

NO. 69753-6-1

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

STATE OF WASHINGTON,

Appellant,

v.

MILAHN MOORE,

Respondent.

REC'D

III 31 2013

King County Prosecutor
Appellate Unit

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

The Honorable Susan Craighead, Judge

BRIEF OF RESPONDENT

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION ONE

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A. ISSUE PRESENTED

Police seized respondent without a warrant in connection with a reported trespass involving three African-American teenagers, one of whom was wearing a purple sweater. While respondent is an African-American, and was in the general vicinity of the reported trespass, it is undisputed that (1) respondent was alone (not among a group of three); (2) respondent is not a teenager, but in his twenties; (3) respondent clearly was not wearing a purple sweater; (4) and respondent was crossing a yard on the opposite side of the street from the reported trespass and not traveling from the direction of the reported trespass. Did the trial court properly find that officers lacked reasonable suspicion respondent had committed, or was in the process of committing, the crime of trespass?

B. STATEMENT OF THE CASE

The King County Prosecutor's Office charged Milahn Moore with one count of Residential Burglary in connection with the January 17, 2012, break in at 8620 53rd Avenue S. in Seattle. CP 1-5. The defense filed a motion to suppress an out-of-court identification of Moore, arguing it was the product of impermissibly suggestive procedures. CP 23-26.

A hearing was held before the Honorable Susan Craighead.

3RP¹ 2-4; 4RP 4-5. At that hearing, and in light of testimony from the police officers involved in Moore's arrest, it became apparent to the court and defense counsel that there was an additional issue in the case: whether police had reasonable suspicion to seize Moore prior to the out-of-court identification. 4RP 103-105. The prosecutor had identified this as a potential issue even before the officers' testimony and had anticipated a defense motion on the issue. 4RP 105.

Evidence at the hearing revealed police had the following information when they seized Moore without a warrant.² At 1:54 p.m. on January 23, 2012, Neale Frothingham called 911 and reported four juvenile males attempting to break into a neighbor's house at 8620 53rd Avenue South, in the Rainier Beach neighborhood, considered a high crime area. CP 89. Frothingham followed the individuals to a nearby house and provided police with a description of the vehicle in which two of them left the area. CP 89. Police

¹ Moore adopts the State's chosen format for citation to the verbatim report of proceedings.

² In its brief, the State cites repeatedly to pretrial exhibits 2 and 4 to establish the facts surrounding the warrantless seizure. See Brief of Appellant, at 5-6, 8-9, 14-15, 22, and appendix C. These exhibits were never admitted, however, and their content is not properly considered.

stopped the vehicle and discovered an empty firearm holster inside. CP 89.

Later, Officers Jason Suarez and Matthew Hurst were dispatched to search the general vicinity in case a firearm had been tossed from the vehicle. CP 89-90. At 3:26 p.m., Ashley Gunderson – another resident of the neighborhood – called 911 and reported there were three males attempting to enter an abandoned house on the west side of Hamlett Avenue South. CP 90. Gunderson indicated the three males were black, ages 15 to 18, and in the backyard of the home. One was wearing a purple sweater. CP 90. Since Officers Suarez and Hurst were already in the general vicinity, they responded to the call. CP 90.

Officer Hurst then noticed a young black male (later identified as Milahn Moore) sprinting through a yard on the east side of Hamlett Avenue South. CP 90-91. It appeared to Officer Hurst that the individual had come from the alley behind Hamlett Avenue before cutting through the yard. CP 90. Gunderson had not reported seeing anyone running, however. CP 90. And Moore was not wearing a purple sweater. CP 91.

According to Officer Hurst, there was some dirt on the back of Moore's jacket and he had "a frightened look on his face." CP 91.

But Moore was not looking back behind him as if he were being pursued. CP 91. And when asked to explain the basis for his conclusion that Moore looked frightened, Hurst was unable to articulate anything. CP 91. When Moore saw the marked police cruiser, he slowed to a walk. CP 91. Officers Hurst and Suarez decided to stop Moore. After following Moore for a short distance in their patrol car, they ordered him to stop, and Moore complied. He was not sweaty or panting.³ CP 91.

In granting the defense motion to suppress, Judge Craighead found that Moore was not wearing a purple sweater and was on the opposite side of the street from the abandoned house. CP 92-93. Officers had no information on whether Moore had permission to run through the yard where Hurst first spotted him. CP 93. Given Moore's race and the neighborhood, slowing to a walk upon seeing police was not inconsistent with innocence. CP 93. And the fact

³ Subsequent information obtained by officers provided probable cause to arrest Moore for the burglary at 8620 53rd Ave. South. CP 91-92. But officers did not have this information when they initially seized Moore, rendering it irrelevant to whether there had been reasonable suspicion at that time. See State v. Lee, 147 Wn. App. 912, 917, 199 P.3d 445 (2008) (focus is on facts known at inception of stop), review denied, 166 Wn.2d 1016, 210 P.3d 1019 (2009); State v. Lund, 70 Wn. App. 437, 451 n.12, 853 P.2d 1379 (1993) (improper to use post-seizure evidence to justify seizure), review denied, 123 Wn.2d 1023 (1994).

