

No. 69218-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DANTE URELL PIGGEE,

Appellant.

FILED S-871
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STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable Bruce E. Heller

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to suppress the marijuana and other contraband seized from Mr. Piggee.

2. In the absence of substantial evidence, the trial court erred in entering Finding of Fact 6 finding that Mr. Piggee “was a suspect in a fare evasion circumstance.”

3. In the absence of substantial evidence, the trial court erred in entering Finding of Fact 7 finding that:

Deputy Nix was given enough information to warrant an initial detention of the defendant to determine whether the defendant had committed an infraction or a more serious theft.

4. To the extent it is considered a finding of fact, and in the absence of substantial evidence, the trial court erred in entering Conclusion of Law 1 finding the detention of Mr. Piggee was supported by sufficient information to warrant an investigatory stop.

5. To the extent it is considered a finding of fact, and in the absence of substantial evidence, the trial court erred in entering Conclusion of Law 2 finding there is no distinction between traffic and non-traffic infractions for the purposes of an investigative stop.

6. To the extent it is considered a finding of fact, and in the absence of substantial evidence, the trial court erred in entering

Conclusion of Law 3 finding that:

The court finds Deputy Nix received a dispatch regarding an uncooperative passenger leaving the international district station without producing identification. The person was suspected of evading the fare. Deputy Nix observed the defendant walking on Jackson Street being followed by transit security officers and matching the description of the passenger described through dispatch. Deputy Nix wanted to speak with the defendant because he was a suspect in a fare evasion circumstance and to determine whether an infraction occurred. There was more information available to the Deputy other than the fact the defendant was being uncooperative; the defendant was a fare violator.

Here the court finds that Deputy Nix had reasonable suspicion, based on sufficient information from dispatch, to detain the defendant in order to determine whether a crime had been committed. There existed articulable facts and circumstances to warrant a prudent person in believing criminal activity is afoot. The detention of the defendant was lawful.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Under RCW 81.112.210 and RCW 7.80.060, a police officer or other designated person may detain an individual for a nontraffic infraction where the infraction occurs in the designated person's presence. Here Mr. Piggee was detained by a deputy for suspected fare evasion where the infraction did not occur in the deputy's presence.

Did the trial court err in finding the deputy had reasonable suspicion to detain Mr. Piggee for a fare evasion violation when it did not occur in the deputy's presence?

2. The Supreme Court has unequivocally held a detention of a person by the police cannot be based solely upon an anonymous informant's tip. Here, anonymous fare enforcement officers reported that they had observed a black man commit a fare infraction. In response to this tip, a deputy detained Mr. Piggee, a black man, subsequently arrested him, and seized marijuana and other contraband. Did the trial court err in concluding the deputy's seizure of Mr. Piggee was constitutional, and in denying the motion to suppress the marijuana and other contraband seized thereby?

C. STATEMENT OF THE CASE

On December 6, 2011, King County Deputy Robert Nix overheard a radio transmission that Sound Transit Fare Enforcement had an uncooperative person who refused to show identification leaving the International District Station in Seattle. 7/19/2012RP 7-11. The only description of the man was a black adult man. 7/19/2012RP 12. The fare enforcement people indicated they were following the man. 7/19/2012RP 12.

As the deputy approached Fifth Avenue and Jackson Street, he saw a black man followed by two Fare Enforcement Officers.¹ 7/19/2012RP 12. The deputy identified Dante Piggee as the man crossing the street. 7/19/2012RP 14. The deputy stopped his car and asked Mr. Piggee to step over and speak with him. 7/19/2012RP 16. According to the deputy, Mr. Piggee kept walking and, in response, the deputy grabbed Mr. Piggee's hand and attempted to direct him over to the police car. 7/19/2012RP 16. The deputy claimed Mr. Piggee pushed him away and said he had his ticket. 7/19/2012RP 17. The fare enforcement people stated Mr. Piggee had committed a fare violation and they wanted to identify him. 7/19/2012RP 17. A struggle ensued and Mr. Piggee was ultimately arrested for resisting arrest and assault on a police officer. 7/19/2012RP 18-19.

The deputy searched Mr. Piggee and discovered some marijuana. 7/19/2012RP 20. Mr. Piggee was subsequently charged with Third Degree Assault and Possession with Intent to Distribute or Manufacture Marijuana. CP 82-83.

