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MAR 27 2012

King County Prosecutor
Appellate Unit

NO. 67077-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

S.P.,

Appellant.

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

The Honorable Helen Halpert, Judge

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ARGUMENT IN REPLY</u>	1
THE INVESTIGATIVE STOP OF S.P. WAS NOT SUPPORTED BY A REASONABLE SUSPICION OF CRIMINAL ACTIVITY.	1
B. <u>CONCLUSION</u>	6

TABLE OF AUTHORITIES

	Page
 <u>WASHINGTON CASES</u>	
 <u>State v. Biegel</u>	
57 Wn. App. 192, 787 P.2d 577	
<u>review denied</u> , 115 Wn.2d 1004 (1990)	4, 5
 <u>State v. Diluzio</u>	
162 Wn. App. 585, 254 P.3d 218	
<u>review denied</u> , __ Wn.2d __, No. 86369-5 (2011)	3
 <u>State v. Doughty</u>	
170 Wn.2d 57, 239 P.3d 573 (2010).....	4, 5
 <u>State v. White</u>	
76 Wn. App. 801, 888 P.2d 169 (1995)	
<u>aff'd.</u> , 129 Wn.2d 105 (1996).....	1, 2
 <u>OTHER JURISDICTIONS</u>	
 <u>Dallas v. State</u>	
995 So.2d 1062 (Fla. App. 2008).....	2
 <u>Hereford v. State</u>	
302 S.W.3d 903 (Tex. App. 2009).....	2
 <u>People v. Goldstein</u>	
223 Cal. App. 3d 465, 272 Cal. Rptr. 881 (Cal. App. 1990)	2

A. ARGUMENT IN REPLY

THE INVESTIGATIVE STOP OF S.P. WAS NOT SUPPORTED BY A REASONABLE SUSPICION OF CRIMINAL ACTIVITY.

S.P. argues on appeal the trial court erred by concluding the officers who detained him for investigation had a reasonable, articulable suspicion that he was involved in a drug crime. Brief of Appellant (BOA) at 6-11. In response, the State maintains observation of a hand-to-hand exchange of unknown items in a high-crime area, as well as S.P.'s furtive hand movements, supported the officers' investigative detention. Brief of Respondent (BOR at 5-15).

Among the cases the State cites in support of its argument is State v. White, 76 Wn. App. 801, 803, 888 P.2d 169 (1995), aff'd., 129 Wn.2d 105 (1996). BOR at 8-9. This Court upheld the trial court's conclusion that probable cause supported the officer's arrest. Id., 76 Wn. App. at 804.

The State describes the facts of White as follows:

[T]he officer saw White and Murray walking together before separating to stand several feet apart. Another man approached and White directed him to Murray. While Murray and the other man spoke, White walked a few feet behind them. White looked over his shoulder after Murray and the man exchanged an unknown object for money. After the man left, the officer saw hand movements between White and Murray but did not know what, if anything at all, passed between the two men.

BOR at 9 (citations omitted).

This factual recitation is accurate as far as it goes. But the State omits this Court's description of the "exchange:"

After a few steps, the man in the sweat suit took money from his pocket and counted it. Murray reached into his shorts and dropped something on the ground. The man in the sweat suit stopped, picked up the object, looked at it, put it in his mouth for a moment, and handed Murray money. When Murray and the other man stopped, White looked behind him over both shoulders.

76 Wn. App. at 803.

These facts were critical to a threshold finding that a drug transaction occurred. This Court has certainly read police testimony that crack cocaine buyers put the drug in their mouths to determine its identity and quality, as well as to quickly swallow it if apprehended by police. See, e.g., Hereford v. State, 302 S.W.3d 903, 908 (Tex. App. 2009) (officer testified he knew crack cocaine would not dissolve if simply kept in one's mouth); Dallas v. State, 995 So.2d 1062, 1063 (Fla. App. 2008) (police officer testified drug dealers commonly hide crack cocaine in their mouths so they can swallow it if confronted by police); People v. Goldstein, 223 Cal. App. 3d 465, 468, 272 Cal. Rptr. 881 (Cal. App. 1990) (officer testified he "knew from his training and experience that a person purchasing crack cocaine tastes it to test its worth").

