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No. 62874-7-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

CEDRIC BERRY,

Appellant.

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

The Honorable Charles Mertel

REPLY BRIEF OF APPELLANT

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FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
2009 OCT 15 PM 4:54

TABLE OF CONTENTS

A. ARGUMENT..... 1

THE OFFICERS LACKED REASONABLE  
SUSPICION TO JUSTIFY A TERRY STOP.....1

1. The officers’ previous contacts with Mr. Berry  
did not transform the innocuous facts into  
reasonable suspicion.....2

2. The officer’s incorrect belief that Mr. Berry had  
been trespassed from the apartment complex  
did not create reasonable suspicion to  
stop.....2

3. Glover, Little, and Bray are not on point.....3

B. CONCLUSION.....7

## TABLE OF AUTHORITIES

### Washington Supreme Court Cases

<u>State v. Armenta</u> , 134 Wn.2d 1, 948 P.2d 1280 (1997).....	1
<u>State v. Day</u> , 161 Wn.2d 889, 168 P.3d 1265 (2007).....	7
<u>State v. Gatewood</u> , 163 Wn.2d 534, 182 P.3d 426 (2008).....	1, 2
<u>State v. Glover</u> , 116 Wn.2d 509, 806 P.2d 760 (1991).....	3-6
<u>State v. Kennedy</u> , 107 Wn.2d 1, 726 P.2d 445 (1986).....	2
<u>State v. Ladson</u> , 138 Wn.2d 343, 979 P.2d 833 (1999).....	7
<u>State v. Little</u> , 116 Wn.2d 488, 806 P.2d 749 (1991).....	3-6
<u>State v. White</u> , 97 Wn.2d 92, 640 P.2d 1061 (1982).....	3

### Washington Court of Appeals Cases

<u>State v. Bray</u> , 143 Wn. App. 148, 177 P.3d 154 (2008).....	3, 6
<u>State v. McCormick</u> , ___ Wn. App. ___, 216 P.3d 475 (2009).....	3

### United States Supreme Court Cases

<u>Terry v. Ohio</u> , 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).....	1, 2, 6
<u>Wong Sun v. United States</u> , 371 U.S. 484, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).....	7

### Constitutional Provisions

Article 1, section 7.....	7
Fourth Amendment.....	7

A. ARGUMENT

THE OFFICERS LACKED REASONABLE  
SUSPICION TO JUSTIFY A TERRY STOP

In his opening brief, Mr. Berry argued that the police officers who stopped him lacked reasonable suspicion to justify a Terry stop.<sup>1</sup> App. Op. Br. at 9-18. The officers stopped Mr. Berry because (1) Mr. Berry was walking through an apartment complex known for narcotics activity, (2) one officer incorrectly believed Mr. Berry had been trespassed from that apartment complex, (3) the officers observed that Mr. Berry had a wide-eyed, “surprised” look on his face when he saw the officers and was looking around when he was talking to the officers, (4) the officers had unspecified previous contacts with Mr. Berry during narcotics investigations in that neighborhood, and (5) the officers knew Mr. Berry was on DOC supervision. RP 24-26. These innocuous facts do not amount to reasonable suspicion. State v. Martinez, 135 Wn. App. 174, 180, 143 P.3d 855 (2005); State v. Armenta, 134 Wn.2d 1, 13, 948 P.2d 1280 (1997); State v. Gatewood, 163 Wn.2d 534, 539, 182 P.3d 426 (2008). Rather, the stop in this case was one of many suspicion-less stops these officers made of Mr. Berry simply

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

because of his prior criminal activity and his presence in a high-crime area. RP 84.<sup>2</sup>

1. The officers' previous contacts with Mr. Berry did not transform the innocuous facts into reasonable suspicion. The State attempts to distinguish Martinez and Gatewood by arguing that the officers in this case had individualized suspicion because they knew Mr. Berry from previous contacts involving narcotics investigations, which the officers did not describe. Br. of Resp. at 12; RP 25. However, an officer's knowledge about a suspect's prior criminal activity does not create the level of articulable suspicion required to justify a Terry stop: 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). Without any indication that Mr. Berry was involved in *current* criminal activity, the stop amounts to nothing more than unconstitutional harassment of one of the usual suspects.

2. The officer's incorrect belief that Mr. Berry had been trespassed from the apartment complex did not create reasonable suspicion to stop. The State also argues that the

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<sup>2</sup> Mr. Berry testified, "I felt like I was being harassed. I mean the simple that every time Officer Settle or Officer Nelson see me, they stop me, harass me – I mean ask me what where I am going, what I am doing." RP 84.

officers had reasonable suspicion because Officer Settle believed Mr. Berry had been trespassed from the apartment complex where they stopped him. Br. of Resp. at 12. However, this belief was incorrect, and was based on a computer search performed during an unspecified previous contact with Mr. Berry (possibly months before the stop in this case) – which Officer Settle did not bother to confirm before stopping Mr. Berry. RP 31, 41. Therefore, Officer Settle’s incorrect belief did not justify the stop because (1) it was unreasonable for the officers to rely on the distant memory of a specific address from a previous computer search, and (2) there is no good faith exception to the exclusionary rule in Washington. State v. McCormick, \_\_\_ Wn. App. \_\_\_, 216 P.3d 475 (2009) (citing State v. White, 97 Wn.2d 92, 109-10, 640 P.2d 1061 (1982)).

