

FILED
Apr 20, 2015
Court of Appeals
Division I
State of Washington

No. 72733-8-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JEREMIAH McKENZIE,

Appellant.

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

The Honorable Richard McDermott

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying McKenzie's motion to suppress evidence, pursuant to CrR 3.6.

2. To the extent that the finding presumes criminal activity was afoot, the trial court erred in entering Finding of Fact A2. Supp. CP ___ (Sub No. 55 at 1).¹

3. The trial court erred in entering Conclusion of Law D.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Under both the Fourth Amendment and article I, section 7 of the Washington Constitution, warrantless seizures are presumptively unreasonable. An investigatory detention is one of the narrowly-drawn exceptions to the warrant requirement, but, for a detention to be constitutional, the State must prove by clear and convincing evidence that the detention was justified at its inception by specific, articulable facts supporting a reasonable suspicion of criminal activity. Jeremiah McKenzie was detained by a police officer based solely on a report that he had been seen inside a minivan at a late hour, sifting through the contents with a flashlight. Was the seizure unconstitutional under the Fourth Amendment and article I, section 7?

¹ The trial court's written findings of fact and conclusions of law were entered after the initial designation of clerk's papers was filed. A supplemental designation was filed on April 13, 2015. For the court's convenience, copies of the findings and conclusions are attached.

2. The remedy for a violation of the rights guaranteed by article I, section 7 is suppression of all evidence gained by unconstitutional means. Here, the State used the evidence recovered during a search that followed the illegal seizure to support a prosecution for possession of vehicle theft tools, and argued it was circumstantial evidence of guilt of possession of a stolen vehicle and vehicle prowl. Must the conviction for possession of vehicle theft tools be reversed and dismissed, and the remaining counts reversed and remanded for a new trial?

C. STATEMENT OF THE CASE

On August 19, 2013, at 4:21 a.m., Kent police officer David Kallir was dispatched to a 911 call. RP 40. The reporting party had told dispatch that a minivan was parked across from his house, and he could see someone sifting through it with a flashlight. Id. The person then left the van and walked westbound. RP 40-41.

Kallir encountered appellant Jeremiah McKenzie at 4:25 a.m. RP 48-49. McKenzie was the only person on the road, and he matched the description of the person that the reporting party saw leave the minivan and walk westbound. RP 41, 43. Kallir stopped McKenzie to investigate. RP 43. Kallir stopped McKenzie even though, as he later conceded at a CrR 3.6 hearing, he did not know if a crime had been committed. He

explained, “we just have somebody calling saying that somebody’s in a vehicle ... Maybe it’s their vehicle. Maybe it’s not. We don’t know.” Id.

Kallir questioned McKenzie and asked him to identify himself. RP 44-45. Although McKenzie did not have identification, he provided Kallir with his name and date of birth. RP 45. Kallir ascertained that McKenzie had a felony no-bail warrant, and he arrested McKenzie on the warrant. RP 45, 58-59. During a search incident to McKenzie’s arrest, Kallir recovered a flashlight, two screwdrivers, and one blue glove. Supp. CP ___ (Sub No. 55 at 2).

The State charged McKenzie with possession of a stolen vehicle, based on the minivan, vehicle prowling in the second degree, based upon stolen items belonging to a third party that were found in the minivan, and making or having vehicle theft tools, based on the items recovered during the search. CP 1-2. McKenzie moved to suppress pursuant to CrR 3.6 on the basis that the initial detention was not supported by the requisite reasonable suspicion of criminal activity.

At the suppression hearing, the State conceded that McKenzie was detained for purposes of an investigatory stop when Kallir first contacted him. RP 61, 83-84, 87. The State nevertheless argued that Kallir “was investigating criminal activity that was afoot and this was a reasonable suspect.” RP 84. The State contended, initially, that McKenzie bore “the

absolute burden to show that there's been some violation of governmental requirements of constitutional and statutory law.” RP 64. The State later argued that the “standard here is preponderance.” RP 82.

The court denied the motion to suppress. The court orally ruled that Kallir had “probable cause to detain Mr. McKenzie early on,” and had “probable cause to stop him and to ask him some questions to determine who he was and what he was doing there.” RP 86.

Following a jury trial, McKenzie was convicted of the three criminal counts with which he was charged. CP 13-15. McKenzie appeals. CP 54.

D. ARGUMENT

The Terry stop was not supported by a reasonable suspicion of criminal activity, and thus violated article I, section 7 and the Fourth Amendment.

