts with other precedent from the Court of Appeals and this Court's opinions in State v. Z.U.E. and State v. Doughty.

[6] Terry v. Ohio, 392 U.S. 1, 20-22, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

a. The Anonymous Tip and Photograph Did Not Provide Individualized Suspicion that Van Duren Was Engaged in Criminal Activity.

The State carries the "heavy burden" of proving the justification for a warrantless search or seizure. State v. Jones, 146 Wn.2d 328, 335, 45 P.3d 1062 (2002); State v. Ladson, 138 Wn.2d 343, 350, 979 P.2d 833 (1999). "'[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.'" Id. (quoting Terry, 392 U.S. at 21). Thus, there must be "a substantial possibility that criminal conduct has occurred or is about to occur." State v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). An officer's actions also "must be justified at their inception," and circumstances arising after the seizure cannot inform the analysis of the initial seizure. State v. Gatewood, 163 Wn.2d 534, 539, 182 P.3d 426 (2008); accord, Terry, 392 U.S. at 21-22 (requiring analysis of "facts available to the officer at the moment of the seizure").

Both the trial court and the Court of Appeals cited the photograph and information provided by the anonymous tip, as a valid basis for the seizure of Van Duren. 1RP 122; CP 229.; Op. at 8-10. This determination is incorrect as a matter of law. Based on this record, the factual basis requirement was not satisfied for Cook's suspicion that the man or car was

involved in criminal activity. Moreover, even if the anonymous tip could be considered reliable, the record does not establish the basis of the tipster's knowledge to support the tips.

A suspicion based on an informant's tip requires the State to show the tip bears some "indicia of reliability" under the totality of the circumstances. Z.U.E., 183 Wn.2d at 618. Courts "require that there must either be (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. These corroborative observations must corroborate more than just innocuous facts. Id. at 618-19.

In Z.U.E., a named, but otherwise unknown 911 caller reported that she saw a 17–year–old girl hand a gun to a shirtless man, who then carried the gun through the park. 183 Wn.2d at 614. The caller provided a detailed description of the girl's appearance but not why she thought the girl was 17 years old. Id. Other callers had reported seeing a man with a gun in the park but only one reported the girl. Id. The other callers also reported that the man got into a white or gray two-door car with about eight other people at an intersection by the park. Id. at 613-14. Officers arrived at the intersection and could not find the man, but they did spot a girl, matching the description provided, get into the backseat of a gray four-door car. Id. at 614-15. As a

part of their investigation for a minor in possession of a firearm, the officers approached the car and ordered the occupants out. Id. at 615-16. Z.U.E. was one of the occupants and was subsequently arrested for obstruction of law enforcement and possession of marijuana. Id. at 616.

On appeal, Z.U.E. challenged the officers' reasonable suspicion for the stop and the reliability of the caller's tip. Id. This Court held that the 911 caller's tip was unreliable and did not create a sufficient basis to justify the stop. Id. at 622-23. As the Court noted, an officer's reasonable suspicion must be grounded in specific and articulable facts. Id. at 617. The facts must demonstrate more than a generalized suspicion or a hunch that the person detained has committed a crime. Id. at 618. "[T]he facts must connect the particular person to the particular crime that the officer seeks to investigate." Id.

This Court reasoned that while the call was made by an eyewitness who provided her name and contact information, made contemporaneous to the events, and came through an emergency 911 line, the caller did not offer any factual basis to support the allegation that the crime of a minor in possession of a firearm had been committed. Id. at 622-23. The officers could not ascertain how the caller knew the girl was a minor to evaluate the accuracy of the statement. Id. This Court also noted that the officers did not make any corroborative observations showing the presence of criminal

activity or that the caller's information was obtained in a reliable fashion; corroboration of appearance was not enough. Id. at 623.

The Court of Appeals attempted to distinguish Z.U.E., concluding that "Officer DeWitt's observations showed that the anonymous informant's tips possessed an indicia of reliability and a reasonable suspicion for the stop." Op. A at 10. But, the Court of Appeals conclusory holding is based on the trial court findings which are not supported by the record. Moreover, Z.U.E. is not factually distinguishable.