¹ The deputy testified the Sound Transit Fare Enforcement Officers are *not* fully commissioned police officers. 7/19/2012RP 21. The trial court made a specific finding that the fare enforcement people were not fully commissioned law enforcement officers and had no authority to arrest Mr. Piggee. CP 27 (Finding of Fact 2).

Prior to trial Mr. Piggee moved to suppress the marijuana and other contraband seized from him. CP 10-15. Deputy Nix was the only witness to testify: neither Fare Enforcement Officer was called to testify. 7/19/2012RP 7-41. Following the hearing, the trial court denied the motion to suppress, finding that the deputy had reasonable suspicion to believe Mr. Piggee had committed a fare infraction. CP 27-29.

Following a jury trial, Mr. Piggee was acquitted of the third degree assault but convicted of the possession of intent count. CP 61-62.

D. ARGUMENT

THE DEPUTY LACKED REASONABLE SUSPICION TO DETAIN MR. PIGGEE, THUS HIS DETENTION WAS ILLEGAL

1. Under both the state and federal constitutions, the Terry stop is an exception to the warrant requirement, and as such must be jealously and carefully drawn. As a general rule, a warrantless search is per se unreasonable under both the Fourth Amendment and article I, section 7 unless the search falls within one or more specific exceptions to the warrant requirement. *State v. Duncan*, 146 Wn.2d 166, 171, 43 P.3d 513 (2002); *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722

(1999). One exception to the warrant requirement occurs in a situation where a police officer makes a brief investigatory *Terry* stop based upon reasonable suspicion, supported by objective facts, that an individual is involved in criminal activity. *Brown v. Texas*, 443 U.S. 47, 51, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979); *Terry v. Ohio*, 392 U.S. 1, 21-22, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *State v. Armenta*, 134 Wn.2d 1, 10, 948 P.2d 1280 (1997).

An investigatory stop occurs at the moment when a reasonable person would not feel free to leave. *Armenta*, 134 Wn.2d at 10. “[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.” *Armenta*, 134 Wn.2d 1 at 13. “Race or color alone is not a sufficient basis for making an investigatory stop.” *State v. Almanza-Guzman*, 94 Wn. App. 563, 567, 972 P.2d 468 (1999).

The *Terry* exception is more narrowly construed under the Washington Constitution than under the Fourth Amendment. *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). This Court reviews the constitutionality of a warrantless stop *de novo*. *State v. Acrey*, 148 Wn.2d 738, 745, 64 P.3d 594 (2003).

Application of *Terry* stops for investigation of criminal violations is distinguishable from the realm of civil infractions, and the Supreme Court has declined to extend the *Terry* stop exception under the Fourth Amendment and article I, section 7 of the Washington State Constitution to nontraffic civil infractions. *See State v. Day*, 161 Wn.2d 889, 897-98, 168 P.3d 1265 (2007) (parking infraction); *Duncan*, 146 Wn.2d at 175 (alcohol violation). Thus *Terry* will not justify a stop and frisk for a civil infraction such as here.

When investigating a civil infraction an officer is not seeking to arrest an individual, but rather to issue a citation. In light of the lower risk to society involved with civil infractions, the common law principle recognized in *Hornaday* suggests that a less intrusive procedure would be more acceptable than with the commission of a felony or even a misdemeanor.

Duncan, 146 Wn.2d at 178.

2. The infraction of fare evasion did not occur in Deputy Nix's presence, thus the detention of Mr. Piggee could not be based on investigation of the civil infraction for fare evasion. The civil infraction Mr. Piggee was suspected of committing was fare evasion. The infraction did not occur in Deputy Nix's presence, thus his detention of Mr. Piggee was illegal.

Where the officer is investigating a civil infraction, under RCW 7.80.050(2) “[a] notice of civil infraction may be issued by an enforcement officer when the civil infraction occurs *in the officer's presence.*”² (Emphasis added). Under RCW 7.80.060, a person who is being issued a citation for an infraction must stop and identify themselves upon by request. An enforcement officer³ may detain the individual “for a period of time not longer than is reasonably necessary to identify the person for purposes of issuing a civil infraction.” *Id.* Specific to this case, RCW 81.112.210 (2) authorizes fare enforcement officers in transit agencies to enforce fares pursuant to RCW 7.80.040

² See also RCW 10.31.100, which states that: “[a] police officer may arrest a person without a warrant for committing a misdemeanor or gross misdemeanor *only when the offense is committed in the presence of the officer.*” (Emphasis added).

