

NO. 69951-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ARDEN CURTIS GIBSON,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL HAYDEN

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

JENNIFER P. JOSEPH
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

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A. ISSUES PRESENTED

1. Police officers may conduct an investigatory stop if they have a reasonable and articulable suspicion that an individual is involved in criminal activity; i.e., there is a substantial possibility that criminal conduct has occurred or is about to occur. Less than five minutes after a radio dispatch advised officers of a burglary in progress, Officer Kowalchuk observed Arden Gibson, who resembled the description of the suspect, three to five blocks away from the burglarized home. When the officer turned on his lights and pulled his patrol car over to make contact with Gibson, Gibson saw the officer, started walking briskly away, and paid no heed to Officer Kowalchuk's direction to stop. Did the trial court correctly conclude that the officer had sufficient grounds to make an investigatory stop?

2. Findings of fact and conclusions of law may be submitted and entered while an appeal is pending if, under the facts of the case, there is no appearance of unfairness and the defendant is not prejudiced. Here, the findings of fact were entered by the trial court while the appeal was pending and are consistent with the trial court's oral ruling. Has the trial court properly entered written findings in this case?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Arden Curtis Gibson was charged with burglary in the first degree. Clerk's Papers (CP) 1-5. Gibson moved to suppress the show-up identification and the stolen silver property seized following an investigative stop and subsequent arrest, arguing that the police lacked reasonable suspicion to justify the warrantless stop. CP 7-15. Seattle Police Officer Joseph Kowalchyk was the sole witness at the CrR 3.6 hearing. RP 7-35. The trial court denied Gibson's motion, orally finding that Officer Kowalchyk had sufficient reasonable suspicion that Gibson was involved in the burglary because Gibson was within a few blocks of the crime scene, within five minutes of the dispatch about a burglary that had just occurred, and he generally matched the description of the suspect. RP 43-47. While this appeal was pending, the trial court entered written findings and conclusions consistent with its oral ruling. CP 82-84.

Following a jury trial, Gibson was found guilty as charged. CP 16. Based upon his offender score of 14, the trial court imposed a low-end, standard-range sentence of 87 months. CP 45-53. He appeals. CP 54.

2. SUBSTANTIVE FACTS

On October 1, 2012, Officer Kowalchuk was patrolling in North Seattle when he heard a radio dispatch about a burglary in progress at an occupied home three or four blocks south of his location. RP 8-10, 13-14. The dispatch provided a general description of the suspect: "black male, middle age, late twenties, early thirties. Dark clothing description. There wasn't much other than a dark colored jacket and a backpack." RP 11.

Kowalchuk heard the dispatch at 11:04 a.m., activated his emergency lights, and began looking for the suspect. RP 10, 14. Several other officers were also in the area to look for the suspect. RP 34-35. Three to five minutes later, and three to five blocks away from the burglarized home, Kowalchuk noticed an African-American male "stuffing a dark piece of clothing in the top of the backpack." RP 13-14, 22. This man, later identified as Gibson, was the only African-American male with a backpack on the street. RP 45.

Kowalchuk pulled the patrol car over next to Gibson. RP 21. Gibson saw the patrol car and the lights, made eye contact with the officer, and "started taking off." RP 23. Even after Kowalchuk told him to stop, Gibson continued crossing the street at "a pretty fast

pace.” RP 23-24. Gibson also “said something, you talking about the dude that was down the street there or something like that.”

RP 22. Kowalchyk interpreted the remark as a reference to the burglary. Id. Kowalchyk ordered Gibson to stop and detained him at approximately 11:09 a.m., within five minutes of the initial dispatch. RP 26-27.

Kowalchyk and back-up officers detained Gibson for several minutes, while the victim was brought to his location for a show-up. RP 24. After the victim positively identified Gibson, Kowalchyk placed Gibson under arrest at 11:18 a.m. RP 24-25, 27. The subsequent search of Gibson's backpack revealed antique silver dishes and silverware that had been stolen from the victim's home. RP 99, 140-41.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE DISCOVERED FOLLOWING A LAWFUL TERRY STOP.

Gibson contends that Officer Kowalchyk lacked sufficient basis to stop him, so the evidence discovered during the encounter should have been suppressed, and his conviction for first degree burglary must therefore be reversed. Because the record

establishes that Officer Kowalchyk had a reasonable and articulable suspicion that Gibson was involved in criminal activity, the claim must be rejected.

In reviewing the denial of a motion to suppress, the appellate court determines whether substantial evidence supports the trial court's factual findings, and whether those findings support its conclusions of law. State v. Ross, 106 Wn. App. 876, 880, 26 P.3d 298 (2001). Unchallenged findings are verities on appeal. Id. Conclusions of law are reviewed de novo. Id.