The trial court's finding that the informant's description and picture of the car matched the description given to Cook by DeWitt is unsupported by the record. CP 229 (findings of fact 11-12). DeWitt may have provided Cook with the license plate and description of the car contacted, but Cook did not testify as to the specific description of the car that DeWitt gave him. And while Cook believed the car depicted in the photo was a red "2005-ish Toyota Corolla", Cook acknowledged he could "not specifically" identify the make, model, or license plate of the car depicted in the photo. Cook had never personally seen the car before and could not identify the car's license plate from the photograph. Contrary to the trial court's findings, and the Court of Appeals opinion, what the suppression hearing reveals is that Cook knew next to nothing about the car depicted in the informant's photo, including whether it was the same one contacted by DeWitt. This does not

satisfy the "indicia of reliability" required for an informant's tip under Z.U.E.

The Court of Appeals also concluded the anonymous informant's tip and photograph provided a factual basis to connect the man "walking from the vicinity of the burglarized residence" to the car. Op. at 10. But this "evidence" similarly lacks the requisite "indicia of reliability".

Cook was shown a photograph of a man in a gray jacket with a black backpack walking to a parked car from the "vicinity" of the burglarized house. But Cook knew nothing about the woman who showed him the photograph, or the man or car depicted therein.

Cook did not know the name of the woman informant or what exactly she had told him. Cook could not recall: (1) how the woman obtained the photograph, (2) when it was taken, (3) whether the woman even took the photograph, or (4) whether the cell phone containing the photograph belonged to her. While Cook speculated the woman was a neighbor of the homeowners, he could not say that the woman actually told him that. There was no evidence that the women saw the man depicted in the photograph in the house, that photograph was taken contemporaneously with the burglary, or that the woman even knew the house had been burglarized when she took the photograph or showed it Cook.

Cook was also in no position to corroborate the informant's tip and say that the man in the photograph matched the man depicted in the surveillance video. No evidence established that Cook recognized the man in the photograph. He did not watch the surveillance video from inside the house. Cook could not even recall whether he knew the race of the man in the photograph.

Finally, Cook opined the house could be seen from the golf course parking lot. But Cook also acknowledged that he did not know how far the parking lot was from the house. Cook's opinion that the house could be seen from the parking lot, which itself was an unknown distance from the house, was therefore speculation based on the facts established at the suppression hearing.

Van Duren also cited Division Two's opinion in State v. Hopkins, where the Court of Appeals reversed Hopkins's drug conviction and concluded that despite the general presumption that a citizen informant is reliable, the name and cell phone number of an informant unknown to officers is insufficient to establish reliability and cannot by itself justify an investigative stop. 128 Wn. App. 855, 863-64, 866, 117 P.3d 377 (2005).

There, an unknown 9-1-1 caller reported that a minor might be carrying a gun and accurately described the minor's location and provided

a partially accurate description of the minor's appearance. Id. at 858-59. No other objective facts indicated a crime had occurred. Id at 864.

The informant gave his name and cell phone number and during a second call provided police with another phone number. Id. at 858. Police went to a public pay phone at the location the informant identified. The officers saw Hopkins, who resembled the informant's description hanging up the phone. Hopkins had his back to the officers. Neither officer observed a gun or any illegal, dangerous, or suspicious activity. Nonetheless, officers seized Hopkins, and during a subsequent search found methamphetamine, for which Hopkins was charged. Id. at 859.

The Court of Appeals noted that before seizing Hopkins, the officers' suspicion of criminal activity was based solely on the informant's tip that only accurately described Hopkins location, clothing, and backpack. Id. at 865. The court also noted that officers did not observe any suspicious behavior but relied on the informant's "incorrect and vague" assertion that Hopkins unlawfully possessed a gun as a minor. Id. The court expressly rejected the State's assertion that an anonymous tip asserting a person is a carrying a gun, without more, was sufficient to justify an investigatory stop. Hopkins, 128 Wn. App. at 381-82 (citing Florida v. J.L., 529 U.S. 266, 272, 120 S. Ct. 1375, 146 L. Ed. 2d 254 (2000)).

