

original

No. 35225-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY ROY CLINTON,

Appellant.

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COUNTY OF PIERCE
BY STATE OF WASHINGTON
C. MUMFORD

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Rosanne Buckner, Judge

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The court erred in failing to suppress evidence which was the fruits of an unlawful search or seizure under Article 1, §7, of the Washington constitution.

2. Appellant assigns error to the court's CrR 3.6 conclusion of law 1, which provides:

The Court finds that given the officers' experience, the information that he had, and the actions of the suspects the deputy had reason for a brief stop.

CP 29. Appellant also assigns error to CrR 6.1 conclusion 1, essentially identical. CP 48-51.

3. There was not substantial evidence supporting the court's oral finding that the car appellant was a passenger in was "parked by a gate to a park where the deputy knew there was drug sales from vehicles." RP 31.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The officer seized a car and its occupants based upon statements of two girls that a car matching that description had been parked there for "a while" and that they had seen people coming and going to the car. The officer knew that some houses in the general area were "drug" houses but the car was not near any of them. The officer also said a mobile home park nearby was known to have "drug issues."

When the officer's car came into view, the people in the front seat started making motions which were not "furtive" but involved driving away. Did the officer improperly stop the vehicle and its occupants for an "investigatory stop" where he pulled across the road in front of the moving

vehicle in order to stop them even though it was daytime, the car was lawfully parked, the officer did not see any criminal or suspicious activity, and the officer did not verify the reliability of the girls' statements in any way?

2. Even if the seizure did not occur at the time of the initial investigatory detention but later when the officer demanded identification from all the occupants, did the officer not have "reasonable suspicion" that the people in the car were or were about to be involved in criminal activity where the only additional fact he knew at that time were that the driver of the car gave a few different reasons why they were parked there?

3. Did the trial court err in relying on facts not known to the officer at the time of the seizure and facts not supported by the evidence in finding the seizure constitutional?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Timothy Roy Clinton was charged by amended information with second-degree identity theft and second-degree possession of stolen property. CP 25-26; RCW 9.35.020(1), RCW 9.35.020(2)(b), RCW 9A.56.140(1), RCW 9A.56.060(1)(c).

On August 2, 2006, a suppression hearing was held before the Honorable Rosanne Buckner, after which an agreed stipulated facts trial was held and the judge found Mr. Clinton guilty as charged.¹ RP 1; CP

¹The volumes of the verbatim report of proceedings will be referred to as follows: Suppression and stipulated facts trial of August 2, 2006, as "RP;" Sentencing of August 6, 2006, as "SRP."

23; CP 48-51. At sentencing on August 6, 2006, the court imposed a standard range sentence. SRP 10; 33-43.

Mr. Clinton appealed, and this pleading follows. CP 24.

2. Testimony and ruling at suppression hearing

On June 15, 2006, Pierce County Sheriff's Office patrol officer Eric Jank was in the area of Prairie Ridge Drive at about 4:30 in the afternoon. RP 5. He was looking for a red van reported to have been selling ice cream illegally on the street. RP 5, 13. He saw two girls, about 10 or 12 years old, and asked them if they had seen the van. RP 5.

The girls had not seen the van but said they had seen a white Mustang parked "down by the park," about two or three blocks away. RP 6. The officer said the girls also told him the car had been there "for a while" and they did not recognize it. RP 6. The girls said they saw people "coming to and from the car" so the officer went to "check it out." RP 6.

The officer had never seen the girls and did not ask their names. RP 6, 12. He did not ask them how long "a while" was to the girls and thus how long the car had been there. RP 1-19. He also apparently did not ask or verify where they lived or anything else about them. RP 1-19. He admitted that what the girls reported to him was not criminal conduct. RP 12.

A mobile home park essentially surrounded the nearby community park. RP 6. The mobile home park was, according to the officer, "well known for drugs." RP 6. Indeed, the officer said, "[w]e have a lot of drug activity in the area, in the mobile home park by the community park." RP 6. He based this statement on his "experience," "several reports from

people we have,” and “informants.” RP 6. He also said there were some reports in the previous two weeks of “drug activity” and that there were some “drug houses” in the area. RP 18.

