

No. 68694-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

PEDRO E. PADILLA,

Appellant.

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

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred in denying Mr. Padilla's motion to suppress the evidence obtained as a result of Officer Gregorio's unconstitutional seizure of him.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Under the Fourth Amendment and article I, section 7, an officer may seize a person without a warrant only if he has reasonable suspicion that the person is committing a crime. Carrying a gun is not a crime, and the Supreme Court has rejected a "firearm exception" to the above rule. Did the trial court violate Mr. Padilla's constitutional rights by admitting the evidence obtained when Officer Gregorio seized him without a warrant on the basis that "Officer Gregorio had reasonable and articulable suspicion to believe that [Mr. Padilla] was armed with a firearm?"

C. STATEMENT OF THE CASE

Seattle Police Officer Chris Gregorio was dispatched to an apartment complex to address a domestic dispute involving a man by the name of Reginald Barron. CP 62.¹ Although no violence was involved, Mr. Barron's daughter had apparently called 911 to complain that her drunk father was at her apartment without her consent. By 8:40pm, the

¹ The trial court's "CrR 3.6 Findings of Fact and Conclusions of Law" are at Clerk's Papers 62-65, and attached to this brief as Appendix A.

daughter reported the father had left, and there was no longer a problem.

RP 44-45.

In the meantime, Officer Gregorio arrived at the complex and went to a back gate. The officer had dealt with Barron many times, and knew Barron usually exited through the back gate following a 911 call. RP 9-10; CP 62-63 (Findings of Fact 1, 4). When the officer arrived, he saw someone standing by the bushes along the fence, hunched over. RP 12; CP 63 (FF 7). Although the person was a six-foot-tall, 230-pound white man, and Officer Gregorio knew Reggie Barron is a 5'6", 140-150-pound black man, the officer reported he thought the man was Barron. RP 13, 36-37; CP 63 (FF 10,11). Officer Gregorio shined his spotlight on the man. RP 14; CP 63 (FF 11).

The man, appellant Pedro Padilla, turned around and had a "deer in headlights" look because he was blinded by the spotlight. RP 15, 17, 59. Officer Gregorio realized it was not Mr. Barron. RP 15; CP 63 (FF 13). The officer nevertheless did not leave the scene to look for Barron. Instead, he asked Mr. Padilla what he was doing. RP 16; CP 63 (FF 14). The question was not rhetorical; he wanted an answer. RP 47.

Mr. Padilla did not say anything, but threw something into the bushes. RP 16; CP 63 (FF 14). The item hit the fence and made a metallic "clink" sound, which caused Officer Gregorio to believe it might

be a gun. RP 16-17; CP 63 (FF 15, 16). Officer Gregorio also knew there had been a drive-by shooting in the area two-and-a-half hours earlier around 6:00pm, but he had no reason to believe Mr. Padilla was involved in that incident. RP 7-8, 35.

Nevertheless, Officer Gregorio drew his gun and ordered Mr. Padilla to lie on the ground. RP 17; CP 64 (FF 18). Mr. Padilla was “very compliant,” and the officer handcuffed him. RP 18-19. Mr. Padilla lay on the ground in handcuffs for about a minute until several backup officers arrived at little after 8:40pm. RP 18; CP 64 (FF 21). At that point, Officer Gregorio retrieved the gun Mr. Padilla had thrown in the bushes. RP 20; CP 64 (FF 23).

Officer Gregorio then ran a background check on Mr. Padilla and discovered he had a prior conviction for second-degree robbery. RP 30. The State charged Mr. Padilla in juvenile court with first-degree unlawful possession of a firearm based on this prior conviction. CP 27. Mr. Padilla moved to suppress the gun because it was the fruit of Officer Gregorio’s illegal seizure of him. CP 9-24; RP 72-81. The trial court denied the motion, concluding the detention was lawful because “Officer Gregorio had reasonable and articulable suspicion to believe that the Respondent was armed with a firearm.” CP 65.