The Court of Appeals opinion here fails to cite to, much less address, Division Two's opinion in Hopkins. But as in Z.U.E. and Hopkins, here the female informant's tip failed to provide Cook a reasonable suspicion to justify an investigatory stop of Van Duren. Z.U.E. and Hopkins determined that an accurate description of a person's location, clothing, backpack, and other identifying information, made contemporaneous to the suspected criminal events, was insufficient to establish reasonable suspicion. See also Campbell v. State of Wash. Dept. of Licensing, 31 Wn. App. 833, 644 P.2d 1219 (1982) (finding traffic stop unlawful where police officer stopped car for suspicion of drunken driving based on conclusory tip from unidentified passing motorist that driver was drunk but where officer observed no conduct indicative of drunk driving). Even less reliable evidence existed in this case.

Finally, nothing that Cook observed about the actions of the car or the two people inside provided him with reasonable suspicion to justify an investigatory traffic stop. By Cook's own admission, he was unable to determine whether anyone in the car matched the physical description of the man depicted in the photograph. There was also "nothing" that Cook observed about the car that warranted stopping it, such as an equipment failure or traffic violation. The Court of Appeals opinion wholly fails to address this point.

Contrary to the Court of Appeals opinion, nothing about the information provided from the anonymous tipster, photograph, DeWitt's prior contact, or the car or occupants subsequent behavior in the presence of Cook, provided a reasonable suspicion to justify an investigatory stop of Van Duren.

b. Mere Proximity to the Burglary Did Not Justify the Warrantless Seizure of Van Duren.

The Court of Appeals opinion also fails to address Van Duren's argument that the car's location within one mile of the burglary about one hour after it occurred, does not provide a reasonable suspicion for the warrantless seizure. Merely associating with a person or place suspected of criminal activity "does not strip away" individual constitutional protections. State v. Broadnax, 98 Wn.2d 289, 296, 654 P.2d 96 (1982).

In Doughty, this Court held the Terry stop at issue was unlawful: "A person's presence in a high-crime area at a 'late hour' does not, by itself, give rise to a reasonable suspicion to detain that person." 170 Wn.2d at 62. There, Doughty approached a suspected drug house late at night, stayed for two minutes, and then drove away. Id. at 60. Officers stopped Doughty for suspicion of drug activity despite not seeing what occurred in the house. Id.

As this Court recognized, "a person's 'mere proximity to others independently suspected of criminal activity does not justify the stop.'" Id.

(quoting State v. Thompson, 93 Wn.2d 838, 841, 613 P.2d 525 (1980)). see also State v. Crane, 105 Wn. App. 301, 312, 19 P.3d 1100, 1106 (2001) ("Neither close proximity to others suspected of criminal activities nor presence in a high crime area, without more, will justify a seizure."), overruled on other grounds by State v. O'Neill, 148 Wn.2d 564, 62 P.3d 489 (2003). Doughty requires Terry stops to be based on individualized suspicion, not some general aura of suspiciousness radiating from a compromised location.

Doughty comports with United States Supreme Court precedent. In Ybarra v. Illinois, 444 U.S. 85, 87 & n.1, 100 S. Ct. 338, 62 L. Ed. 2d 238 (1979), the Court construed an Illinois statute permitting police to detain and search any person found on a premises when executing a search warrant. Officers obtained a warrant because they suspected a bartender of dealing heroin from a bar. Id. at 88. When executing the warrant, officers detained and searched Ybarra, a patron, and found heroin. Id. at 88-89. The Court held the detention unlawful: "Although the search warrant . . . gave officers authority to search the premises and to search [the bartender], it gave them no authority whatever to invade the constitutional protections possessed individually by the tavern's customers." Id. at 91-92. The Court confirmed that the "'narrow scope' of the Terry exception does not permit a frisk for weapons on less than reasonable belief or suspicion directed at

the person to be frisked." Id. (quoting Dunaway v. New York, 442 U.S. 200, 210, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979)).

Similarly, in Brown v. Texas, 443 U.S. 47, 48-49, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979), the Court considered the propriety of officers' stop of Brown, who was merely walking in an alley with a "high incidence of drug traffic." Brown refused to identify himself and was arrested. Id. at 49. The Court held that the initial detention was unlawful, noting "an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field." Id. at 51. "[S]eizure[s] must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual . . . ." Id.

