

69403-1

69403-1

No. 69403-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

THOMAS JERALD WENGER,

Appellant.

---

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

The Honorable Ellen J. Fair

---

BRIEF OF APPELLANT

---

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A. ASSIGNMENTS OF ERROR

1. Mr. Wenger's Fourth Amendment and Article I, section 7 rights were denied when the trial court refused to order the contraband seized from him suppressed.

2. In the absence of substantial evidence, the trial court erred in entering Finding of Fact 9, finding that Mr. Wenger matched the general description of the person identified by the informant.

3. To the extent it can be construed as a Finding of Fact, and in the absence of substantial evidence, the trial court erred in entering Conclusion of Law 3, finding the defendant generally matched the description given by the informant.

4. To the extent it can be construed as a Finding of Fact, and in the absence of substantial evidence, the trial court erred in entering Conclusion of Law 5, finding the officers had a reasonable and articulable suspicion to allow the police to detain Mr. Wenger.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Under article I, section 7 of the Washington Constitution, the police may engage in a brief investigatory stop of an individual based upon an informant's tip only where both the informant and the informant's tip are reliable and the police corroborate details of the tip.

Here, neither the informant nor the informant's tip were reliable. Is Mr. Wenger entitled to reversal of his conviction for a violation of his right to privacy under the Washington Constitution?

2. The police may engage in a brief investigatory stop where they have reasonable suspicion the individual may be engaged in criminal activity. Mr. Wenger was stopped by the police in a public area in the middle of the day and did not match the description provided by the citizen informant. Did the police lack reasonable suspicion requiring reversal of Mr. Wenger's conviction?

### C. STATEMENT OF THE CASE

On August 1, 2012, at approximately 1:30 p.m., a citizen informant<sup>1</sup> contacted the police to report two men were trying to "jimmy" a door in a nearby church. CP 2; RP 4. The informant gave the police a general description of the men as having grayish hair, wearing light colored t-shirts, and riding bicycles. CP 2; RP 12.

Everett Police Officer Soderstrom responded to the church, and as he neared one of the entrances, a man on a bicycle fled from the nearby bushes. RP 6. Soderstrom was able to stop the man. CP 2.

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<sup>1</sup> The citizen informant gave her name as Gayle Evans. CP 2. The police never contacted her prior to stopping Mr. Wenger. RP 11.

This man was wearing a blue shirt when he was stopped. RP 14.

Soderstrom continued to search the area.

As Soderstrom neared another entrance to the church, he saw a man, later identified as appellant, Thomas Wenger, standing outside an outcropping of the building next to a bicycle. RP 8. Mr. Wenger has brown hair and was wearing a black t-shirt. RP 13. According to Soderstrom, Mr. Wenger looked at him, then began riding away. CP 2; RP 8. Mr. Wenger was stopped one half-block away from the church by another police officer. CP 2. It was determined that a warrant existed for Mr. Wenger's arrest. CP 2. A subsequent search of Mr. Wenger's wallet revealed less than one gram of methamphetamine. CP 20.

Mr. Wenger was charged with possession of methamphetamine while on community custody. CP 60-61. Following the denial of Mr. Wenger's motion to suppress the evidence pursuant to CrR 3.6, he and the State agreed to a bench trial on stipulated facts. CP 17-21. The trial court subsequently found Mr. Wenger guilty as charged. CP 19-21.

D. ARGUMENT

1. THE STATEMENTS PROVIDED BY GAYLE EVANS WERE UNRELIABLE AND UNCORROBORATED BY OFFICER OBSERVATION.

a. An informant's tip may create a reasonable suspicion if both the informant and the tip are reliable, and such information can be corroborated by officers. 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).

Although *Terry* 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).