The court found Mr. Padilla guilty after a stipulated-facts bench trial. CP 25-26, 57; RP 92-94. Mr. Padilla timely appeals. CP 61.

D. ARGUMENT

The trial court violated Mr. Padilla's rights under the Fourth Amendment and article I, section 7 by admitting evidence obtained as a result of an unconstitutional seizure.

1. The Terry stop is a narrow exception to the warrant requirement allowing for a warrantless seizure only where the officer has reasonable suspicion that the individual seized is committing a crime.

Article I, section 7 of the Washington Constitution prohibits government invasion of private affairs absent authority of law. Const. art. I, § 7. The Fourth Amendment prohibits unreasonable searches and seizures. U.S. Const. amend. IV.

Under both the federal and state constitutions, warrantless searches and seizures are unreasonable per se unless an exception applies. *State v. Loewen*, 97 Wn.2d 562, 565, 647 P.2d 489 (1982); *State v. Lennon*, 94 Wn. App. 573, 579, 976 P.2d 121 (1999). One narrow exception to the warrant requirement is the *Terry* stop. *See Terry v. Ohio*, 392 U.S. 1, 21, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968). Under *Terry*, an officer may briefly detain a person if the officer harbors a reasonable suspicion, based on specific articulable facts, that the individual is engaging in criminal activity. *Id.*

As an exception to the warrant requirement, the *Terry* stop must be narrowly construed and “jealously and carefully drawn.” *State v. Martinez*, 135 Wn. App. 174, 179, 143 P.3d 855 (2006). When the “reasonable suspicion” standard is not strictly enforced, the exception swallows the rule and “the risk of arbitrary and abusive police practices exceeds tolerable limits.” *Brown v. Texas*, 443 U.S. 47, 52, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979).

The *Terry* exception must be limited to those situations in which there is a “substantial possibility” that a crime has been committed and that the individual detained is the offender. *Martinez*, 135 Wn. App. at 180; 4 Wayne R. LaFare, *Search and Seizure* § 9.5(b) at 489 (4th ed. 2004). “[A] hunch does not rise to the level of a reasonable, articulable suspicion.” *State v. O’Cain*, 108 Wn. App. 542, 548, 31 P.3d 733 (2001). “Innocuous facts do not justify a stop.” *Martinez*, 135 Wn. App. at 180; *State v. Armenta*, 134 Wn.2d 1, 13, 948 P.2d 1280 (1997).

The *Terry* exception is more narrowly construed under our state constitution than under the Fourth Amendment. *See State v. Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008). The State bears the burden of proving the legality of a warrantless seizure by clear and convincing evidence. *State v. Garvin*, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009).

An appellate court reviews the constitutionality of a warrantless seizure de novo. *Martinez*, 135 Wn. App. at 179.

2. Because owning a firearm is not a crime, the trial court erred in ruling the seizure was valid because “Officer Gregorio had reasonable and articulable suspicion to believe that [Mr. Padilla] was armed with a firearm.”

The trial court did not find or conclude that Officer Gregorio had reasonable suspicion that Mr. Padilla was committing or had committed a crime at the time of the seizure. CP 62-65. This failure requires reversal and suppression of the evidence because “*Terry* requires a reasonable, articulable suspicion, based on specific, objective facts, that the person seized has committed or is about to commit a crime.” *Gatewood*, 163 Wn.2d at 539 (emphasis in original) (holding fact that individual’s eyes grew wide upon seeing police, he twisted to side as if to hide something, and then jaywalked, did not rise to reasonable suspicion of criminal activity).