When asked if the officer had experience himself regarding drugs, he said, “[y]oung people with them, yes.” RP 7. The officer also said it was “common for a person to sell drugs out of cars,” but did not say if it was common for that area. RP 7. He was also asked, without reference to when, “[h]ave you received any reports of selling drugs out of cars,” and he said he had, “parked on the gravel areas,” and that there were “reports of cars parked there as well, but all over in the area.” RP 19. He did not recollect any dates and times of such reports and none of the reports involved a white Mustang. RP 19.

The officer drove to a dead-end which butted up to the large community park. RP 7. Once there, he saw a white Mustang parked, backed up to a closed gate. RP 7. As he got closer, the officer said, he saw the front passenger of the car “look towards the driver and start waving his hand forward, motioning to go, it looked like.” RP 7. The driver then “fidgeted around,” moving his body, so that the officer could not tell what he was doing. RP 8.

The officer admitted the car was lawfully parked. RP 12. The officer refused to say that the motions of the people in the car were “furtive,” admitting, “I can’t say that” they were. RP 15. Instead, he said, the people just “started acting like they were going to leave.” RP 15. It seemed suspicious to him that the car appeared to be leaving in a hurry as soon as they saw a police officer. RP 16. In his opinion, he did not think

people would act like that if they were legally there. RP 15.

The officer admitted, however, that he did not see anything that confirmed what the girls said about people “coming and going” to the car. RP 13. Indeed, the officer saw no criminal conduct at all. RP 13. Once he drew near, however, the car started to drive away. RP 15.

The officer then parked diagonally across the road like he would “with any traffic stop.” RP 8. While the officer testified that there was still room so that the car he was trying to block could have driven away, he also admitted that he had every intention of contacting these people and finding out what was going on. RP 8, 13. He described it as “executing a suspicious vehicle stop,” which he said was to contact these people “to investigate what they were up to.” RP 14. He also said he expected them to stay there and submit the investigation. RP 14.

Although the front passenger continued signaling for the driver to go, the car stopped. RP 8. The officer approached and started questioning the driver, asking what they were doing. RP 8. The driver said they were “hanging out.” RP 8. The officer then told the man that a couple of kids had said “their” vehicle was parked here and they had seen people coming to and from it. RP 8-9. The driver did not say anything, so the officer then asked why the driver was leaving. RP 9. The driver said he thought the officer had a key to the park and was going to open the gate. RP 9. When the officer said he did not carry keys to public parks, the driver said they were waiting for a friend. RP 9. The officer testified that he thought they were engaged in criminal activity because of their inconsistent claims about whether they were waiting for a friend or for someone to open a

gate. RP 17.

In his report, the officer recorded the driver saying he was “hanging out,” but included nothing about the driver saying he was waiting for a friend. RP 18.

The officer continued the conversation with the driver for “a few more minutes like that.” RP 9. He did not detail what the driver said in that conversation. RP 9. At some point, he had ordered the occupants of the car to put their hands up, having the front passenger and the driver put their hands on the dashboard and the back seat occupant put his hands on the back of the front seat. RP 17.

After a few minutes of the conversation, the officer asked everyone in the car to give him their identification. RP 9. The driver gave the officer identification but the front passenger had none. RP 9. The person in the rear of the car told the officer he did not have to give the officer identification, as he had done nothing wrong. RP 9-10.

By that time, the officer had already gotten a license from the driver which he said was “valid,” although he did not explain whether he made that determination based upon appearance or on calling to verify the identification with dispatch. RP 16. The officer nevertheless called for another officer to come to the scene, because the officer did not like the “way” the man in the backseat had refused to provide information. RP 16. The occupants of the car were detained while the officer called for backup. RP 10. The officer then again demanded that the man in the backseat identify himself. RP 10. The man told the officer his name was Timothy Clinton. RP 10.