Brief investigatory "Terry" stops are well-established exceptions to the general rule that warrantless seizures are unconstitutional. Terry v. Ohio, 392 U.S. 1, 30-31, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); State v. Gatewood, 163 Wn.2d 534, 539, 182 P.3d 426 (2008). A Terry stop is justified when an officer has specific and articulable facts that give rise to a reasonable suspicion that the person stopped is, or is about to be, engaged in criminal activity. State v. Kinzy, 141 Wn.2d 373, 384-85, 5 P.3d 668 (2000). A reasonable suspicion is the "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). "The reasonableness of the officer's suspicion is determined by the

totality of the circumstances known to the officer at the inception of the stop.” State v. Rowe, 63 Wn. App. 750, 753, 822 P.2d 290 (1991), overruled in part on other grounds by State v. Bailey, 109 Wn. App. 1, 3, 34 P.3d 239 (2000). The totality of the circumstances includes factors such as the officer’s training and experience, the location of the stop, the conduct of the person detained, the purpose of the stop, the amount of physical intrusion upon the suspect’s liberty, and the length of time the suspect is detained. State v. Acrey, 148 Wn.2d 738, 747, 64 P.3d 594 (2003).

In this case, several officers were looking for a suspect in the area of the victim’s house within moments of the report of the crime. Officer Kowalchyk observed Gibson within three or four blocks of the victim’s house. Gibson was an adult African-American male with a backpack, into which he was stuffing a dark piece of clothing. This matched the victim’s description of a “black male, middle age, late twenties, early thirties. Dark clothing ... a dark colored jacket and a backpack.” RP 11. Gibson saw the officer and tried to avoid contact by crossing the street. Despite several officers searching the area for the suspect, Gibson was the only person matching the description who was located within the area. RP 35. The streets were relatively empty, and there were no

other people matching the description on the street. RP 44-45; CP 83 (FF 3(g)). The detention was not particularly lengthy or intrusive – Kowalchuk patted Gibson down and had him sit on the patrol car bumper for less than ten minutes to allow another officer to transport the victim for a show-up identification. RP 24-27.

Given the totality of the circumstances, Officer Kowalchuk had a reasonable suspicion that the defendant was in fact the perpetrator of the burglary. State v. Randall, 73 Wn. App. 225, 230-31, 868 P.2d 207 (1994) (finding reasonable suspicion where persons stopped matched descriptions given by victim or witness to recent robbery, were found six blocks from the scene of the crime, and walked away upon seeing officer); State v. Glover, 116 Wn.2d 509, 514, 806 P.2d 760 (1991) (finding reasonable suspicion of criminal activity based on fact that defendant did not appear to live in apartment complex with posted “no trespassing” policy and acted suspiciously upon seeing officers); State v. Clark, 13 Wn. App. 21, 533 P.2d 387 (1975) (finding reasonable suspicion where officers responding to a possible burglary without any suspect description saw defendant walking along road in the rain 300 yards from house where alarm had gone off). Accordingly, the Terry stop was lawful and the evidence subsequently discovered was properly admitted.

Gibson contends, however, that the description of the suspect was too vague and general to give rise to reasonable suspicion. He relies on United States v. Brown, 448 F.3d 239 (3d Cir. 2006). There, victims of an attempted armed robbery in Philadelphia described the suspects as two “African-American males between 15 and 20 years of age, one 5’ 8” and the other 6’, wearing dark, hooded sweatshirts and running south on 22nd Street.” Id. at 241. Shortly after the victim contacted police, she received a call from her friend advising that two men who fit the descriptions were in a store three blocks away from the robbery scene. Id. at 242. Based on this tip, an officer went to that location and saw the men leave the store with coffee and hail a taxi. Id. Before they could get in, the officer approached, dismissed the taxi, informed the men that they would be held until the victims could be transported for a show-up, and attempted to pat them down. Id. at 242-43. Initially cooperative, Brown attempted to flee during the frisk, after which the officer recovered a gun from Brown’s front belt area. Id. When the victim arrived, she denied that the two were the people who had robbed her. Id. at 244. Brown was nevertheless arrested and, following an unsuccessful motion to suppress the gun, convicted of being a felon in possession of a firearm. Id.

On appeal, the Third Circuit concluded that the officer lacked reasonable suspicion to stop Brown. In part, this was because broadcast description of the robbery suspects lacked sufficient specificity. 448 F.3d at 247-48. The court observed that Philadelphia's population is 43% African American, that the "medium" height for men in this country is 5' 8", and that the stop occurred near a predominately African-American neighborhood, such that it was "in no way unusual to see two black males at that intersection." Id. at 247 & n.8.¹ "To make matters worse, the match of Brown and Smith to even this most general of descriptions was hardly close." Id. Not only were the 27- and 31-year-old men significantly older than the "15 [to] 20 years of age" description, but they also had full beards and the description included no mention of facial hair. Id. at 248. But that was not all that undermined reasonable suspicion. The court held that the tip about the suspects' location was unreliable, and that the officer had observed nothing else that would justify the stop. Id. at 248-52. "Nothing about their behavior was evasive or suspicious." Id. at 251. They

¹ In Washington, "racial incongruity," or the presence of a person of any race being allegedly "out of place" in a particular geographic area, does not support a finding of reasonable suspicion. State v. Barber, 118 Wn.2d 335, 346, 823 P.2d 1068 (1992).

were initially cooperative when approached and engaged in a “nice, brief conversation” with the officer. Id. at 251-52.