1. The State bears the burden of proving the validity of an investigatory detention by clear and convincing evidence.

Warrantless searches or seizures are per se unreasonable under both the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution. State v. Doughty, 170 Wn.2d 57, 61, 239 P.3d 573 (2010). A brief investigatory detention based on a reasonable suspicion that criminal activity is afoot is one of the “narrowly-drawn” exceptions to the warrant requirement. Terry v. Ohio, 392 U.S. 1,

22, 88 S. Ct. 1868, 1880, 20 L. Ed. 2d 889 (1968); State v. Garvin, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009). However the State bears the burden of proving the exception to the warrant requirement by clear and convincing evidence. Garvin, 166 Wn.2d at 250.

To meet its burden of showing a Terry stop was valid, the State must prove the officer had a well-founded suspicion that the defendant was engaged in criminal conduct. Doughty, 170 Wn.2d at 62. A “well-founded suspicion” requires the State to demonstrate that the circumstances at the time of the stop were more consistent with criminal than with innocent conduct. State v. Pressley, 64 Wn. App. 591, 596, 825 P.2d 749 (1992). In addition, “in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” Id. (quoting Terry, 392 U.S. at 21). “Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction.” Terry, 392 U.S. at 22.

The trial court considers the totality of the circumstances in evaluating the reasonableness of a Terry stop. The court’s findings of fact are reviewed for substantial evidence. State v. Gatewood, 163 Wn.2d 534,

539, 182 P.3d 436 (2008). The court's conclusions of law regarding the constitutionality of a stop are reviewed de novo. Id.

2. The mere report that a person had been seen inside a minivan with a flashlight, without more, did not establish a reasonable suspicion of criminal activity as required to support McKenzie's detention.

To be constitutional, a Terry stop must be justified at its inception. Gatewood, 163 Wn.2d at 539 (citation omitted). Additionally, where, as here, a stop is based not on the officer's personal observations but on a tip from an informant, "[t]he reasonable suspicion ... at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person." State v. Cardenas-Muratalla, 179 Wn. App. 307, 315, 319 P.3d 811, 816 (2014) (quoting Florida v. J.L., 529 U.S. 266, 272, 120 S.Ct. 1375, 146 L.Ed.2d 254 (2000)). This case fails to meet these basic conditions.

The prosecutor conceded that McKenzie was detained at the outset of Kallir's interactions.² RP 61 (Prosecutor argues, "If the initial detention is invalid, then nothing else matters ... because everything will be suppressed ... the issue is the detention. The officer never would have learned the defendant's name if he hadn't detained him."). The prosecutor repeated this concession in the context of the CrR 3.5 hearing. RP 87

² McKenzie testified that Kallir pulled up to him in a marked patrol car and directed him to sit on the bumper of his car. RP 73. He did not feel free to leave. RP 71-73. The State did not rebut this evidence.

(prosecutor concedes that when McKenzie was being questioned he was “not free to leave”).

The trial court agreed that Kallir seized McKenzie. Supp. CP __ (Sub No. 55 at 2, Finding of Fact 6) (“The officer stopped this person who was identified as the defendant.”). The court concluded, however, that “Officer Kallir’s detention of the defendant was justified as a Terry stop based on what the officer knew and observed at the time of the detention, based on the rapid arrival at the scene after the 911 call, and based on the time of day.”³ Supp. CP __ (Sub No. 55 at 3, Conclusion of Law D). None of these bases, considered individually or combined, supplies the required reasonable suspicion.

All Kallir knew at the time of the detention was what had been relayed to him by dispatch. As he admitted, he had no basis to conclude that McKenzie was engaged in criminal activity from the information dispatch had given him. Dispatch only reported “somebody calling saying that somebody’s in a vehicle.” RP 51-52.

What was observed by the 911 caller – that McKenzie was in the van with a flashlight and appeared to be “sifting through it” – was not inherently suspicious behavior. There is nothing suspect or criminal about

³ The court did not reference the legal standard it applied in reaching this conclusion. It is worth remembering, however, that the prosecutor first argued that McKenzie bore the burden of showing his warrantless stop was unconstitutional, and then that the State’s burden was only a preponderance. RP 64, 82.

using a flashlight to look for something in a vehicle. To the contrary, there are a myriad of innocent explanations for such conduct. It would be natural to use a flashlight within a vehicle if the dome light inside the car is broken. People store many items in their cars, including paperwork that might be difficult to read or identify without a flashlight, especially at nighttime. Some people live in their vehicles, and might be expected to “sift through” the items within.