³ “Enforcement Officer” as used in this chapter encompasses more than just law enforcement officers. RCW 7.80.040.

through RCW 7.80.070 but only when the infraction has occurred in the officer's presence. RCW 81.112.210(2)(b)(iii).

An example of the application of the "in the presence" rule is found in *State v. Hornaday*, 105 Wn.2d 120, 713 P.2d 71 (1986). In *Hornaday*, an Okanogan County police officer observed the defendant who appeared to be intoxicated. When the officer approached the defendant, he could smell a strong odor of alcohol on the defendant's breath. *Id.* at 121. The officer asked the defendant for some identification. The defendant showed him his Washington State driver's license which indicated that he was only 20 years old. *Id.* The officer arrested the defendant for illegal consumption or possession of alcohol. *Id.* The officer did not observe the defendant acquire alcohol, nor did the officer observe any liquor in the defendant's possession. *Id.* Further, the officer did not observe the defendant consume any liquor. *Id.* The Supreme Court held that the offense of possession of alcohol was not committed in the officer's presence and thus, the arrest of the defendant was improper. *Id.* at 129.

Here, the deputy stopped Mr. Piggee based solely upon the fact he was a black man⁴ and the fare enforcement people were following a black man. The deputy did not see anything that occurred in the transit station, and while arguably a fare violation may be a continuing offense where the person refuses to identify themselves, the deputy observed *nothing* that occurred inside the transit station. Thus any fare violation did not occur in the deputy's presence. The seizure of Mr. Piggee could not be based upon reasonable suspicion of a fare violation based solely upon the deputy's observations alone.⁵

3. Where a Terry stop is based on an informant's tip, the State must prove the informant and information provided are reliable. Since the fare evasion infraction did not occur in the deputy's presence and did not provide any basis to detain Mr. Piggee, only the observations of the fare enforcement officers were necessary to arguably provide reasonable suspicion for Mr. Piggee's detention. But since these

⁴ The trial court referred to the fact Mr. Piggee "matched the description of the person given through dispatch." CP 28 (Finding of Fact 5). The only description Deputy Nix had was that the person was a black adult male. 7/19/2012RP 12.

⁵ The seizure also cannot be justified under the "fellow officer rule." *See State v. White*, 76 Wn.App. 801, 805, 888 P.2d 169 (1995), *aff'd*, 129 Wn.2d 105, 915 P.2d 1099 (1996). First, the fellow officer rule has never been extended beyond felonies to misdemeanors or infractions. *See State v. Ortega*, 159 Wn.App. 889, 898, 248 P.3d 1062 (2011) (cases cited and discussion therein). More importantly, the fellow officer rule applies to law enforcement officers. The two fare enforcement people were security guards who were not law enforcement officers.

individuals were not law enforcement officers but citizen informants, neither of whom testified, and no information regarding them was presented at the CrR 3.6 hearing, there was no basis for the trial court to find reasonable suspicion to detain Mr. Piggee.

Although the *Terry* case involved a stop based on the personal observations of police officers, in some circumstances an informant's tip may create the required reasonable suspicion. *Adams v. Williams*, 407 U.S. 143, 146-47, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972). This occurs only if the tip exhibits sufficient indicia of reliability. *Alabama v. White*, 496 U.S. 325, 326-27, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990); *State v. Sieler*, 95 Wn.2d 43, 47, 621 P.2d 1272 (1980). "Indicia of reliability" requires: (1) knowledge that the source of the information is reliable, and (2) a sufficient factual basis for the informant's tip or corroboration by independent police observation. *State v. Jones*, 85 Wn.App. 797, 799-800, 934 P.2d 1224 (1997), citing *Sieler*, 95 Wn.2d at 47-49.

Under article I, section 7, the State establishes an informant's tip's reliability when "(1) the *informant* is reliable *and* (2) the informant's *tip* contains enough objective facts to justify the pursuit and detention of the suspect *or* the noninnocuous details of the tip have

been corroborated by the police thus suggesting that the information was obtained in a reliable fashion.” *State v. Hart*, 66 Wn.App. 1, 7, 830 P.2d 696 (1992) (emphasis in original).