Moore, like those in the yard of the abandoned home, was “a young black male” was too general to declare a “match.” CP 93.

Ultimately, Judge Craighead concluded officers did not have lawful grounds to seize Moore without a warrant because they lacked reasonable suspicion that he had trespassed on the property of the abandoned home or was trespassing as he ran through the yard on Hamlett Avenue.⁴ CP 92-94. The State indicated it could not proceed in light of the ruling, and Judge Craighead dismissed the case. 6RP 43; CP 69.

The State has appealed.

⁴ The State notes that, because the defense moved to suppress only after two out of three prosecution witnesses had testified, the parties' examinations had not been focused on the circumstances of the investigatory stop. Brief of Appellant, at 3 n.2. However, the prosecutor was provided an opportunity to recall witnesses if she deemed it necessary. 4RP 105-106. She chose not to exercise that option. 4RP 137; 5RP 3.

C. ARGUMENT

THE TRIAL COURT PROPERLY FOUND AN ABSENCE OF REASONABLE SUSPICION SUPPORTING THE WARRANTLESS SEIZURE.

Under the Fourth Amendment to the United States Constitution and article 1, § 7 of the Washington Constitution, warrantless searches and seizures are per se unreasonable unless the State demonstrates they fall within one of the "jealously and carefully drawn exceptions" to the warrant requirement. State v. Hendrickson, 129 Wn.2d 61, 70, 917 P.2d 563 (1996) (quoting Arkansas v. Sanders, 442 U.S. 753, 759, 61 L. Ed. 2d 235, 99 S. Ct. 2586 (1979)).

One of these narrow exceptions is the "Terry investigatory stop," discussed in detail in Terry v. Ohio, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968). During a Terry stop, an "officer may briefly detain and question a person reasonably suspected of criminal activity." State v. Watkins, 76 Wn. App. 726, 729, 887 P.2d 492 (1995) (quoting State v. Rice, 59 Wn. App. 23, 26, 795 P.2d 739 (1990)).

To justify an intrusion under Terry, an officer must be able to point to "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant th[e]

intrusion." State v. Williams, 102 Wn.2d 733, 739, 689 P.2d 1065 (1984) (quoting Terry, 392 U.S. at 21). Specific and articulable facts means that the circumstances must show "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). An officer's objective basis for suspicion must be particularized because the "demand for specificity in the information upon which police action is predicated is the central teaching of [the Supreme] Court's Fourth Amendment Jurisprudence." Terry, 392 U.S. at 22 n.18.

As an initial matter, Moore was seized the moment Officers Suarez and Hurst "made it clear he needed to stop." 4RP 83. A person is seized "when, by means of physical force or a show of authority, his or her freedom of movement is restrained and a reasonable person would not have believed he or she is (1) free to leave, given all the circumstances, or (2) free to otherwise decline an officer's request and terminate the encounter." State v. O'Neill, 148 Wn.2d 564, 574, 62 P.3d 489 (2003) (internal quotations and citations omitted). Commands such as "halt," "stop, I want to talk to you," "wait right here," and the like qualify as seizures. See State v. Whitaker, 58 Wn. App. 851, 854, 795 P.2d 182 (1990), review denied, 116 Wn.2d 1028 (1991); State v. Ellwood, 52 Wn. App. 70,

73-74, 757 P.2d 547 (1988); State v. Sweet, 44 Wn. App. 226, 230, 721 P.2d 560, review denied, 107 Wn.2d 1001 (1986); State v. Eriederick, 34 Wn. App. 537, 541, 663 P.2d 122 (1983).

The State does not dispute that Moore was seized, but contends the seizure was justified because officers had reasonable suspicion to believe Moore had either trespassed at the abandoned house or was in the process of trespassing when officers saw him running through a yard. Brief of Appellant, at 14-16. The State is mistaken. Judge Craighead properly found the State did not establish specific and articulable facts justifying a warrantless intrusion; *i.e.*, a substantial possibility Moore had been involved in criminal activity. Williams, 102 Wn.2d at 739; Kennedy, 107 Wn.2d at 6.

Regarding a possible trespass at the abandoned house, officers had only a vague description of those involved. Ashley Gunderson merely reported seeing three black males, 15-18, and one was wearing a purple sweater. CP 90. Moore was alone (not with two others), he was in his twenties (not 15-18), and he was wearing a bright red jacket (not a purple sweater). 4RP 85, 87, 131. Moreover, as Judge Craighead found, Moore was on the opposite side of the street from where Gunderson had seen the three teens

and not coming from the direction of that home. CP 90, 92-93.