Although some of the facts in this case may resemble Brown, that case is ultimately distinguishable. Here, the description of the burglary suspect was “black male, middle age, late twenties, early thirties. Dark clothing description ... dark colored jacket and a backpack.” RP 11. Gibson was 49 years old when stopped. CP 9. But while a similar age discrepancy in Brown helped make the description “wildly wide of the target,” 448 F.3d at 248, the trial court here explicitly found that Gibson “looks fairly young” and “does not clearly fall outside that description.” RP 40;² CP 83 (FF 3(f)). Additionally, Gibson carried a backpack, like the suspect. RP 22. Although Gibson’s red and black striped shirt might not meet the “dark clothing” descriptor, Officer Kowalchyk observed Gibson stuffing some dark clothing into the backpack. Id. Further, when Kowalchyk approached Gibson with emergency lights activated, Gibson was not “cooperative” like the suspects in Brown – instead, he made eye contact with the officer and quickly walked away. RP 23-14. Thus, compared to Brown, Gibson’s behavior

² The trial court further observed, “[Gibson] doesn’t have a wrinkled forehead. His skin is fairly smooth. And as a factual matter, I will tell you that if I was having to guess his age, I would be guessing probably closer to 35 than as you stated, 39.” RP 40.

was more evasive and suspicious. Finally, from viewing Officer Kowalchyk's dash camera video, the trial court found that the streets were relatively empty and Gibson was the only African-American man with a backpack in the area. RP 44-45; CP 83 (FF 3(g)).

This case is more like Randall. There, an officer received a dispatch reporting an armed robbery which included a description of the suspects. 73 Wn. App. at 226.³ Approximately 10 minutes later, the officer saw Randall, who matched the description of one of the suspects, about six blocks away from the robbery site. Id. When Randall and his companion saw the officer approach, they walked away. Id. The officer relocated Randall some time later, told him that he looked like a robbery suspect, and patted him down, finding drugs and paraphernalia. Id. at 227. The officer arrested Randall for the drug violation, for which he was later convicted. Id.

On appeal, Randall challenged the trial court's failure to grant his motion to suppress the drugs on grounds that the officer lacked reasonable suspicion to justify the Terry stop. 73 Wn. App. at 227. This Court disagreed, concluding that the officer had

³ The opinion does not include the description.

reasonable suspicion because Randall fit the description of one of the armed robbers, was located within 10 minutes of the dispatch and only six blocks from the robbery site, and left the area upon seeing an officer approach. Id. at 230-31. Similarly here, Gibson generally matched the description of the burglar, was located within three to five minutes of the dispatch and only three to five blocks from the burglary site, and tried to leave the area upon seeing Officer Kowalchuk stop his patrol car. As in Randall, these facts created reasonable suspicion to justify the stop. This Court should affirm.

2. THERE WAS NO PREJUDICE IN THE TRIAL COURT'S DELAYED ENTRY OF CrR 3.6 FINDINGS.

Gibson points out that the trial court failed to timely enter findings of fact and conclusions of law as required by CrR 3.6(b). On August 28, 2013, the trial court entered the required written findings. CP 82-84.

Findings of fact and conclusions of law may be submitted and entered while an appeal is pending if there is no prejudice to the defendant by the delay and no indication that the findings and

conclusions were tailored to meet the issues presented on appeal.

State v. Quincy, 122 Wn. App. 395, 398, 95 P.3d 353 (2004).

The delay in the entry of the findings does not in and of itself establish a valid claim of prejudice. In State v. Smith, this Court held that the State's request at oral argument for a remand to enter the findings would have caused unnecessary delay and was thus prejudicial. 68 Wn. App. 201, 208-09, 842 P.2d 494 (1992).

However, unlike Smith, here the court entered findings that have not delayed resolution of Gibson's appeal. There is no resulting prejudice.

Nor can Gibson establish unfairness or prejudice resulting from the content of these findings. A review of the findings illustrates that the State did not tailor them to address the defendant's claims on appeal. CP 82-84. The language of the findings is consistent with the trial court's oral ruling. 1RP 43-47. Moreover, the trial prosecutor who drafted the findings of fact had no knowledge of the issues in this appeal. CP 85-86.

In light of the above, Gibson can demonstrate neither an appearance of unfairness nor prejudice. The trial court's CrR 3.6 findings of fact and conclusions of law are properly before this Court.

D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm Gibson's conviction for Burglary in the First Degree.

DATED this 1st day of October, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

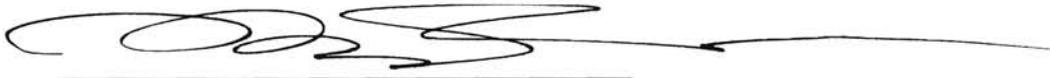
By: 
JENNIFER P. JOSEPH, WSBA #35042
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Thomas M. Kummerow, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the BRIEF OF RESPONDENT, in STATE V. ARDEN CURTIS GIBSON, Cause No. 69951-2 -I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 7 day of October, 2013

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

Name
Done in Seattle, Washington