After a few minutes, another officer arrived on the scene. RP 11. That officer jumped out of his car, looked into the detained car, and saw Mr. Clinton. RP 11. The officer said he recognized Mr. Clinton from previous contacts and knew Mr. Clinton had an outstanding warrant. RP 11. The warrant was verified and Mr. Clinton then was arrested. RP 11.

Mr. Clinton was searched incident to arrest and found with a driver's license, social security card and visa check card in the name of Paul Able. RP 30. When contacted, Mr. Able said the items had been stolen. RP 30. Some suspected drugs were also found but the drug charge was dismissed because the prosecution did not get lab analysis to prove the items were actually illegal drugs. RP 31.

In refusing to suppress the evidence seized after the arrest, the court found that "the brief detention of the defendant was reasonable." RP 31. The court subsequently found Mr. Clinton guilty as charged. RP 35.

D. ARGUMENT

THE TRIAL COURT ERRED IN FAILING TO SUPPRESS THE EVIDENCE WHICH WAS THE FRUITS OF AN UNLAWFUL SEIZURE

Both the Fourth Amendment and Article I, § 7, of the Washington constitution protect citizens against unreasonable searches and seizures. State v. Hendrickson, 129 Wn.2d 61, 70-71, 917 P.2d 563 (1996); State v. Parker, 139 Wn.2d 486, 987 P.2d 73 (1999). Warrantless searches and seizures are *per se* unreasonable. See State v. Williams, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). To rebut this presumption of unreasonableness, the prosecution must prove that a warrantless search falls under one of the very limited "jealously" drawn exceptions to the

warrant requirement. State v. Kinzy, 141 Wn.2d 373, 384, 5 P.3d 668 (2000), cert. denied, 531 U.S. 1104 (2001).

In this case, the prosecution argued that the warrantless stop of the car and its occupants was a valid “investigatory” stop under Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). RP 25. To meet that limited exception to the warrant requirement, however, the officer must have had a “reasonable suspicion” based on specific, articulable facts, that the person seized is already or is about to be engaged in criminal activity. State v. Armenta, 134 Wn.2d 1, 10, 948 P.2d 1280 (1997). “Reasonable suspicion” is evaluated by examining whether the facts known to the officer at the time of the seizure amount to “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).

The seizure in this case was not based upon such substantial possibility. As a threshold matter, the trial court made no specific finding as to when, exactly, Mr. Clinton was seized. CP 31; RP 29-31. But usually this determination is crucial. A court reviewing the propriety of a seizure must evaluate the facts known to the officer at the time the seizure occurred, in order to determine whether the search was constitutional. See Kennedy, 107 Wn.2d at 6. It is difficult to determine whether an officer acted reasonably based upon what he knew at the time of a seizure if you do not know when the seizure *occurred*.

The trial court’s failure to make a specific finding about when the seizure of Mr. Clinton occurred is not fatal here, however, because the other findings of the court indicate what it had found and the parties

agreed occurred. The court found that the deputy “parked diagonally in the road . . . to stop the vehicle and investigate.” CP 28. It entered that finding after counsel reminded the court that the deputy had testified that “he had intended to effect a stop on the vehicle as it left,” and that he had “stopped” the vehicle and intended to do so to investigate. SRP 2. The court asked the prosecutor if he had any objections to adding “that language,” and the prosecutor said, “[n]o.” SRP 3. The court then read part of a finding already drafted, then said, “[a]nd the deputy intended to stop the vehicle?” SRP 3. The prosecutor said, “[y]es,” and counsel agreed, “[y]es, to conduct an investigatory stop.” SRP 3. The court then read the language of the finding to the parties, that the deputy had parked as he did across the road “to stop the vehicle and investigate.” SRP 3. The prosecutor’s response was, “I believe that’s a fair assessment of the testimony.” SRP 3.

Thus, everyone conceded that the officer had conducted an investigatory stop of the car, based upon the evidence presented. And it is undisputed that the car was *driving away* when the deputy parked diagonally in the road, causing the vehicle to stop. CP 21, 28; RP 15, 16.