While Moore is black, “[r]easonable suspicion may not be based on broad profiles which cast suspicion on entire categories of people without any individualized suspicion of the particular person to be stopped.” United States v. Diaz- Juarez, 299 F.3d 1138, 1141 (9th Cir. 2002) (quoting United States v. Rodriguez- Sanchez, 23 F.3d 1488 (9th Cir. 1994), overruled in part on other grounds by United States v. Montero-Camargo, 208 F.3d 1122 (9th Cir. 2000)), cert. denied, 538 U.S. 934, 123 S. Ct. 1601, 155 L. Ed. 2d 334 (2003).

Being a young African-American in the general area of a recent crime is not individualized suspicion of criminal activity. The Third Circuit Court of Appeals held that the description of robbery suspects as “African-American males between 15 and 20 years of age, wearing dark, hooded sweatshirts and running south on 22nd Street, where one male was 5’8” and the other was 6” failed the Fourth Amendment’s “demand for specificity” where it was common to find African-American males in that area of town. United States v. Brown, 448 F.3d 239, 247-248 (3rd Cir. 2006). Gunderson’s description was even less specific.

In nonetheless claiming reasonable suspicion, the State

takes aim at some of Judge Craighead's findings and her conclusions based on those findings. This Court "will review only those facts to which error has been assigned." State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). "Where there is substantial evidence in the record supporting the challenged facts, those facts will be binding on appeal." Id. Any unchallenged fact is a verity on appeal. Id. at 644. This Court determines whether the facts support the court's conclusions of law under a de novo standard. State v. Setterstrom, 163 Wn.2d 621, 625, 183 P.3d 1075 (2008).

The State challenges that portion of finding of fact 5 that states Gunderson's call was "broadcast at 3:29 p.m." Brief of Appellant, at 22 n.9. But Officer Suarez specifically testified to this. 4RP 69. And whether officers had all their information by 3:29 or, as the State claims, 3:28 is not important.

The State challenges that portion of finding of fact 6 that states Moore "was not looking back as if he were being pursued." Brief of Appellant, at 22. Although it would benefit the State had Moore been looking over his shoulder (converting "running" into "fleeing"), finding 6 is supported by the evidence. Officer Hurst testified to specific observations he made of Moore as Moore ran through the yard (including seeing a "dusty kind of dirty spot" on his

jacket and the expression on his face). 4RP 79-80, 128-129, 134-135. But when asked if Moore ever looked back, Hurst indicated he did not remember seeing that. 4RP 134. This justified a finding that it did not happen.

Targeting several other findings and conclusions, the State also faults Judge Craighead for finding reasonable, innocent explanations for Moore's behavior rather than assuming nefarious intent. Brief of Appellant, at 18-22. The State points out that, for reasonable suspicion, the possibility of innocent conduct need not be ruled out and conduct that is both consistent with criminal activity and consistent with non-criminal activity may justify a brief detention. Brief of Respondent, at 13 (citing United States v. Arvizu, 534 U.S. 266, 122 S. Ct. 744, 152 L. Ed. 2d 740 (2002), and State v. Kennedy, 107 Wn.2d at 6). This is true. But Judge Craighead properly found the conduct at issue simply did not demonstrate criminal activity. Mere hunches do not suffice. Suspensions must be well-founded and reasonable. State v. Doughty, 170 Wn.2d 57, 63, 239 P.3d 573 (2010).

Specifically, citing conclusion 5, the State argues the fact Moore was running should have carried more weight, and supported a finding that (even if Moore was not part of the

trespassing group observed by Ms. Gunderson), Moore was trespassing when he crossed through the yard on Hamlett Avenue South.⁵ Brief of Appellant at 18-19. But Officer Hurst conceded he had no idea whether, for example, Moore lived on the property on which he was running. 4RP 82. This was not a situation where Moore was crossing multiple private properties, which might warrant an investigation into whether Moore was trespassing. Compare State v. Guzman-Cuellar, 47 Wn. App. 326, 329-331, 734 P.2d 966 (1987) (police observe individual at 2:30 a.m. leave one residential property, walk to another, and enter by walking between a fence and garage); see also State v. Ortiz, 104 Wn.2d 479, 485, 706 P.2d 1069 (1985) (probable cause to arrest for trespass where suspect fled police, ran through a number of yards, and crossed over a number of fences). Moreover, Moore was neither sweating nor panting, indicating he had been running only very briefly. CP 91.