Whether a tip provides sufficient indicia of reliability to support reasonable suspicion is evaluated differently under the state and federal constitutions. Under the Fourth Amendment, a tip's reliability is analyzed by reviewing the totality of the circumstances. *White*, 496 U.S. at 328-29. In contrast, under article I, section 7, the State must prove both that (1) the *informant* is reliable, and (2) the informant's *tip* is reliable. *State v. Jackson*, 102 Wn.2d 432, 435-36, 688 P.2d 136 (1984); *State v. Hart*, 66 Wn.App. 1, 8, 830 P.2d 696 (1992), *citing Sieler*, 95 Wn.2d at 48 (emphasis in original). Courts have, however, expanded this analysis to include a third prong: "whether the officers can corroborate any details of the information's tip." *State v. Lee*, 147 Wn.App. 912, 918, 199 P.3d 445 (2008), *citing Sieler*, 95 Wn.2d at 47. Thus, the credibility of an informant may be established by police verification of the informant's statement of detailed criminal activity not generally known or readily available. *State v. Anderson*, 41 Wn.App. 85, 94-95, 702 P.2d 481(1985), *reversed on other grounds*,

107 Wn.2d 745, 733 P.2d 517 (1987); *see also State v. Shaver*, 116 Wn.App. 375, 380-81, 65 P.3d 688(2003). The corroborated information must itself suggest criminal activity. “Merely verifying ‘innocuous details,’ commonly known facts or easily predictable events should not suffice to remedy [the] deficiency.” *Jackson*, 102 Wn.2d at 438; *State v. Maddox*, 116 Wn.App. 796, 803, 67 P.3d 1135 (2003), *aff’d*, 152 Wn.2d 499 (2004).

The reliability of the informant may be weighed by showing that the informant based his or her information on personal knowledge. *See, e.g., Aguilar v. Texas*, 378 U.S. 108, 114, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964); *State v. Vickers*, 148 Wn.2d 91, 112, 59 P.3d 58 (2002); *State v. Wolken*, 103 Wn.2d 823, 827, 700 P.2d 319 (1985). Moreover, the reliability of the tip can be determined if some underlying factual justification for the informant’s conclusion is revealed so that an assessment of the probable accuracy of the informant’s conclusion can be made. *Campbell v. Department Of Licensing*, 31 Wn.App. 833, 835, 644 P.2d 1219 (1982). This requirement is intended to prevent investigatory stops based on an informant’s misinterpretation of innocent conduct. *Id.*

The *Sieler* Court succinctly explained:

Even assuming that an unknown but named telephone informant was adequately reliable . . . this reliability by itself generally does not justify an investigatory detention. Although there is some authority to the contrary . . . the State generally should not be allowed to detain and question an individual based on a reliable informant's tip which is merely a bare conclusion unsupported by a sufficient factual basis which is disclosed to the police prior to the detention . . . Some underlying factual justification for the informant's conclusion must be revealed so that an assessment of the probable accuracy of the informant's conclusion can be made. It simply “makes no sense to require some indicia of reliability that the informer is personally reliable but nothing at all concerning the source of his information.”

*Sieler*, 95 Wn.2d at 48-49 (internal citations omitted). Thus, the multi-prong standard under article I, section 7 cannot be satisfied merely by presenting a witness's name.

b. The stop violated Article I, section 7 due to the insufficiency and unreliability of Gayle Evans' statements. Here, the information reportedly provided by Ms. Evans was that two men were attempting to “jimmy” open a door to the church. Based upon this report, the officers were merely given her name and nothing further. The officers did not speak to Ms. Evans, they had no knowledge as to what caused Ms. Evans to reach her conclusion, they had no idea whether Ms. Evans actually witnessed the alleged “jimmying,” and they also had no actual knowledge of Ms. Evans' background. As this

Court held in *State v. Wakeley*, officers are not allowed to detain citizens based on a “bare conclusion” by a citizen informant. 29 Wn.App. 238, 242, 628 P.2d 835 (1981). Here, the officers failed to verify the veracity of the informant and the reliability of the tip.

