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NO. 69268-2-1

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

STATE OF WASHINGTON,

Respondent,

v.

RYAN C. TERRY,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUE

Did police have probable cause to arrest defendant?

II. STATEMENT OF THE CASE

A. FACTS OF THE CRIME.

On October 22, 2010, defendant, Ryan Christopher Terry, was arrested by Deputy Hansmann. A search incident to arrest located methamphetamine on defendant's person. CP 41-42. Probable cause to arrest defendant was based on Detective Christiansen's stolen vehicles investigation. Detective Christiansen determined that defendant had assisted Lance Schneider transfer a motor from a stolen 1993 Nissan Pathfinder to Schneider's 1993 Nissan Pathfinder.

B. FACTS OF THE INVESTIGATION.

During a stolen vehicle investigation Detective Christiansen came into contact with Darcy Mulrooney in February 2010, at her residence on West Lake Sammamish Parkway. Mulrooney's white 1993 Nissan Pathfinder was parked in her driveway. Between February 2010 and August 2010, Detective Christiansen conducted surveillance and made multiple contacts at Mulrooney's residence. During that time Lance Schneider was observed several times at Mulrooney's residence. Detective Christiansen had previously

arrested Schneider for theft of motor vehicles during a prior investigation in February 2006. On May 8, 2010, Mulrooney sold the white Pathfinder to Schneider. CP 26, 32, 37.

In July Schneider damaged the white Pathfinder motor while working on it in Mulrooney's driveway. The white Pathfinder remained parked in Mulrooney's driveway for several weeks. On July 29, 2010, Detective Christiansen observed Schneider working on the front passenger door of the white Pathfinder parked in the driveway. On August 10, 2010, Detective Christiansen observed an automobile motor in the rear cargo area of the white Pathfinder parked in Mulrooney's driveway. Mulrooney saw Schneider and defendant load an automobile motor from the bed of a pick-up truck into the back of the white Pathfinder in early to mid August 2010. CP 26-27, 32, 37-39.

On August 3, 2010, Elizabeth Usarzewicz's silver 1993 Nissan Pathfinder was stolen. On August 11, 2010, Deputy Haley recovered Usarzewicz's stolen silver Pathfinder on Donald Butler's property at 299th Avenue SE, Monroe. The engine, front fenders and front bumper were missing from the silver Pathfinder when it was recovered. A person who wished to remain anonymous notified Deputy Haley that defendant had been at the location just

before Deputy Haley arrived, that defendant drove onto the property in a normal manner then left the property at a high rate of speed. Deputy Haley knew that defendant had previously lived at the Butler property and that Schneider was also associated with the Butler property. Defendant had listed the Monroe address during prior bookings into the King County Jail. Detective Christiansen investigated other ties between defendant, Schneider and the Butler property. CP 27-28, 33-34, 38-39.

On August 16, 2010, Schneider was arrested while driving his white Pathfinder. Defendant was a passenger. Among the items recovered from the white Pathfinder were a reciprocating saw, a car audio amplifier, and a heavy duty floor jack. The serial numbers on all three items had been scratched or rubbed off. Defendant was again with Schneider in the white Pathfinder when Schneider was arrested on August 25, 2010. CP 27, 33-34.

In mid August Schneider told Vernon Thompson that he had installed a new motor in the white Pathfinder. In mid September 2010, a concerned citizen, who wished to remain anonymous, informed Detective Christiansen that Schneider had told the concerned citizen that he recently put a new motor in the white Pathfinder. Further, Schneider told the concerned citizen that he

had traded the white Pathfinder for a 1995 Saab. Washington Department of Licensing records showed the Saab was registered to Chad Hirsh. On September 28, 2010, Detective Christiansen contacted Hirsh and observed the white Pathfinder parked in the driveway. The hood of the white Pathfinder was open and the serial number located on the side of the engine block was in plain view. The serial number had a fresh bead of weld deliberately obscuring most of the number. The rest of the engine block was darkened and dirty. Hirsh acknowledged that he traded his Saab for Schneider's white Pathfinder approximately two weeks ago. Schneider had told Hirsh that he changed out the motor and transmission of the white Pathfinder about four or five weeks earlier. CP 27-28, 34-36, 39.