3. Glover, Little, and Bray are not on point. The State, relying on State v. Glover, 116 Wn.2d 509, 806 P.2d 760 (1991); State v. Little, 116 Wn.2d 488, 806 P.2d 749 (1991); and State v. Bray, 143 Wn. App. 148, 177 P.3d 154 (2008), argues that the police had reasonable suspicion to stop Mr. Berry for trespassing because there were “No Trespassing” signs at the apartment complex and the police did not believe Mr. Berry was a

resident of the apartment complex. Br. of Resp. at 15-16.

However, these cases are easily distinguished from this case.

First, in Glover and Little, the officers had a substantial amount of evidence indicating that the defendants were trespassing. In those cases, the manager of an apartment complex in an area known for narcotics activity surrounded the property with a fence topped with concertina wire, and posted numerous large “No Trespassing” signs around the property. Glover, 116 Wn.2d 512, Little, 116 Wn.2d at 490. An armed security guard stood at the main entrance. Little, 116 Wn.2d at 490. The manager permitted residents to have guests only if the guests were accompanied by a resident. Id. The apartment manager and the Seattle police made an agreement that the police would investigate individuals observed on the property who were not recognized as residents at the apartment complex (the police were familiar with all of the residents), and then admonish those individuals to never return to the property. Id. All of these facts made it clear that all non-residents were forbidden from entering the apartment complex. Therefore, all the police needed to know in order to conclude that a person was trespassing was that they were not a resident of the apartment complex.

In contrast, the apartment complex in this case was not surrounded by a fence, did not have a security guard, only had a couple of “No Trespassing” and “No Loitering” signs, and did not have a policy forbidding non-residents from entering the property. RP 54. Therefore, there was not the kind of blanket prohibition against non-residents as in Glover and Little, and the police in this case were required to have more information to amount to reasonable suspicion of criminal trespass.

The officers here did not have sufficient information to believe Mr. Berry was trespassing because Mr. Berry had not been trespassed from the apartment complex, and because the apartment manager in this case did not tell the officers that she wanted Mr. Berry to be trespassed from the apartment complex. RP 45, 48. Again, Officer Settle’s unreasonable reliance on an incorrect belief that Mr. Berry had been trespassed from the apartment complex did not create reasonable suspicion that Mr. Berry was trespassing.

Second, the stops in Little and Glover were justified not only because the defendants were believed to be non-residents of the apartment complex, but also because the defendants attempted to flee from the police. In Glover, the officers approached Glover

because they did not recognize him as a resident of the apartment complex. 116 Wn.2d at 512. They conducted the Terry stop because, when they approached Glover, he walked away quickly while glancing toward and away from the officers, and was carrying a plastic bag the officers suspected to contain drugs. Id. at 514. The court held that the officers had reasonable suspicion to investigate Glover for criminal trespass based on their experience, the location of the apartment complex, and Glover's conduct. Id. at 514. Similarly, in Little, the defendants ran when they saw the police, and the court held that the officers had reasonable suspicion to stop the defendants "based on the officers' familiarity with the residents, the posted warnings prohibiting trespassing and loitering, and the [defendants'] flight." Id. at 497.

In this case, Mr. Berry did not flee from the police when he saw them approach. Rather, he continued to walk toward the officers after he saw them, was cooperative and compliant with their commands, and did not attempt to leave at any time. RP 39, 67-68, 146, 152. Therefore, Glover and Little are not on point.

Finally, Bray is also not on point because reasonable suspicion that the defendant in that case was committing burglary was based on several highly suspicious facts other than the

defendant's presence in an area known for burglary and his prior interaction with the police in that area. Bray, 143 Wn. App. at 150-51. In Bray, before the stop, the police observed the defendant driving without his lights on in a fenced storage compound at 2:30 a.m., and then inspecting the doors of storage units. Id. at 150-51, 153-54. When the officers approached, they observed that Bray was wearing camouflage clothing and gloves. Id. at 154. The Bray court held that the officers had individualized suspicion to stop Bray based on all of these suspicious facts – not solely based on the officers' previous contacts with the defendant in that area. Id. at 153-54. Without any evidence that Mr. Berry was involved in criminal activity, his prior interactions with the police and his presence in a high crime area were insufficient to justify the stop.

#### B. CONCLUSION

Because the officers lacked reasonable suspicion to stop Mr. Berry, the stop violated Mr. Berry's rights under the Fourth Amendment and Article I, section 7. Evidence obtained as a result of the stop must be suppressed as fruit of the poisonous tree. State v. Day, 161 Wn.2d 889, 895, 168 P.3d 1265 (2007); State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999); Wong Sun v. United States, 371 U.S. 484, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

Therefore, this Court should reverse Mr. Berry's conviction for possession of cocaine.

DATED this 15th day of October 2009.

Respectfully submitted,



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

STATE OF WASHINGTON,  
Respondent,

*CEORIC BERRY*  
~~ERIN CHAMBERS,~~

Appellant.

NO. 61857-1-I

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 15<sup>TH</sup> DAY OF OCTOBER, 2009, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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**SIGNED** IN SEATTLE, WASHINGTON THIS 15<sup>TH</sup> DAY OF OCTOBER, 2009.

X \_\_\_\_\_

*[Signature]*

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