In this case, the seizure of the car amounted to a seizure of Mr. Clinton. Under Article 1, § 7, a person is seized when a reasonable person in the same position would not believe he or she was free to leave an officer’s presence or otherwise terminate the encounter. See, State v. Young, 135 Wn.2d 498, 511, 957 P.2d 681 (1998). The question of whether a person is seized is a mixed question of law and fact. Armenta, 134 Wn.2d at 9.

As the prosecutor specifically conceded below, this case involved a Terry investigative stop, rather than a traffic stop, because the officer was not stopping the car for any perceived violation of traffic laws but rather to investigate what the girls had told him they had seen. See RP 25. This distinction is crucial. In traffic stop cases the passengers in a car are considered normally free to leave and thus not seized by the traffic stop, because the only person allegedly being investigated is the driver who committed the infraction. State v. Mendez, 137 Wn.2d 208, 218, 970 P.2d 722 (1999).

However where, as here, the stop is not for a traffic offense but for investigation of criminal activity in which all of the car's occupants were potentially suspected in being involved, all of the passengers would be under suspicion and thus not free to leave. See, e.g., State v. Horrace, 144 Wn.2d 386, 394, 28 P.3d 753 (2001) (where an officer's interaction with a citizen is investigatory, the interaction is subject to Terry standards); Armenta, 134 Wn.2d at 10 (investigative detention is a seizure and therefore must be "reasonable" under the constitution).

Here, the officer made it very clear that he was seizing not just the car and the driver but also the car's occupants in order to investigate them. He pulled in front of and partially blocked the car with that intent, "executing a suspicious vehicle stop." RP 14. And he admitted that he had "every expectation" that the car would stop and "they" would stay there while he investigated. RP 14. That authority was clearly showing with the acts of the officer, effectively causing the car to stop by partially blocking it in on the dead-end next to the park.

No reasonable passenger in the car would have felt free to just walk away, given the officer's obvious show of authority. Nor were they so free. Given his suspicion of criminal activity and his intent to stop the car and detain all of its occupants, he would clearly have stopped them from departing. See, e.g., State v. Lesnick, 84 Wn.2d 940, 942-43, 530 P.2d 843, cert. denied, 423 U.S. 891 (1975) (where stopped officer admitted investigating crime and would not have let person in stopped vehicle leave until investigation was over). Mr. Clinton was seized when the car was stopped.

There was not a reasonable suspicion of criminal activity to support that seizure. At the outset, the trial court did not actually find that the officer had a "reasonable suspicion" there was criminal activity afoot. The court just found that the "brief detention" of Mr. Clinton was "reasonable." CP 29-30; RP 14.

It is true that "reasonableness" is the foundational concept underlying the question of whether a seizure is lawful. See Lesnick, 84 Wn.2d at 942-43. But in this context, the "reasonableness" of the seizure is determined by examining the *separate* question of whether the state can point to "specific and articulable facts giving rise to a reasonable suspicion that the person stopped is, or is about to be, engaged in criminal activity." State v. Gleason, 70 Wn. App. 13, 17, 851 P.2d 731 (1993), citing, Terry, 392 U.S. at 21-22. This more specific standard provides the proper balance between the state's interests in crime detection and prevention and a citizen's constitutional rights to privacy and to be free from governmental intrusion into their personal affairs. See, e.g., Armenta, 134

Wn.2d. at 10.

It thus appears that the court applied an incorrect standard in making its determination. In addition, the court erred in relying on facts inapplicable to the determination. The court's written finding was that:

Given the officers' experience, the information that he had, and the actions of the suspects the deputy had reason for a brief stop.

CP 29. The court's more specific oral finding was:

My conclusion is, given these facts, the brief detention of the defendant was reasonable. The defendant was in a vehicle parked by a gate to a park where the deputy knew there was drug sales from vehicles. Two young girls had reported the car and numerous people coming and going from the car. The driver and front passenger behaved suspiciously when they saw the deputy drive up to them, and the driver gave different explanations for why they were parked by the closed gate. And finally, the defendant himself refused to provide identification when requested and had a warrant out for his arrest. So for these reasons, I'll deny the motion for suppression.