On October 5, 2010, a search warrant was served on the white Pathfinder and the engine identification number was inspected. All but the characters "VG" were obscured by the fresh weld. The engine would have to have been removed from the vehicle to apply the weld. The engine identification number for Usarzewicz's silver Pathfinder is VG30638299. Usarzewicz did not give Schneider or defendant permission to take her silver Pathfinder or any parts from her silver Pathfinder. Based on his

experience and training, Detective Christiansen knew that suspects remove or deface serial numbers to avoid being caught with property that could be identified as stolen by the serial numbers. Further, Detective Christiansen knew that suspects wanting to replace vehicle parts without incurring cost will steal a vehicle of the same make, model and year to ensure the parts will match. CP 27, 34, 37-40.

On October 15, 2010, Detective Christiansen contacted Schneider and informed him that he was under arrest for the transfer of his white Pathfinder containing a stolen engine to Chad Hirsh. Schneider asked, "How did you know that was my car? It wasn't in my name." While being transported to the King County jail Schneider asked, "Who ratted me out?" Detective Christiansen told him that he would not discuss who provided information in the investigation. Schneider said, "I'll get the discovery. I'm not the only one involved in this." CP 28, 40-41.

C. PROCEDURAL HISTORY.

Defendant was charged with possession of a controlled substance. CP 60-61. Defendant filed a CrR 3.6 motion to suppress evidence that was heard on May 24, 2012. CP 51-57; 1RP 1-20. The parties stipulated that the court would consider as

fact all the facts in the police reports.¹ CP 26; 1RP 1-3; 2RP 1. On May 29, 2012, the court denied defendant's motion to suppress. CP 26-30; 2RP 1-8.

On June 26, 2012, the case proceeded to bench trial on agreed documentary evidence. Defendant was found guilty of Possession of a Controlled Substance. CP 44-50; 3RP 1-10.

On August 23, 2012, defendant was sentenced to a standard range sentence of 6 months and one day, work release if eligible. CP 15-25; 4RP 1-5. Defendant appealed. CP 3-14.

III. ARGUMENT

A. STANDARD OF REVIEW.

A police officer's determination of probable cause is reviewed as a mixed question of law and fact. City of College Place v. Staudenmaier, 110 Wn. App. 841, 846, 43 P.3d 43, review denied, 147 Wn.2d 1024 (2002); State v. Vasquez, 109 Wn. App. 310, 318, 34 P.3d 1255 (2001). The reviewing court first reviews the factual matters, i.e., who, what, when, and where, for substantial evidence. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994); Staudenmaier, 101 Wn. App. at 846; Bokor v. Dep't of Licensing, 74 Wn. App. 523, 526-27, 874 P.2d 168 (1994).

¹ The reports are attached to the court's Certificate Pursuant to CrR 3.6 as Appendix A. CP 31-43.

Substantial evidence requires “a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding.” Hill, 123 Wn.2d at 644; Staudenmaier, 101 Wn. App. at 846. Where there is substantial evidence in the record supporting the challenged facts, those facts are binding on appeal. Hill, 123 Wn.2d at 647. In reviewing findings of fact entered following a motion to suppress, the court only reviews those facts to which error has been assigned. Hill, 123 Wn.2d at 647. Where the findings are unchallenged, they are verities on appeal. State v. O’Neill, 148 Wn.2d 564, 571, 62 P.3d 489 (2003).

The reviewing court then decides whether the facts support the legal conclusion – probable cause. This legal question is reviewed de novo. State v. Thorn, 129 Wn.2d 347, 351, 917 P.2d 108 (1996), overruled on other grounds, State v. O’Neill, 148 Wn.2d 564, 62 P.3d 489 (2003).

B. THERE WAS SUBSTANTIAL EVIDENCE IN THE RECORD SUPPORTING THE LOWER COURT’S FINDINGS OF FACT.

Defendant does not challenge the lower court’s findings, thus they are verities on appeal. O’Neill, 148 Wn.2d at 571. At the suppression hearing the parties stipulated that the court would consider as fact all the facts in the police reports. CP 26; 1RP 1-3;

2RP 1. The reports were attached as Appendix A to the court's findings of fact and conclusions of law. CP 32-43. There is substantial evidence in the record supporting the findings of fact. Those facts are binding on appeal. Hill, 123 Wn.2d at 647.