Under Brown, Ybarra, and Doughty, Van Duren's presence as a passenger in a car that was not violating any criminal or traffic laws was insufficient to raise a reasonable suspicion that he was associated with any criminal activity. Cook sought out the car and stopped it nearly a mile from the incident scene one hour after the burglary. Cook could not specifically identity who was in the car, how long the car had been in the area, or what the occupants' business in the area was. Cook thus had no reason to suspect that Van Duren was even in the car, much less associated with the burglary.

Based on the totality of circumstances, police did not have reasonable, individualized suspicion, to believe Van Duren was involved in criminal activity. His seizure therefore violated the Fourth Amendment and article I, section 7. Suppression of evidence found as a result of the unlawful search is required. Ladson, 138 Wn.2d at 360. Absent the illegal seizure, insufficient evidence exists to sustain the conviction. This Court should grant review under RAP 13.4(b)(1), (b)(2) and (b)(3).

E. CONCLUSION

Because Van Duren satisfies the criteria under RAP 13.4(b)(1), (b)(2), and (b)(3), he asks that this Court grant review, reverse the court of Appeals, and dismiss his conviction for residential burglary.

DATED this 21st day of February, 2019.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Respondent, v. NICHOLAS BRANDON VAN DUREN DOB: 09/08/1990, Appellant.	No. 76901-4-I DIVISION ONE UNPUBLISHED OPINION FILED: January 22, 2019

APPELWICK, C.J. — Van Duren appeals his conviction for residential burglary while on community custody. He claims that the trial court should have suppressed evidence discovered as a result of an investigatory detention. He also challenges the trial court's imposition of certain LFOs. We affirm the conviction but remand to the trial court to strike the challenged LFOs, consistent with recent changes in the law.

FACTS

On November 24, 2015, a burglary took place in a residential home in the area of the Glen Eagle development in Arlington. At 10:07 a.m., Arlington Police Officer Pendleton Cook responded to a report of burglary. Once at the scene, Officer Cook received information from a female witness—who he thought was a neighbor.[1] He did not obtain identifying information from her.

[1] Findings of fact 2 and 3 mistakenly identify Officer Brian DeWitt rather than Officer Cook as the person who contacted this witness.

The informant told Officer Cook that she "had seen a subject leaving the vicinity of the residence going" to a car and that "she could identify that subject upon seeing that person again." The informant showed Officer Cook a mobile phone picture of the subject and vehicle. The picture showed a male subject wearing a gray jacket and a black backpack. It also showed, according to Officer Cook, a red "2005-ish Toyota Corolla."[2] Based on this information, Officer Cook believed that a man involved in the burglary was somehow associated with the red car.

Prior to Officer Cook's arrival,[3] Arlington Police Officer Brian DeWitt investigated a suspicious red vehicle in Glen Eagle parking lot with a female driver (who was later identified as Lauren Kenney). Officer DeWitt obtained the red vehicle's license plate information but did not make an arrest. Officer Dewitt relayed the information that he had learned from his encounter with the red vehicle to Officer Cook.

Officer Cook described the parking lot area in which Officer Dewitt made contact with the red vehicle as being "basically across the street" from the residence under investigation. He also explained that the two locations are within sight distance of each other. According to Officer Cook, the informant's description

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[2] Officer Cook believed the vehicle was a 2005-ish Toyota Corolla because he owns and drives an identical vehicle. The picture, however, did not show the vehicle's license plate.

[3] It is unclear when Officer DeWitt had seen Kenney in relation to Officer Cook's arrival. However, it is clear that it had occurred before Officer Cook arrived at 10:07 a.m.

and picture of the red car "essentially matched" the make and model of the red vehicle that Officer DeWitt obtained prior to 10:07 a.m.

After talking with the informant, Office Cook went into the residence and "conducted a procedural search of the home because burglaries are dangerous and officer safety necessitates such a search." Officer Cook and his partners discovered a forced entry through a bay window in the rear of the home and "[f]ound evidence of the fact that the house had been likely burglarized." The officers then reviewed tactical operations and decided how to proceed.

Based upon his investigation to that point, Officer Cook believed the person "who left the house and got in the vehicle that drove away, was related to" the burglary. Officer Cook then departed the residence to "perform an area check for the vehicle, thinking that it might still be in the area." Less than a mile away from the residence, Officer Cook spotted a red vehicle matching the description of the informant and Officer Dewitt. At 10:56 a.m., Officer Cook conducted a traffic stop of the red vehicle in which Kenney was the driver and Nicolas Van Duren was the passenger.