RP 31.

Several of these facts, however, were not known to the officer at the time he stopped the car. The "different explanations" had not been given. Mr. Clinton had not been asked for and refused to give identification yet. And the fact that he had a warrant was not known at that time, as the officer who recognized Mr. Clinton and knew of that warrant had not yet even been called or arrived. Facts not known to the officer at the time of a seizure cannot justify that seizure. See State v. Brown, 154 Wn.2d 787, 798, 117 P.3d 336 (2005); see also Armenta, 134 Wn.2d at 14.

Further, the court's finding that the defendant was in a car parked by a gate "to a park where the deputy knew there was drug sales from

vehicles” does not withstand review. A finding of fact must be supported by substantial evidence in the record. State v. Hill, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994). “Substantial evidence” is evidence sufficient to convince a rational, fair-minded trier of fact that the finding is true. Id.

Here, the officer did not testify that the park in question was a “park where the deputy knew there were drug sales from vehicle.” He testified that the mobile home park had a lot of “drug activity.” RP 6. He testified that he had experience with young people with drugs, and that it was common in general for a person to sell drugs out of cars. RP 7. But he never said that it was common for people to sell drugs out of cars in this particular *park*. RP 7.

The remaining facts did not support the seizure. The facts were that 1) two young, unidentified, unknown girls had reported a white Mustang parked for an unspecified time they described as “a while,” 2) that people were seen coming and going from the car but not how many people or how frequently, or even if the people were different or the same people over and over, 3) that the area had some problems with “drug activity” including drug “houses” in the mobile home park and “area” but the car was parked neither in the mobile home park or near the drug houses, 4) that drug dealers in general sometimes sell drugs out of cars but not whether they were known to do that on the street the car was parked, 5) that none of the complaints involving drug activity was in any way associated with or mentioned a white Mustang, 6) that, at some unspecified time in the past, the officer had received reports of people selling drugs out of cars parked on “gravel areas” but not that the area the

white Mustang was in was such an area, and 7) that the driver and front passenger did not behave “furtively” but simply seemed in a hurry to leave once they saw the officer.

That evidence did not amount to a reasonable suspicion, based upon articulable facts, that Mr. Clinton was engaged in or about to engage in criminal activity. Taking the last fact first, it is not uncommon for people to display some nervousness when police arrive. See State v. Barwick, 66 Wn. App. 706, 710, 833 P.2d 421 (1990). And the fact that a car starts to drive away when officers approach is not sufficient to provide a reasonable suspicion, even when the car has committed a traffic infraction, is parked next to a closed park, is parked illegally, and is parked in an area where there has been a rash of burglaries, in a place unusual for anyone to park. See State v. Larson, 93 Wn.2d 638, 642-43, 611 P.2d 771 (1980).

In addition, there was no evidence that the car was in any way associated with any of the suspected drug “houses” in the area, or even with the mobile home park with the drug activity issues. And even if there had been some evidence that *this* section of street next to the park was somehow known for drug sales, the presence of the defendant “in an area where drug transactions were known to occur” cannot by itself “give rise to a reasonable suspicion that they were engaged in criminal conduct.” State v. Sieler, 95 Wn.2d 43, 46-47, 621 P.2d 1272 (1980).

Notably, the officer admitted that none of the reports he had which made him think the area had drug activity involved a white Mustang like the one Mr. Clinton was in here. RP 19.

Further, while the reliability requirements for citizen informants like the two young girls here are more relaxed than requirements for other types of informants, they still exist. State v. Chatmon, 9 Wn. App. 741, 746, 515 P.2d 530 (1973). As a result, a “tip” may only provide sufficient grounds to stop or seize a person if that tip demonstrates some “indicia of reliability.” Sieler, 95 Wn.2d at 46-47. The two-prong analysis requires proof of both that the informant was reliable and that the information given by the informant was also reliable. State v. Smith, 102 Wn.2d 449, 455, 688 P.2d 146 (1984).