1. Statement Of The Person Wishing To Remain Anonymous.

The stipulated facts included the statement that when Deputy Haley recovered Usarzewicz's stolen Pathfinder at the Butler property on 299th Avenue SE, "a person who wished to remain anonymous" told Deputy Haley that defendant had been at the Butler property "just before Deputy Haley arrival ... [defendant had] driven onto the property in normal manner then left the property at a high rate of speed." CP 33. The lower court found that an anonymous citizen told Deputy Haley that defendant had been at the Butler property just prior to Deputy Haley's arrival and had left at a high rate of speed. CP 27. Defendant argues that the lower court should not have considered the statement by the informant. Appellant's Brief 10-11. Defendant claims that the evidence was insufficient to establish the informant's basis of knowledge or reliability. Appellant's Brief 1.

To satisfy both parts of the *Aguilar–Spinelli* test,² the State must prove the underlying circumstances which the trier of fact “may draw upon to conclude the informant was credible and obtained the information in a reliable manner.” State v. Gaddy, 152 Wn.2d 64, 72, 93 P.3d 872, 876 (2004). An informant's tip can furnish probable cause for arrest if evidence establishes the basis of the information and either the informant's credibility or reliability. Gaddy, 152 Wn.2d at 71. Information from a “citizen” does not require a showing of the same degree of reliability as the tip from a “professional” informant. State v. Garcia, 125 Wn.2d 239, 242, 883 P.2d 1369 (1994), citing State v. Kennedy, 107 Wn.2d 1, 8, 726 P.2d 445 (1986). Citizen informants are deemed presumptively reliable. Gaddy, 152 Wn.2d at 73; State v. Lair, 95 Wn.2d 706, 711, 630 P.2d 427 (1981). If either part of the *Aguilar–Spinelli* test are deficient, probable cause may yet be satisfied by independent police investigation corroborating the informant's tip to the extent it cures the deficiency. Jackson, 102 Wn.2d at 438.

² The *Aguilar–Spinelli* test derives from: Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969), and Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964). Although the United States Supreme Court eventually rejected the *Aguilar–Spinelli* test for the “totality-of-the-circumstances” test in Illinois v. Gates, 462 U.S. 213, 230, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), Washington court's still adhere to the *Aguilar–Spinelli* informant test. See State v. Jackson, 102 Wn.2d 432, 443, 688 P.2d 136 (1984).

The first prong of the test relates to the informant's basis of knowledge. Gaddy, 152 Wn.2d at 72; State v. Smith, 110 Wn.2d 658, 663, 756 P.2d 722 (1988). The basis of knowledge prong can be satisfied by showing that the informant “personally has seen the facts asserted and is passing on firsthand information.” Smith, 110 Wn.2d at 663, citing State v. Jackson, 102 Wn.2d 432, 437, 688 P.2d 136 (1984); State v. Wolken, 103 Wn.2d 823, 827, 700 P.2d 319 (1985). Here, the informant contacted Deputy Haley while he was at the Butler property. Based on the content and circumstance of the statement the rational commonsense inference is that the informant was relating facts that he or she had just observed. Smith, 110 Wn.2d at 664; Wolken, 103 Wn.2d at 827. A fair-minded, rational person could conclude that the informant’s basis of knowledge was firsthand observation.

The second prong of the test requires an examination of the credibility of the informant or the reliability of the informant's information. Gaddy, 152 Wn.2d at 72; Smith, 110 Wn.2d at 664. Even if nothing is known about an informant, the facts and circumstances surrounding the furnishing of the information may support a reasonable inference that the informant is telling the truth. Lair, 95 Wn.2d at 710. “The tip coupled, with other information,

may provide “the “little bit more” which is needed to elevate this other information up to the level of probable cause.” State v. Bowers, 36 Wn. App. 119, 124, 672 P.2d 753 (1983), quoting 2 W. LaFave, *Search and Seizure* § 3.3(f) (2012), at 236. Probable cause may be satisfied by independent police investigation corroborating the informant's tip to the extent it cures the deficiency. Jackson, 102 Wn.2d at 438. Here, included in the police reports was the fact that Deputy Haley knew that defendant was associated with the Butler property and that Officer Christiansen's investigation had confirmed defendant's association with the Butler property. CP 33. Nothing about the information provided in the present case casts any doubt on the informant's credibility. The facts in the present case provide a sufficient basis to infer that the informant was telling the truth. State v. Wilke, 55 Wn. App. 470, 479, 778 P.2d 1054 (1989). There were sufficient indicia of reliability to provide an objective measure of reasonableness.