Officer Cook explained that there "was nothing that I could see that would make me perform a traffic stop on that car, except for the fact that it matched the exact description and the plate was the same that we had for the suspicious call earlier in that day, and that it matched time, location, those things."

Officer Cook later described the basis of his associating the red car with the burglary:

> I had seen the picture that the witness had given me and that it matched the make and model, the color that Officer Dewitt had gone out with earlier in that day. In my understanding, too, how that car would be sitting there possibly watching that residence, and then to see a subject or hear that the witness had seen a subject leaving the vicinity of the residence to that car, sort of the connection of the two, I believed that I had enough reasonable suspicion to stop the car and [identify the occupants].

Pursuant to a subsequent search, police officers recovered some items from the red vehicle that the homeowner later identified as being stolen from his home.

The State charged Van Duren with residential burglary. Van Duren moved under CrR 3.6 to suppress all evidence stemming from the investigatory detention and to dismiss the charge against him. He argued that the State seized and later searched him without reasonable suspicion that he had committed a crime. The trial court denied the motion to suppress, ruling:

> Clearly the officer here, based on the corroboration, based upon the informant tip, had a reasonable suspicion. The informant, although the informant is anonymous for this case, clearly provided enough information to link the defendants with the red car, and so this was a valid stop.

Later, the trial court reduced its oral ruling on the suppression motion to writing and entered findings of fact and conclusions of law.[4] The trial court concluded, in relevant part, that

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[4] In his opening brief, Van Duren asserted that the trial court erred when it failed to (1) enter written findings of fact and conclusions of law pursuant to CrR 3.6(b) and (2) enter written findings of fact and conclusions of law setting forth its reasons for consecutive sentences pursuant to RCW 9.94A.535. However, with

2. Based on the corroboration and the information from the informant, the officer had reasonable suspicion.

3. Although the informant is anonymous in this case, there was clearly enough information provided to link the defendants with the red car with the burglary. Therefore, the stop was valid.

. . . .

5. Here, there is sufficient indicia that there was a reasonable suspicion.

The jury found Van Duren guilty of residential burglary. Van Duren later stipulated that he was on community custody at the time of the burglary. He now appeals.

DISCUSSION

Van Duren makes two arguments. First, he argues that the trial court erred in denying his CrR 3.6 motion to suppress evidence. He contends that the seizure was unlawful because the totality of the circumstances do not establish an individualized, reasonable suspicion that he or the car in which he was a passenger, was involved in any criminal wrongdoing. Second, Van Duren argues that, because he was indigent, the trial court's imposition of certain LFOs should be stricken, consistent State v. Ramirez, 191 Wn 2d 732, 426 P.3d 714 (2018).

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our permission, the trial court entered these written findings after Van Duren filed the instant appeal. Late entry of CrR 3.6 findings and conclusions does not require reversal unless it prejudices the defendant. State v. Byrd, 83 Wn. App. 509, 512, 922 P.2d 168 (1996). The written findings and conclusions of law are consistent with the trial court's oral ruling. Because Van Duren does not suggest that the findings and conclusions were tailored to meet the issues presented in his appellate brief, he cannot show prejudice. State v. Tagas, 121 Wn. App. 872, 875, 90 P.3d 1088 (2004) (noting that "a conviction will not be reversed for tardy entry of findings unless the defendant can establish either that [he] was prejudiced by the delay or that the findings and conclusions were tailored to meet the issues presented in [his] appellant's brief."). We, therefore, do not address Van Duren's original assignments of error as to failure to enter written findings.

I. Suppression of Evidence

A. Standard of Review

We review findings of fact entered following a motion to suppress for substantial evidence. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Evidence is substantial when it is enough to persuade a fair-minded person of the truth of the stated premise. State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). Unchallenged findings are considered verities on appeal. State v. O'Neill, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). We review conclusions of law from an order governing the suppression of evidence de novo. State v. Duncan, 146 Wn2d 166, 171, 43 P.3d 513 (2002).