The trial court denied the motion to suppress on the basis that “Officer Gregorio had reasonable and articulable suspicion to believe that [Mr. Padilla] was armed with a firearm.” CP 65. But carrying a firearm is not a crime. To the contrary, it is a constitutional right. U.S. Const. amend. II; const. art. I, § 24; *McDonald v. Chicago*, ___ U.S. ___, 130 S.Ct. 3020, 3026, 177 L.Ed.2d 894 (2010); *State v. Sieyes*, 168 Wn.2d

276, 292, 225 P.3d 995 (2010). Thus, in Seattle, as in the rest of the state, a person has the right to carry a firearm. See SMC 12A.14.080 (providing it is unlawful for a person to “carry concealed on his or her person any deadly weapon other than a firearm”); SMC 12A.14.083 (proscribing the carrying of certain weapons in public places but not firearms).

Although it is unlawful for a felon to own a firearm, Officer Gregorio did not know of Mr. Padilla’s felony record until after the seizure. RP 30. And while it is also unlawful for a person who is under 18 to possess a firearm, Officer Gregorio did not know before the seizure that Mr. Padilla was a month shy of his 18th birthday. RP 25. Thus, it is no surprise that the trial court did not find Officer Gregorio knew these facts before the seizure. CP 62-65. “In the absence of a finding on a factual issue we must indulge the presumption that the party with the burden of proof failed to sustain their burden on this issue.” *Armenta*, 134 Wn.2d at 14.

The fact that the officer learned after the seizure that Mr. Padilla had a prior felony conviction cannot, of course, validate the seizure post hoc. “The reasonableness of official suspicion must be measured by what the officers knew before they conducted their search [or seizure].” *Florida v. J.L.*, 529 U.S. 266, 271, 120 S.Ct. 1375, 146 L.Ed.2d 254 (2000); *State v. Hopkins*, 128 Wn. App. 855, 865, 117 P.3d 377 (2005).

The only thing the officer knew at the time of the seizure was that Mr. Padilla might have a gun, and the trial court upheld the seizure on this basis. But the Supreme Court has already rejected the proposal “that the standard *Terry* analysis should be modified to license a ‘firearm exception.’” *J.L.*, 529 U.S. at 272.

This Court reversed for a similar violation in *State v. Almanza-Guzman*, 94 Wn. App. 563, 565, 972 P.2d 468 (1999). There, officers suspected the defendant of being an alien carrying a weapon without a license because he went to a gun show, took out his gun to show a salesperson what type of magazine he needed, and spoke with a Spanish accent. *Id.* The officers seized the defendant, and it turned out he was in fact an alien without a firearm license. He was arrested and later convicted of unlawful possession of a firearm. *Id.* at 566. But this Court held the evidence should have been suppressed because the agents did not have reasonable suspicion of criminal activity when they detained the defendant. *Id.* at 566-67.

The same is true here. As the trial court concluded, Officer Gregorio had reasonable suspicion that Mr. Padilla had a gun. But as in *Almanza-Guzman*, the officer lacked reasonable suspicion that Mr. Padilla unlawfully possessed the gun.

In sum, because there is no “firearm exception” to the rule that a *Terry* seizure must be justified by reasonable suspicion of a crime, the trial court erred in denying Mr. Padilla’s motion to suppress on the basis that Officer Gregorio reasonably suspected Mr. Padilla had a firearm.

3. The remedy is reversal and remand for suppression of the evidence and dismissal of the charge.

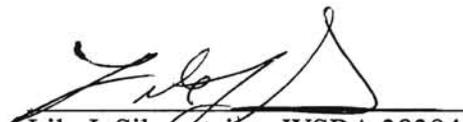
The remedy for a violation of the Fourth Amendment and article I, section 7 is suppression of the fruits of the improper search or seizure. *State v. White*, 97 Wn.2d 92, 110-12, 640 P.2d 1061 (1982); *Gatewood*, 163 Wn.2d at 542. This Court should reverse and remand for suppression of the firearm found as a result of the improper seizure. Because the evidence supporting the charge is insufficient without the gun, the charge should be dismissed with prejudice.