2. Even Without The Challenged Statement There Was Sufficient Evidence To Support Probable Cause To Arrest Defendant.

However, even if the statement challenged by defendant—that defendant had been at the location just prior to Deputy Haley's arrival and had left at a high rate of speed—is set to one side, there

remains sufficient evidence in the record to support a finding of probable cause. State v. Smith, 39 Wn. App. 642, 651-652, 694 P.2d 660 (1984). There was substantial evidence in the record supporting the lower court's findings without the challenged statement. Those facts support the legal conclusion that there was probable cause to arrest defendant.

C. DEFENDANT'S ARREST WAS SUPPORTED BY PROBABLE CAUSE.

Probable cause is not a technical inquiry. State v. Terrovona, 105 Wn.2d 632, 643, 716 P.2d 295 (1986). "Probable cause is determined by considering the total facts on each case, viewed in a practical, non-technical manner." State v. Gillenwater, 96 Wn. App. 667, 671, 980 P.2d 318 (1999). However, a bare suspicion of criminal activity will not give an officer probable cause to arrest. Terrovona, 105 Wn.2d at 643. Probable cause exists where the facts and circumstances within the arresting officer's knowledge and of which the officer has reasonably trustworthy information are sufficient to warrant a person of reasonable caution in a belief that an offense has been committed. State v. Graham, 130 Wn.2d 711, 724, 927 P.2d 227 (1996); Terrovona, 105 Wn.2d at 643. An arrest based on information from fellow officers is

justified only if the other officers have sufficient evidence for probable cause. State v. Gaddy, 152 Wn.2d 64, 71, 93 P.3d 872 (2004). The determination rests on the totality of the facts and circumstances within the officers' knowledge. State v. Knighten, 109 Wn.2d 896, 899, 748 P.2d 1118 (1988); Bokor v. Dep't of Licensing, 74 Wn. App. 523, 527, 874 P.2d 168 (1994). Courts give consideration to the officer's special expertise in identifying criminal behavior. State v. Scott, 93 Wn.2d 7, 11, 604 P.2d 943 (1980). It is not necessary that the knowledge or evidence establish guilt beyond a reasonable doubt, "for in this area the law is concerned with probabilities arising from the facts and considerations of everyday life on which prudent men, not legal technicians, act." Scott, 93 Wn.2d at 11, quoting State v. Parker, 79 Wn.2d 326, 328-329, 485 P.2d 60 (1971); see also State v. Neeley, 113 Wn. App. 100, 107, 52 P.3d 539 (2002); Gillenwater, 96 Wn. App. at 670; State v. Griffith, 61 Wn. App. 35, 39, 808 P.2d 1171 (1991). Ultimately, the test is whether there were facts and circumstances within the officer's knowledge at the time of the arrest to support a determination of probable cause. State v. Fricks, 91 Wn.2d 391, 398, 588 P.2d 1328 (1979); Bokor, 74 Wn. App. at 527; City of Seattle v. Cadigan, 55 Wn. App. 30, 36, 776

P.2d 727 (1989). “When officers are acting in concert, it is proper to determine probable cause from the information available to all of them.” State v. Dunivin, 65 Wn. App. 501, 507, 828 P.2d 1150 (1992).

Clearly, as the lower court found, the facts and circumstances within the officers’ knowledge were sufficient to support a determination of probable cause that Schneider put a stolen motor in his Pathfinder. CP 28. Defendant does not challenge this finding. Where the findings are unchallenged, they are verities on appeal. O’Neill, 148 Wn.2d at 571. Additionally, the trial court found several factors that contributed to finding that the police had probable cause to arrest the defendant:

Usarzewicz’s Pathfinder was stolen on August 3, 2010. On August 11, 2010, Deputy Haley discovered Usarzewicz’s silver Pathfinder on the Butler property in Monroe, missing the engine. Defendant’s association with the Butler property was known to the police. Defendant was also known to associate with Schneider. Defendant was a passenger in Schneider’s vehicle at a time when items with obscured serial numbers were found in the vehicle. In early August, defendant was observed helping Schneider unload an automobile motor from a truck into Schneider’s white Pathfinder.

The partially obscured serial number on the motor in Schneider's Pathfinder matched the serial number on the motor taken from Usarzewicz's silver Pathfinder. When Schneider was arrested for the stolen Pathfinder motor he admitted that he was not the only one involved. CP 26-29. See B, 1, above.

These factors created more than a "bare suspicion" that defendant had engaged in criminal activity. A fair-minded, rational person could conclude that the facts support the legal conclusion that the police had probable cause to arrest defendant.

IV. CONCLUSION

For the reasons stated above, defendant's conviction should be affirmed.

Respectfully submitted on April 25, 2013.

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