Generally, courts may presume the reliability of a tip from a citizen informant, unless the only information available to the responding officer is the informant's name and phone number. *State v. Hopkins*, 128 Wn.App. 855, 863-64, 117 P.3d 377 (2005). Where a citizen informant identifies himself or herself by name, gives his or her address, phone number, and other background information, the police may act on the belief the report comes from a reliable source. *State v. Wakeley*, 29 Wn.App. 238, 241, 628 P.2d 835 (1981). But, where the officer has no information regarding the informant, the officer must either have some corroborative observation which suggests the presence of criminal activity or some verification that the police obtained the informer's information in a reliable fashion. *Sieler*, 95 Wn.2d at 47.

This Court’s decision in *Hopkins* controls here. *Hopkins*, 128 Wn.App. at 862. There, an informant called 911 twice and reported that a young black male was carrying a gun. *Id.* at 858. The caller

reported that the individual was wearing a dark shirt and tan pants and carrying both a green backpack and a black backpack. The informant reported that the suspect was located in a particular phone booth. The police dispatcher relayed the message to police officers, whose car computer displayed the informant's name and telephone number. The officers went to the phone booth in question, saw a young man matching the informant's description, performed a *Terry* stop, and discovered a gun. *Id.* at 859.

Here, there was *no* information presented about the fare enforcement officers, not their names nor phone number or any identifying information. The only information that was learned from the testimony at the CrR 3.6 hearing was that the individuals were *not* fully commissioned law enforcement officers. Further, the only information provided by the fare enforcement people and corroborated by the deputy was that Mr. Piggee was a black man. There was no information presented that the black man the fare enforcement people were attempting to detain was Mr. Piggee. There was nothing presented to establish the fare enforcement officers' reliability, and the fact corroborated by the deputy, that Mr. Piggee was a black man, was

entirely innocuous. Thus, contrary to the trial court's conclusion, there was no reasonable suspicion to authorize the detention of Mr. Piggee.

Even under the Fourth Amendment, which is less protective than article I, section 7, the stop was improper. *See Florida v. J.L.*, 529 U.S. 266, 271, 120 S.Ct. 1375, 146 L.Ed.2d 254 (2000). The facts of *J.L.*, like the facts of *Hopkins*, are extremely similar to this case. *J.L.*, 529 U.S. 266. In *J.L.*, an anonymous caller told the police that a young black man standing at a particular bus stop and wearing a plaid shirt was carrying a gun. *Id.* at 268. Police officers went to the bus stop, saw a man with a plaid shirt, seized him and found a gun. *Id.* The man was a juvenile and was charged with unlawful possession of a firearm. *Id.* at 269.

The United States Supreme Court ruled the evidence should have been suppressed. The Court unequivocally held that an anonymous tip that a particular person is carrying a gun is insufficient to justify a police officer's stop of that person. *Id.* at 268. Here, the fare enforcement officers alleged that a black man had committed a fare violation; no other information about the fare enforcement people was admitted. Thus, the fare enforcement individual's information was no

more than an anonymous tip. The ensuing stop of Mr. Piggee therefore violated the Fourth Amendment. *J.L.*, 529 U.S. at 268.

In sum, under both the Fourth Amendment and article I, section 7, the seizure of Mr. Piggee and the marijuana and other contraband seized from him was unconstitutional. This Court should reverse Mr. Piggee's conviction and remand with instructions to suppress the items seized from him as a result of the improper stop. *Gatewood*, 163 Wn.2d at 542.

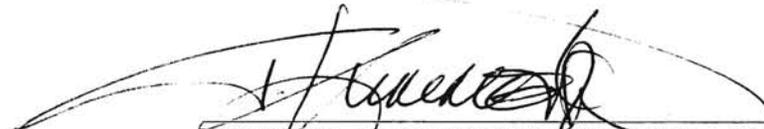
4. The remedy is reversal and suppression. If the investigative stop violates *Terry*, any evidence obtained from a subsequent search must be suppressed. *State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986). In this case, both the initial seizure of Mr. Piggee and the subsequent seizure of the marijuana and contraband were unconstitutional. Thus, this Court must order the illegally seized items suppressed.

E. CONCLUSION

For the reasons stated, Mr. Piggee requests this Court reverse his conviction and order the contraband seized from him suppressed.

DATED this 30th day of January 2013.

Respectfully submitted,



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DANTE PIGGEE,)	
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