E. CONCLUSION

Mr. Padilla asks this Court to reverse and remand for suppression of the evidence and dismissal of the charge.

DATED this 7th day of November, 2012.

Respectfully submitted,


Lila J. Silverstein – WSBA 38394
Washington Appellate Project
Attorney for Appellant

APPENDIX A

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FILED
KING COUNTY WASHINGTON
JUN 4 2012
BY JOVELIA V AVILA
DEPUTY CLERK

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY
JUVENILE DIVISION

STATE OF WASHINGTON,)	
)	
)	Plaintiff,
)	No 11-8-02424-7
)	
vs)	
)	
)	CrR 3 6 FINDINGS OF FACT AND
PEDRO E PADILLA)	CONCLUSIONS OF LAW
DOB 10/31/1993,)	
)	
)	
)	
)	Respondent
)	

THE ABOVE-ENTITLED CAUSE having come on for a CrR 3 6 motion on March 27, 2012 before the Honorable Judge Barbara Mack in the above-entitled court, the State of Washington having been represented by Deputy Prosecuting Attorney Candice Duclos, the Respondent appearing in person and having been represented by his attorney, George Eppler, the court having heard sworn testimony and arguments of counsel, now makes and enters the following findings of fact and conclusions of law

FINDINGS OF FACT

- 1 On September 28, 2011 Seattle Police Officer Gregorio was on-duty and was dispatched to a domestic violence call involving a suspect named Reginald Barron at 9061 Seward Park Ave South Seattle, Washington, the Lake Washington Apartments Officer Gregorio is very familiar with Barron and can recognize him on sight
- 2 Officer Gregorio did not have probable cause to detain Barron based on the information he received from dispatch while responding

CrR 3 6 FINDINGS OF FACT AND
CONCLUSIONS OF LAW- 1

ORIGINAL

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1 3 When Officer Gregorio came on shift on September 28, 2011 he was informed of a shooting that
2 had occurred earlier in the day not far from the Lake Washington Apartments Officer Gregorio
was advised that the shooting was a drive-by shooting and the suspect(s) had not been captured

3 4 Officer Gregorio responded to the area on the back side exit of the Lake Washington
4 Apartments, across from the Safeway, to a gated path along which Barron had fled from the
apartments in the past

5 5 Officer Gregorio had his lights and sirens on as he approached the apartments but turned them
6 off approximately 1-2 blocks before arriving

7 6 Officer Gregorio stopped his vehicle on the road, somewhere between 10 feet and 10 yards away
8 from the Lake Washington Apartment's fenced back gate

9 7 Officer Gregorio immediately saw a subject standing at the bottom of the stairs near the gate and
another subject, later identified as the Respondent, Pedro Padilla, hunched over with his back to
Officer Gregorio, partially hidden near the bushes

10 8 It was dusk when Officer Gregorio saw the Respondent

11 9 Barron was known to crouch down similar to how the Respondent was crouched in order to hide
12 or conceal alcohol

13 10 Officer Gregorio believed that the Respondent was Barron based on the area where located, a
similar hair style, and the manner in which the Respondent was crouched

14 11 Officer Gregorio informed dispatch that he was out with Barron, turned his vehicle's spotlight
15 on, directed it at the Respondent and exited his vehicle

16 12 Officer Gregorio did not draw his service weapon upon exiting his vehicle

17 13 Within 5 seconds of Officer Gregorio exiting his vehicle, the Respondent looked back at him
18 Officer Gregorio immediately realized the subject was not Barron and informed dispatch he was
not out with Barron

19 14 Officer Gregorio asked the Respondent what he was doing Almost simultaneously, the
Respondent turned and threw a dark object behind him

20 15 The object that was thrown hit the nearby metal fence and made a metallic clank sound, metal
21 on metal

22 16 Officer Gregorio recognized the sound, based on his training and experience, as being consistent
with that of a gun striking a metal fence