B. *Terry*[5] Stop

Generally, the Fourth Amendment to the United States Constitution protects against unlawful searches and seizures. Article I, section 7 of the Washington Constitution protects against unwarranted government intrusions into private affairs. A brief investigative detention, otherwise known as a Terry stop, is an exception to the warrant requirement. State v. Gatewood, 163 Wn 2d 534, 539, 182 P.3d 426 (2008). Although article I, section 7 provides greater protection than guaranteed by the Fourth Amendment, regarding the validity of a Terry stop, however, article I, section 7 generally tracks the Fourth Amendment. State v. Z.U.E., 183 Wn.2d 610, 617, 352 P.3d 796 (2015). Warrantless searches are per se unreasonable. State v. Doughty, 170 Wn.2d 57, 61, 239 P.3d 573 (2010). The

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

State has the burden to demonstrate that a warrantless search falls within an exception to the rule. Id.

A Terry stop is permissible where the State shows "that the officer had a 'reasonable suspicion' that the detained person was, or was about to be, involved in a crime." Z.U.E., 183 Wn.2d at 617 (quoting State v Acrey, 148 Wn.2d 738, 747, 64 P.3d 594 (2003)). The officer's reasonable suspicion must be grounded in specific and articulable facts. Id. at 617-18. The facts must demonstrate more than a generalized suspicion or hunch that the person detained has committed a crime. Id. at 618.

In analyzing the grounds for a Terry stop, trial courts are required to evaluate the totality of the circumstances available to the investigating officer. State v. Glover, 116 Wn.2d 509, 514, 806 P.2d 760 (1991). Furthermore, when an officer bases his or her suspicion on an informant's tip, the State must demonstrate that the tip bears some indicia of reliability. Z U.E , 183 Wn.2d at 618. Indicia of reliability is shown by 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.

If the Terry stop is determined to be unlawful, "the subsequent search and fruits of that search are inadmissible." State v. Kennedy, 107 Wn.2d 1, 4, 726 P.2d 445 (1986).

Van Duren argues that tips from the anonymous informant did not show the requisite indicia of reliability to justify Officer Cook's alleged reasonable suspicion.

He also argues that the red vehicle's mere proximity to the burglarized home does not justify Officer Cook's Terry stop of the vehicle. We disagree on both grounds.

Here, Officer Cook responded to a burglary. Once on scene, an anonymous informant told him that she had seen a subject "walk from the vicinity of the residence" to a red car. She then showed him a picture of the subject and a portion of the red vehicle, which Officer Cook recognized as a 2005 Toyota Corolla. Officer Cook also received information from Officer Dewitt, who had previously made contact with a red vehicle in the vicinity of the burglarized home. At a minimum, the evidence in the record establishes that the Glen Eagle parking lot and the burglarized home are in sight distance of each other. The informant had seen, and had a picture of, a male subject walking toward a red vehicle.

Officer Cook and his team conducted a search of the home and found evidence that a burglary had been committed. Based on all that he knew at that point, Officer Cook believed that there was likely some connection between the individual who committed the burglary and the red vehicle that drove away. He also determined that there was likely a connection between the red vehicle depicted in the informant's mobile phone picture and the red vehicle Officer Dewitt contacted. He then conducted an area search for a red vehicle matching those descriptions.

Within a relatively close proximity, and within 50 minutes of responding to the burglary call, Officer Cook spotted a red vehicle that looked similar to the informant's picture and matched the license plate that Officer Dewitt obtained earlier. Given the totality of circumstances, Officer Cook had a reasonable

suspicion that the red vehicle in which Van Duren was a passenger was connected to the residential burglary under investigation. Officer Cook's Terry stop was valid.

Van Duren also claims that the circumstances of his case are similar to those in Z.U.E. and argues that law enforcement did not have a reasonable suspicion to justify a Terry stop. We disagree.

In Z.U.E., an unknown 911 caller reported that she saw a 17 year old girl hand a gun to a shirtless man, who then carried the gun through a park. 183 Wn.2d at 614. The caller gave a detailed description of the girl's appearance but not why she thought the girl was age 17. Id. Other callers also reported seeing a man with a gun in the park and that the man got into a white or gray two door car with about eight other people at an intersection by the park. Id. at 613-14. Officers responded to investigate for a minor in possession of a firearm but could not find the man. Id. at 615. However, officers did see a girl—matching the description provided—get into the backseat of a gray four door car. Id. at 614-15. As part of their investigation, the officers approached the car and ordered the occupants out. Id. at 616. Z.U.E. was one of the occupants and was later arrested for obstruction of law enforcement and possession of marijuana. Id. Later, Z.U.E. challenged the officers' reasonable suspicion for the stop and the reliability of the caller's tip. Id.