McKenzie matched the description of the person who had been in the minivan, but there was nothing about his appearance or behavior that contributed to a reasonable suspicion he had been engaged in criminal activity. McKenzie was walking, not running. He was not wearing a mask or a balaclava. He was not carrying anything unusual. There was nothing about his appearance that supported an inference that he had been doing something illegal.

When Kallir seized McKenzie, he did not know whether the minivan belonged to McKenzie. He did not know if the minivan had been stolen, or if McKenzie had permission to be in the vehicle. He did not know whether McKenzie had broken into the minivan or entered it with a key.

The time of day also did not support an inference that McKenzie’s conduct was criminal. Several decisions reject the notion that activity at a

late hour can justify a stop. In Doughty, for instance, a Spokane police officer stopped Doughty after he saw Doughty park his car outside a suspected drug house at 3:20 a.m., return to his car less than two minutes later, and then drive away. Doughty, 170 Wn.2d at 59. The Supreme Court noted that a person’s presence in a high-crime area at a “late hour” does not give rise to a reasonable suspicion sufficient to detain that person. Id. at 62. Even though the house Doughty visited was a suspected drug house, his visit occurred late at night, and he was there for less than two minutes, the Supreme Court invalidated the stop, ruling, “Police may not seize a person who visits a location—even a suspected drug house—merely because the person was there at 3:20 a.m. for only two minutes.” Id. at 63.

In State v. Richardson, 64 Wn. App. 693, 825 P.2d 754 (1992), Division Three of this Court held that a stop was not supported by a reasonable suspicion of criminal activity where officers observed Richardson at 2:30 a.m. walking with someone who earlier had been seen engaging in suspicious activity consistent with “running drugs.” Id. at 697. As in Doughty and Richardson, the fact that McKenzie was observed in the minivan at 4:30 a.m. does not support a reasonable suspicion that McKenzie was engaged in criminal activity.

There was no exigency or need for haste that might justify invocation of a less stringent standard for the seizure. In limited circumstances, Washington courts have held that the totality of the circumstances may warrant a less onerous showing in support of an officer's reasonable suspicion of criminal activity. See Cardenas-Muratalla, 179 Wn. App. at 314 (noting that “[o]fficers investigating reports of emergent risks of imminent violence do not have the opportunity to make detailed inquiries to establish the veracity or vantage point of individuals reporting suspicious activity”). Here, however, Kallir was investigating a misdemeanor property crime. There was no reason for Kallir to take shortcuts in his investigation.

Further, conducting a Terry stop of McKenzie was not Kallir's only option. McKenzie was walking, not running, and the streets were otherwise quiet and deserted. RP 41. Kallir easily could have followed McKenzie while other officers ascertained whether specific, articulable facts supported a reasonable suspicion that a vehicle prowler had been committed. Or Kallir could have engaged in a consensual encounter with McKenzie in order to further investigate the activity reported by the 911 caller. Cf. Gatewood, 163 Wn.2d at 541. But this is not what happened, it is not what the State argued, and it is not what the trial court found. The

State did not meet its heavy burden of establishing that an investigative detention was justified.

3. McKenzie's conviction for possession of vehicle theft tools must be reversed and dismissed, and the other counts should be remanded for a new trial.

Whenever the rights protected by article I, section 7 are violated, the exclusionary remedy must follow. State v. Winterstein, 167 Wn.2d 620, 632, 220 P.3d 1226 (2009). "The exclusionary rule mandates the suppression of evidence gathered through unconstitutional means." Garvin, 166 Wn.2d at 254. The same remedy is compelled under the Fourth Amendment. Wong Sun v. United States, 371 U.S. 471, 488, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

The screwdrivers, flashlight, and glove were the basis for the making or having vehicle theft tools count.⁴ That conviction must therefore be reversed and dismissed.

The remaining convictions should be reversed for a new trial. The State presented expert testimony that the "most basic implement" used to steal cars is a flathead screwdriver. RP 133. Another prosecution witness testified that because the ignition in the minivan had been modified, it

⁴ In addition, the police conducted a show-up identification procedure with Bob Pedersen, the person who called 9-1-1. RP 176, 234. This too would need to be suppressed as the "fruit of the poisonous tree."

could be started with a screwdriver.⁵ RP 150. In closing, the prosecutor argued,

these two screwdrivers and this flashlight are what [McKenzie] used to move the vehicle, to engage in the possession of the vehicle, and they are consistent ... with motor vehicle theft. That's what they were used for in this case.

RP 267. The State also argued that a blue glove found in a Honda Prelude was the twin of the glove that was found on McKenzie's person, and established a nexus between McKenzie and the theft of items from the Prelude. RP 258, 267.