- 1 17 Officer Gregorio has 15 years of combined law enforcement experience with Seattle Police Department and the United States Military
- 2
- 3 18 Officer Gregorio drew his service weapon and ordered the Respondent to show his hands and get on the ground The respondent complied
- 4
- 5 19 This detention occurred at approximately 2040hrs
- 6
- 7 20 Officer Gregorio was alone with the Respondent and had requested back-up officers who had not yet arrived
- 8
- 9 21 The Respondent remained on the ground at gun point for less than one minute before additional officers arrived to assist Officer Gregorio
- 10
- 11 22 One of the back-up officers helped the Respondent up and removed him from the area where the gun had been thrown
- 12
- 13 23 Officer Gregorio performed a quick search of the area and found a gun approximately three feet from where the Respondent had been laying The location of the gun was consistent with the direction in which the Respondent had thrown the gun
- 14
- 15 24 The Respondent was placed under formal arrest at approximately 2044hrs

13 And having made those Findings of Fact, the Court also now enters the following

14 CONCLUSIONS OF LAW

- 15 1 Officer Gregorio testified at the CrR 3 6 hearing The Court found Officer Gregorio's testimony to be credible
- 16
- 17 2 State v Young, 135 Wn 2d 498, 512 (1998), includes a non-exhaustive list of displays of authority that can amount to a seizure This non-exhaustive list is helpful for the court to consider in determining whether the Respondent was seized at any point during the encounter with Officer Gregorio
- 18
- 19 3 Officer Gregorio spotlighting the Respondent with his vehicle spotlight did not amount to a seizure
- 20
- 21 4 Officer Gregorio approaching the Respondent and asking what he was doing was a social contact and did not amount to a seizure
- 22
- 23 5 Based on Officer Gregorio's training and experience, his knowledge of the earlier shooting, his initial observations of the Respondent crouched near the bushes, the Respondent's

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throwing of an object and the sound of the object hitting the fence being consistent with that of a gun hitting a metal fence, Officer Gregorio had reasonable and articulable suspicion to believe that the Respondent was armed with a firearm

6 The nature and the scope of the investigative stop conducted by Officer Gregorio that ensued after the gun was thrown was reasonable and justified given the nature of the suspected crime and the potential danger to officers, the Respondent and members of the community in general

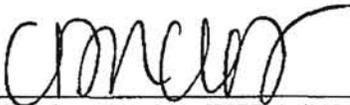
In addition to the above written findings and conclusions, the court incorporates by reference its oral findings and conclusions and the evidence and exhibits contained in the court record

Signed this 4 day of June, 2012



Honorable Barbara Mack

Presented by



Candice Duclos, WSBA #42662
Deputy Prosecuting Attorney

Approved as to form with objections noted below



George Eppler, WSBA #15268
Attorney for Respondent

Respondent asserts that substantial evidence,
1 does not exist to support findings of fact 12,14,and 19
2 that Conclusion of law 3 standing alone disregards the other factors, combined w/ # 3,which
amounted to a detention,
3 that Conclusions of Law 4,5, and 6 are not supported by substantial evidence,
4 lastly, substantial evidence supported the trial court finding #'s 10 thru 31, enumerated in the filed
affidavit of counsel, and established at the CrR 3 6 Hearing

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

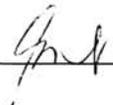
STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 68694-1-I
v.)	
)	
PEDRO PADILLA,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 7TH DAY OF NOVEMBER, 2012, I CAUSED THE ORIGINAL **OPENING 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:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> PEDRO PADILLA (NO VALID ADDRESS) C/O COUNSEL FOR APPELLANT WASHINGTON APPELLATE PROJECT	() () (X)	U.S. MAIL HAND DELIVERY RETAINED FOR MAILING ONCE ADDRESS OBTAINED

SIGNED IN SEATTLE, WASHINGTON THIS 7TH DAY OF NOVEMBER, 2012.

X _____ 

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