The Washington Supreme Court held that the 911 caller's tip was unreliable and did not create a sufficient basis to justify the Terry stop. Id. at 622-23. It reasoned that while the call was made by a citizen eyewitness, made contemporaneous to the events, came through an emergency 911 call, and the caller provided her name and contact information, the caller did not offer any

factual basis to support the allegation that the crime of a minor in possession of a firearm had been committed. Id. The officer could not ascertain how the caller knew the girl was a minor to evaluate the accuracy of the statement. Id. at 623. Nor did the officers make any corroborative observations showing the presence of criminal activity or that the caller's information was obtained in a reliable fashion. Id.

In contrast, here, the anonymous informant's tips here provided a factual basis to connect a male subject—walking from the vicinity of the burglarized residence—to a red 2005 Toyota Corolla. It was documented in a photograph. The suspicious nature of the red vehicle's presence was corroborated with what Officer Dewitt previously observed—a red 2005 Toyota Corolla parked in the vicinity of the burglarized residence. Unlike Z.U.E., where the 911 caller did not provide a factual basis for the alleged crime of a minor in possession of a firearm, Officer Dewitt's observations showed that the anonymous informant's tips possessed an indicia of reliability and a reasonable suspicion for the stop. Therefore, the trial court did not err in concluding that there was sufficient indicia that there was a reasonable suspicion to stop the red vehicle in which Van Duren was a passenger

II. Legal Financial Obligation Challenge

Van Duren filed a supplemental brief, based on recent changes in the law concerning legal financial obligations (LFOs), seeking to have the $200 criminal filing fee and the $100 DNA (deoxyribonucleic acid) sample collection fee stricken

from his judgment and sentence. At the time Van Duren was sentenced, these fees were mandatory.

In June 2018, amendments to former RCW 36.18.020(2)(h) took effect and prohibited trial courts from imposing the $200 criminal filing fee on defendants who are indigent at the time of sentencing. LAWS OF 2018, ch. 269, § 17. Also effective in June 2018, the DNA collection fee statute—RCW 43.43.7541—now mandates, in important part, that "[e]very sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars unless the state has previously collected the offender's DNA as a result of a prior conviction." LAWS OF 2018, ch. 269, § 18.

In September 2018, the Washington Supreme Court held that LFO statutory amendments apply prospectively and are applicable to cases pending on direct review and not final under RAP 12.7 when the amendments were enacted. Ramirez, 191 Wn.2d at 748-49. That includes Van Duren's case.

The record establishes that Van Duren was indigent at the time of sentencing. The State concedes that the $200 criminal filing fee should be stricken from his judgment and sentence. Accordingly, per Ramirez, we direct the trial court to strike the $200 criminal filing fee.

Van Duren argues that the $100 DNA collection fee was improper because he has previous felony convictions and he would necessarily have had his DNA sample collected pursuant to RCW 43.43.754(1)(a).[6] While the State concedes

[6] Under RCW 43.43.754: "(1) A biological sample must be collected for purposes of DNA identification analysis from: (a) Every adult or juvenile individual

that Van Duren has multiple prior convictions, it asks that this issue be remanded to the trial court to determine if his DNA has previously been collected. Based on Van Duren's lengthy criminal history, including five prior adult convictions and one juvenile adjudication,[7] we infer that Van Duren has previously provided a DNA sample following his prior felony convictions. We, therefore, direct the trial court to strike the $100 DNA collection fee.

CONCLUSION

We remand the judgment and sentence to strike the criminal filing fee and the DNA collection fee, but affirm the sentence in all other respects. The State did not request appellate costs, and we do not award costs pursuant to RAP 14.2.

WE CONCUR:

convicted of a felony, or" other crimes (or equivalent juvenile offenses) identified in subsection (1)(a)(i)-(x) and (1)(b).

[7] Between 2009 and 2017, Van Duren was convicted of second degree burglary, bail jumping, possession of a controlled substance, residential burglary. In 2007, as a juvenile, Van Duren was convicted of residential burglary.