Without this evidence, the State would only be able to show that McKenzie was seen inside the blue minivan, in which items from the Prelude were also found, and that the minivan's hood was warm, suggesting that it had been driven recently. RP 150, 222-23, 236-37. The screwdriver, flashlight, and glove were key to the State's proof of knowledge, intent, and identity with respect to the two remaining charges. These convictions should therefore be reversed and remanded for a new trial.

⁵ The minivan's owner testified that she herself placed a piece on the minivan's steering column so that it could be started with a screwdriver, because she had lost her keys. RP 190.

E. CONCLUSION

A reasonable suspicion of criminal activity did not support Kallir's decision to conduct an investigative detention of McKenzie. The after-acquired evidence must be suppressed. The conviction for possession of vehicle theft tools should be reversed and dismissed, and the remaining counts remanded for a new trial.

DATED this 20th day of April, 2015.

Respectfully submitted:

/s/ Susan F. Wilk
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Washington Appellate Project (91052)
Attorneys for Appellant

State v. McKenzie, No. 72733-8-I

Appendix

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

JEREMIAH McKENZIE,

Defendant,

No. 14-1-00940-9 KNT

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON CrR 3.6
MOTION TO SUPPRESS PHYSICAL,
ORAL OR IDENTIFICATION
EVIDENCE

A hearing on the admissibility of the defendant's statement(s) was held on September 10 and 11, 2014, before the Honorable Richard McDermott. After considering the evidence submitted by the parties and hearing argument, the court makes the following findings of fact and conclusions of law as required by CrR 3.6.

A. THE UNDISPUTED FACTS

1. On August 19, 2013, Kent Police Department (KPD) Officer David Kallir was on duty.
2. Around 4:20 AM, the officer was dispatched to the 10500 block of SE 233rd Place in Kent for a possible vehicle prowl.

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 1

Daniel T. Satterberg, Prosecuting Attorney
Norm Maleng Regional Justice Center
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1 3. The officer was looking for a suspect who was male, had a thin build, was approximately 5'5"
2 tall, was wearing a dark jacket and bandana, was carrying a backpack, and was walking towards
3 Benson Avenue.

4 4. As the officer approached the location, he saw a person who matched this description.

5 5. The officer did not see any other pedestrians in the area.

6 6. The officer stopped this person who was identified as the defendant.

7 7. The officer questioned the defendant about where he was coming from at that time of
8 morning, and the defendant told him he was coming from his girlfriend's home, was heading to
9 the local Jack-in-the-Box restaurant, and was seeking food for her because she was ill.

10 8. The officer explained why he had stopped the defendant, and the defendant denied being
11 inside the prowled vehicle.

12 9. The officer learned that the defendant had a warrant for his arrest and therefore placed him
13 under arrest.

14 10. The officer searched the defendant incident to this arrest and recovered screwdrivers, a
15 flashlight, and one glove.

16 11. The officer advised the defendant of his Miranda rights, and the defendant invoked those
17 rights.

18
19 B. THE DISPUTED FACTS:

20 There are no disputed facts.

21
22 C. CONCLUSIONS AS TO THE DISPUTED FACTS:

23 Because there are no disputed facts, there are no associated legal conclusions.

24
WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 2

Daniel T. Satterberg, Prosecuting Attorney
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1 D. CONCLUSIONS OF LAW AS TO THE ADMISSIBILITY OF THE EVIDENCE
2 SOUGHT TO BE SUPPRESSED:

3 The defense argued that the officer did not have a sufficient factual basis for the initial
4 stop of the defendant. The court concludes that Officer Kallir's detention of the defendant was
5 justified as a Terry stop based on what the officer knew and observed at the time of the
6 detention, based on the rapid arrival at the scene after the 911 call, and based on the time of day.

7
8 The court denies the defendant's motion to suppress.

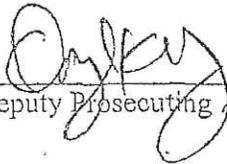
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10 In addition to the above written findings and conclusions, the court incorporates by
11 reference its oral findings and conclusions.

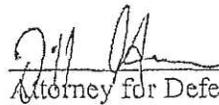
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13 Signed this 16th day of January, 2015.

14
15 
16 JUDGE RICHARD McDERMOTT

17
18 Presented by:

Approved as to form; objections noted in the record:

19  23586
20 Deputy Prosecuting Attorney

 39747
21 Attorney for Defendant

22
23
24 WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 3

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 72733-8-I
)	
JEREMIAH MCKENZIE,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 20TH DAY OF APRIL, 2015, 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 20TH DAY OF APRIL, 2015.

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