Additionally, the officers failed to corroborate the information provided by Ms. Evans. Prior to arriving at the church, the officers were informed that the subjects were “white males, [with] grayish hair, [and] light colored t-shirts.” RP 12. But Officer Sodestrom noted that Mr. Wenger was wearing a black t-shirt. RP 13. The officer also noted that Mr. Wenger has brown hair. RP 14. Further, Mr. Cooper and Mr. Wenger were not together when the police contacted them. The officers’ observations failed to corroborate the information given by the informant and were, in fact, contrary to it.

It may be argued that although Ms. Evans’ tip was inaccurate, it was sufficient to support an investigatory stop by the officers. Such an assertion runs afoul of numerous Washington appellate decisions. In *Hopkins*, an informant told the police that a man “might be carrying a gun.” 128 Wn.App. 855, 858, 117 P.3d 377 (2005). The caller proceeded to describe the alleged gun wielder, leading to a seizure of Hopkins and the subsequent discovery of a revolver and a small baggie

of methamphetamine. *Id.* at 858-59. On appeal, the Court reversed the trial court's finding of reasonable suspicion:

The informant's tip contained inaccurate information about Hopkins' height, weight, and age, but the tip reasonably identified Hopkins' clothing, other physical features, and location. The informant's only allegation of criminal activity was that a minor was 'scratching his leg' with 'what appeared to be a gun,' and that he 'thinks' the gun is in Hopkins' right pocket... But these facts alone fail to reliably provide an officer with reasonable suspicion of criminal behavior.

*Id.* at 864. Similarly, the vague and inconsistent information provided by Ms. Evans is insufficient to meet the higher standard of article I, section 7.

It might also be argued that the conduct Ms. Evans described posed some danger to the public justifying the stop. This argument should be rejected. *See State v. Vandover*, 63 Wn.App. 754, 822 P.2d 784 (1992). In *Vandover*, officers responded to an anonymous telephone tip that a man driving a gold-colored Ford Maverick was brandishing a sawed-off shotgun in front of a restaurant. *Id.* at 755. The officers pulled over Vandover, who was driving a green Ford Maverick, searched his vehicle, and found a loaded shotgun and cocaine. *Id.* at 756. The Court of Appeals held that, although the tip indicated a potential danger to the public, the stop was nevertheless

unreasonable because there was not a sufficient basis to believe the informant's tip was reliable. *Id.* at 760. Thus although the informant's tip in this case may have suggested some potential danger, that *possibility* of danger did not render the stop reasonable due to a lack of indicia that the tip itself was reliable.

Thus, the stop of Mr. Wenger violated Article I, section 7 because the informant's tip failed both prongs of the reliability test, and a failure on either prong alone required suppression. Accordingly, this Court should reverse Mr. Wenger's conviction and order the drugs suppressed.

2. THE OFFICERS LACKED REASONABLE SUSPICION TO PERFORM A STOP UNDER *TERRY*, THUS THE SEIZURE OF MR. WENGER WAS ILLEGAL.

a. A *Terry* stop must be supported by reasonable, objective, and articulable suspicion of criminal activity. Article I, section 7 of the Washington Constitution prohibits government invasion of private affairs absent authority of law. Const. art. 1, § 7. "Authority of law" means a warrant, unless one of the few "jealously and carefully drawn" exceptions applies. *State v. Martinez*, 135 Wn. App. 174, 179, 143 P.3d 855 (2006). The United States Supreme Court has also afforded police officers the ability to conduct warrantless

investigatory stops. *Terry*, 392 U.S. at 21-22. These investigatory stops, however, must be supported by reasonable, objective, and articulable suspicion of criminal activity. *Id.* at 21. The level of articulable suspicion required to justify a *Terry* stop is 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). “[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; *Armenta*, 134 Wn.2d at 13. 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*, 443 U.S. at 52. Furthermore, an investigatory stop must be “reasonably related in scope to the justification for [its] initiation.” *Terry*, 392 U.S. at 29.

Additionally, if the initial stop was unlawful, the subsequent search and fruits of that search are inadmissible. *Wong Sun v. United States*, 371 U.S. 471, 487-88, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); *Kennedy*, 107 Wn.2d at 4. Lastly, the State bears the burden of proving

the reasonableness on an investigatory stop. *State v. Hopkins*, 128 Wn.App. 855, 862, 117 P.3d 377 (2005).