APPENDIX B

16-1-01276-31
CR 110
Certificate
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FILED

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SONYA KRASKI
COUNTY CLERK
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

STATE OF WASHINGTON,
Plaintiff,
v.
VAN DUREN, NICHOLAS
Defendant

No. 16-1-01276-31

CERTIFICATE PURSUANT TO CrR 3.6 OF THE CRIMINAL RULES FOR SUPPRESSION HEARING

On March 15, 2016, a hearing was held on the defendant's motion to suppress evidence. The court considered the testimony of the witnesses at the hearing and the arguments and memoranda of counsel. Being fully advised, the court now enters the following findings of fact and conclusions of law:

I. FINDINGS OF FACT

1. On November 24, 2015, a burglary took place in a residential home in the area of the Glen Eagle development in Arlington.
2. Officer Dewitt arrived at the location of the burglary scene and obtained information from an anonymous informant that lead him to believe that there had been a burglary.
3. Based on the informant, Officer Dewitt believed that a man was involved in the burglary and was somehow involved with a red car.
4. The informant was a neighbor who knew the area, knew the victim, took a picture of the red car, and saw someone get into the red car.
5. Officer Dewitt discovers a red car in the Glen Eagle parking lot with the female driver, who was later identified as the co-Defendant Lauren Kinney.
6. The Glen Eagle parking lot was adjacent from the place that was burglarized.
7. Officer Cook arrived at the scene at 10:07 am.

8. It is unclear when Officer Dewitt had seen Ms. Kinney in relation to Officer Cook's arrival. However, it is clear that it had occurred before Officer Cook's arrival at 10:07 am.
9. Officer Dewitt relayed the information that he had learned, listed above, to Officer Cook.
10. Officer Cook went into the home and conducted a procedural search of the home because burglaries are dangerous and officer safety necessitates such a search.
11. After reviewing the information from the informant, Officer Cook determined that there was most likely corroboration between the red car that Officer Dewitt saw and the red car that the informant took a picture of. He also determined that the red car was likely connected to the individuals who may have committed the burglary.
12. Officer Cook conducted a traffic stop on a red car matching the description of Officer Dewitt and the informant.
13. Both defendants were contacted in the red car on that traffic stop.
14. Between 10:07am and 10:57am, when the Defendants were stopped in the red car by Officer Cook. That is when the area search was conducted.
15. In those 50 minutes, the red car is in the area of the burglary.
16. The Court is unable to exactly determine the mileage between the burglarized home and the red car, but it appears that it is reasonably close proximity.

II. **CONCLUSIONS OF LAW**

1. A valid *Terry* stop requires reasonable suspicion based on the totality of the circumstances.
2. Based on the corroboration and the information from the informant, the officer had reasonable suspicion.
3. Although the informant is anonymous in this case, there was clearly enough information provided to link the defendants with the red car with the burglary. Therefore, the stop was valid.
4. This case is very similar to another case, which pre-dated *State v. Z.U.E.*, 183 Wn.2d 610, 352 P.3d 796 (2015) (en banc). That case involved a robbery by two hooded men of a cafe. The Court found that there was reasonable suspicion based for a traffic stop of a vehicle taking the closest freeway onramp to the robbery location, which contained two males and was driving at a high rate of speed.

5. Here, there is sufficient indicia that there was a reasonable suspicion.
6. With regard to the *Franks* hearing, there were no intentional misrepresentations in the search warrant.
7. There were omissions in the search warrant, however, there was enough probable cause contained in the search warrant for Judge Bui to approve the warrant even with those omissions.
8. Defendant's motion to suppress for lack of reasonable suspicion is denied.
9. Defendant's Motion pursuant *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L.Ed.2d 667 (1978), is denied.

DONE IN OPEN COURT this 13th day of ~~March~~ April, 2018.

Judge Richard T. Okrent

Presented by:

LAURA J HARMON, WSBA #: 47814
Deputy Prosecuting Attorney

copy received this 13th day of ~~March~~ April, 2018.:

DEREK GONOM, WSBA #: 36781
Attorney for Defendant

not present
NICHOLAS VAN DUREN
Defendant

Pursuant to State v Corbin, 79 Wn App. 446, 903 P 2d 999 (Div. 1, 1995), this presentment is not a critical stage and the Defendant need not be present

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

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