Citing conclusion 6, the State argues the fact Moore slowed

⁵ A person is guilty of trespassing “if he or she knowingly enters or remains unlawfully in or upon premises of another” RCW 9A.52.080(1). A person “enters or remains unlawfully” when “he or she is not then licensed, invited, or otherwise privileged to so enter or remain.” RCW 9A.52.010(5).

to a walk upon seeing police also should carry more weight. Brief of Appellant, at 19-20. Judge Craighead recognized an individual's reaction to police is a relevant consideration. 6RP 40 (citing State v. Pressley, 64 Wn. App. 591, 825 P.2d 749 (1992)). But many such reactions are ambiguous. See State v. Soto-Garcia, 68 Wn. App. 20, 26, 841 P.2d 1271 (1992) (looking away as officer approaches not reasonable suspicion of wrongdoing), abrogated on other grounds, State v. Thorn, 129 Wn.2d 347, 917 P.2d 108 (1996); State v. Gatewood, 163 Wn.2d 534, 540, 182 P.3d 426 (2008) (startled reactions to police presence, including "widening eyes" and walking away, do not amount to reasonable suspicion). Running from police after seeing them can be very suspicious. See State v. Little, 116 Wn.2d 488, 496, 806 P.2d 749 (1991); State v. Sweet, 44 Wn. App. 226, 230-231, 721 P.2d 560, review denied, 107 Wn.2d 1001 (1986). Thus, had Moore – an African-American male in a high crime area – continued to run upon seeing police, it would have looked very suspicious. Conversely, making sure, as Moore did, that police knew he was *not* running from them was not suspicious.

Citing finding of fact 6, the State faults Judge Craighead for giving little weight to Officer Hurst's description of Moore's facial expression as "fear" and "panic" after Hurst was unable to provide

any specific details supporting those conclusions.⁶ The State maintains it is unclear what more the officer could have articulated to support his conclusions. Brief of Appellant, at 20. A non-exhaustive list of descriptive facts, however, includes mouth agape, eyes staring wildly, crying, face trembling, holding one's head with both hands, looking intently behind or around, and/or profuse sweating. Judge Craighead did not err in affording little weight to Hurst's description. See Brown v. Texas, 443 U.S. 47, 52, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979) (officer's testimony that situation "looked suspicious" without ability to identify facts supporting that conclusion insufficient).

Citing finding of fact 7, the State also argues Judge Craighead should not have dismissed the significance of the dirt on the back of Moore's jacket. Brief of Appellant, at 19-20. But there was nothing linking the patch of dirt to anything criminal. Officer Hurst suggested the dirt could indicate Moore had crawled through a window or through a bush. 4RP 83. But this was pure speculation; no one reported seeing anybody crawling anywhere.

⁶ As the prosecutor stated below, Officer Hurst "was disinclined to explain exactly how he knew what that facial expression was." 6RP 17.

Judge Craighead's finding that the dirt was "of unclear relevance" is correct and supported by the record.

The State's accusation that Judge Craighead employed a "hyper-technical" and "divide-and-conquer" analysis is incorrect. See Brief of Appellant, at 18. Judge Craighead was required to consider the totality of the circumstances rather than each individual circumstance. See State v. Marcum, 149 Wn. App. 894, 907, 205 P.3d 969 (2009). And she was well aware of this requirement, providing a thoughtful, thorough analysis, and expressly indicating her decision was based on the totality of the circumstances. See 6RP 43.

The State also contests Judge Craighead's observation that there was more evidence of criminal activity in State v. Doughty, 170 Wn.2d 57 – a case where the Supreme Court found *no* reasonable suspicion – than in Moore's case. But in doing so, the State incorrectly assumes Judge Craighead's challenged findings and conclusions are wrong. See Brief of Appellant, at 16-17.

Not only are the challenged findings and conclusions supported by the evidence and the law, critically, many of Judge Craighead's findings are not challenged at all, are therefore verities, and significantly undermine reasonable suspicion,

including the fact (1) Moore was alone (whereas police had a report of three individuals); (2) Moore, who is in his twenties, was older than the reported 15-18 year-olds; (3) Moore was clearly not wearing the one garment (a purple sweater) worn by one of the trespass suspects; (4) Moore was seen cutting through only a single yard; and (5) Moore was on the opposite side of the street from the abandoned home and coming from the opposite direction of the home. Judge Craighead properly found the State had failed to demonstrate a substantial possibility Moore was involved in criminal activity.

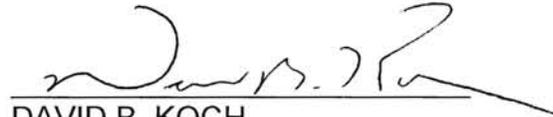
D. CONCLUSION

Moore was seized without reasonable suspicion of criminal activity. All evidence discovered following the illegal seizure was properly suppressed and the burglary charge properly dismissed.

DATED this 31st day of July, 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to read "David B. Koch", written over a horizontal line.

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