A person is “seized” under the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980). This standard is analyzed in light of the objective facts surrounding the encounter. *Armenta*, 134 Wn.2d at 10-11; *State v. Ellwood*, 52 Wn.App. 70, 73, 757 P.2d 547 (1988). Likewise, a seizure has occurred article I, section 7 of the Washington Constitution only when, by means of physical force or a show of authority, a person’s freedom of movement is restrained and when, in light of all of the circumstances, a reasonable person would not believe he is free to leave or to otherwise decline an officer’s request and end the encounter. *State v. Young*, 135 Wn.2d 498, 510-11, 957 P.2d 681 (1998). The same objective standard, as applied under the Fourth Amendment, also applies here. *Id.*

b. The officers lacked sufficient indicia of reliability to create a reasonable suspicion, thus creating an illegal and improper Terry stop and seizure. Prior to arrival upon the scene, the officers received a call from a named but unknown citizen-informant describing what she believed to be an attempted forced entry. As argued *supra*, the informant's statements rest on questionable grounds due to an insufficient showing of credibility and reliability. Thus an analysis of the facts excluding the informant's statements is required. Without these statements, the officers lacked reasonable suspicion to conduct a *Terry* stop.

Once the officers arrived, they observed no indication of a crime occurring or potentially about to occur. In fact, the officers merely observed two men occupying public space: the first individual (not the defendant) was in shrubbery and the second (the defendant) was near the church. CP 2. Further, both men were merely riding their bicycles in proximity of the responding officers. CP 2. Subsequently, both men were seized based upon these insufficient observations. CP 2.

The totality of the circumstances does not support a finding of reasonable suspicion. The officers based their investigatory stop solely upon the defendant's presence in an area of possible criminal activity,

and an unsubstantiated informant statement. As held by the United States Supreme Court, “[a]n individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime.” *Illinois v. Wardlow*, 528 U.S. 119, 124, 120 S.Ct. 673, 676 (2000), *citing Brown*, 443 U.S. at 52.

Accordingly, this Court should find that the officers lacked a reasonable suspicion to conduct a *Terry* stop.

c. This Court should order the evidence seized by the police suppressed. “All evidence obtained as a result of an unlawful seizure is inadmissible.” *State v. Reichenbach*, 153 Wn.2d 126, 135, 101 P.3d 80 (2004). Thus where officers obtain evidence as a result of an improper *Terry* stop, the evidence must be suppressed. *Armenta*, 134 Wn.2d at 17. “[T]he right of privacy shall not be diminished by the judicial gloss of a selectively applied exclusionary remedy. . . . [W]henever the right is unreasonably violated, the remedy must follow.” *State v. Winterstein*, 167 Wn.2d 620, 633, 220 P.3d 1226 (2009), *quoting State v. White*, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982).

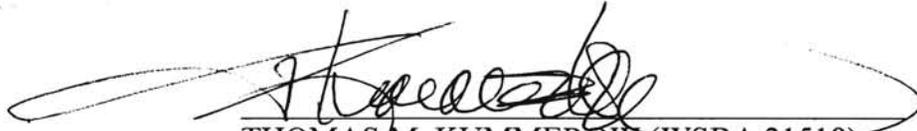
Accordingly, all evidence obtained as a result of the illegal stop must be suppressed.

E. CONCLUSION

For the reasons stated, Mr. Wenger requests this Court order the contraband suppressed and reverse his conviction.

DATED this 20<sup>th</sup> day of March 2013.

Respectfully submitted,



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DIVISION I**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 69403-1-I
	)	
THOMAS WENGER,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 20<sup>TH</sup> DAY OF MARCH, 2013, 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:

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**SIGNED** IN SEATTLE, WASHINGTON, THIS 20<sup>TH</sup> DAY OF MARCH, 2013.

x \_\_\_\_\_ 

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