Without the omitted facts, the question as to whether officers had probable cause to arrest or, as pertinent here, a reasonable suspicion to

detain, would be much closer. State v. Diluzio¹ is instructive in determining whether reasonable suspicion exists. An officer there saw a vehicle stopped in a traffic lane as the driver spoke with a female pedestrian through the passenger window. There were no bus stops nearby and the area was known for high levels of prostitution activity. After seeing the woman get into the front passenger seat of the vehicle, the officer stopped the driver. 162 Wn. App. at 588-89.

The appellate court held the officer's detention was unlawful:

There was no police informant and the police officer did not see any money change hands and did not overhear any conversations between the two individuals. Neither individual was known to have been involved in prostitution or solicitation activities. These incomplete observations do not provide the basis for a Terry stop.

162 Wn. App. at 593.

The facts in S.P.'s case are similar. As in Diluzio, officers Buck and Majack saw no money change hands and overheard nothing S.P. and Taha said to each other. Further, although the officers were familiar with the area, neither testified they recognized the van or S.P. Given the suspected crimes, the hand-to-hand exchange the officers observed was the functional equivalent of the driver's conversation with the woman and her joining him in the vehicle. Also similar is that both incidents occurred

¹ 162 Wn. App. 585, 593, 254 P.3d 218, review denied, ___ Wn.2d ___, No. 86369-5 (2011).

in notorious areas. Just as the facts in Diluzio were insufficient, so too are those in S.P.'s case.

The State also relies on State v. Biegel² to argue S.P.'s detention was lawful. BOR at 11-12. In Biegel, the defendant parked his car near an apartment that officers were surveilling in a high-crime area. The defendant got out of his car, spoke with one of several persons standing on the corner for about 30 seconds and then followed that person into the apartment building. Although the officer testified the conduct was consistent with a drug deal, he could not identify the person as a dealer. 57 Wn. App. at 193. The defendant returned from the apartment three or four minutes later and was immediately detained. 57 Wn. App. at 194.

The court rejected the State's assertion that the officer had probable cause to arrest once the defendant came out of the targeted apartment. It observed, however, that the officer had a reasonable suspicion sufficient to justify an investigative detention. 57 Wn. App. at 194-95. The State relies on Biegel for this latter holding.

The opinion in Biegel issued 20 years before the Supreme Court's related decision in State v. Doughty, 170 Wn.2d 57, 239 P.3d 573 (2010). At 3:20 a.m., an officer observed Doughty park his car, approach a house,

² 57 Wn. App. 192, 787 P.2d 577, review denied, 115 Wn.2d 1004 (1990).

return to his car less than two minutes later, and drive away. The police had by then identified the residence as a "drug" house based on neighbors' complaints of large quantities of short-stay traffic. 170 Wn.2d at 60. The observing officer did not see any of Doughty's actions at the house, and did not know if he interacted with anybody there. He nevertheless stopped Doughty based on a suspicion he was involved in drug activity. Id.

The Supreme Court found the officer lacked the requisite reasonable suspicion to support the investigative detention. 170 Wn.2d at 65. It found the officer did not see any of Doughty's interactions at the house and observed he may not have interacted with anyone there. 170 Wn.2d at 64. The Court concluded, "The two-minute length of time Doughty spent at the house—albeit a suspected drug house—and the time of day do not justify the police's intrusion into his private affairs." Id.

Doughty casts considerable doubt on Biegel. As in Doughty, the officer did not see Biegel's interactions inside the apartment, if any. Nor did the officer hear what Biegel said to the person on the street corner, who was not identified as a drug dealer. As in Doughty, all the officer knew was that Biegel went to a "drug residence" and returned a few minutes later. Doughty essentially guts Biegel, and this Court should find the State's reliance on Biegel unpersuasive.

Similarly, this Court should find the Brief of Respondent unpersuasive. Because neither officer had a reasonable suspicion to detain S.P., this Court should reverse his conviction.

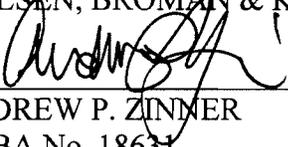
B. CONCLUSION

For the reasons cited herein and in his Brief of Appellant, S.P. requests this Court to reverse the trial court's denial of his motion to suppress evidence and remand for dismissal with prejudice.

DATED this 26 day of March, 2012.

Respectfully submitted,

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