While officers need not prove that a citizen informer has previously been credible in prior tips (as there are usually no such tips), police must “ascertain some information which would reasonably support an inference” that what the informant said was true. Chatmon, 9 Wn. App. at 747. To do this, either it must be “that the informant’s tip contains enough objective facts to justify the pursuit and detention of the subject,” or there must have been “corroboration of the tip’s noninnocuous details by the police.” State v. Hart, 66 Wn. App. 1, 8-9, 830 P.2d 696 (1992).

Here, the officer made no effort to verify the reliability of the girls or their information. He did not know them. He had never seen them before. He did not ask their ages, or their names, or even how long they thought the car had been there, i.e., what they meant by “a while.” He did not ask where they lived, to verify whether it was relevant that they said they had never seen that car before. Even with the greater presumption of reliability for citizen informants, given the officer’s complete failure to make any effort to establish the girls’ reliability, the first prong of the test

was not met here.

Nor was the second. Confirming that a car which matches the informant's description was in the place the informant said is not sufficient to provide a reasonable suspicion of criminal activity. See Chatmon, 9 Wn. App. at 748. And it certainly does not provide the corroboration necessary to suggest "either the presence of criminal activity" or the reliability of the information of a tipster. Lesnick, 84 Wn.2d at 943. This is so even when the tipster tells the police specifically that the car has been involved in a crime. Id. Notably, here, the officer admitted that what the girls described to him was not, in fact, criminal conduct. RP 13-14.

Sieler, supra, is instructive. In that case, police officers were given information by an unknown but named informant that he had seen what he believed to be a drug sale in a black-over-gold Dodge with a certain license number in the school parking lot. 95 Wn.2d at 44-45. Without any corroboration of any signs of criminal activity, officers arrived and detained the occupants of the vehicle matching the description given by the informant. 95 Wn.2d at 45. In reversing, the Supreme Court faulted the failure not only to establish any reliability for the informant himself but also of the "factual basis" to verify the reliability of the information itself. Id. Indeed, the Court declared, it was the verification of the facts related by the informant which provides protection against "investigatory detentions made on the basis of a tip provided by an honest informant who misconstrued innocent conduct." 95 Wn.2d at 48; see also, Lesnick, 84 Wn.2d at 943 (where there is no reliability or only minimal reliability to an informant's information, either police should give no response or

investigate further before that information can support a seizure of another citizen).

Here, there was no verification of any facts by this officer, other than the type and location of the car. The officer saw no one coming and going to the car. RP 13-14. He saw no one in the car engaged in any criminal activity. RP 13. He saw only people who chose to drive away when an officer approached. RP 13. And in fact, he conceded, what the girls reported to him was not criminal conduct. RP 12.

This officer received an unverified tip from unknown minors on a street. He did not investigate anything about them or the reliability of their claims, prior to relying on those claims in seizing citizens. He did not observe any criminal activity or even any activity confirming what the girls claimed. Indeed, he did not try to make any surreptitious observations of the car himself or trying to investigate to see if there was anything to verify that this specific car was involved in actual or potential criminal activity.

The evidence here was simply not enough to support the objective conclusion of a reasonable suspicion, based on specific articulable facts, that Mr. Clinton was engaged in or about to engage in criminal activity, as required. Mr. Clinton was a passenger in a car parked, legally, during the day, on a street in a general area, encompassing an entire mobile home park and nearby, where there have been issues with drugs. Two unnamed girls of unknown reliability said they had seen people coming and going to that car. They did not say and the officer apparently did not ask if it was the *same* people, or how long the activity had actually been occurring, or

even whether the girls lived in the neighborhood and thus their statements that they did not recognize the car might have been relevant.

Certainly the officer had a reason to want to see what was going on. But that reason did not amount to a “reasonable suspicion,” based upon specific, articulable facts, sufficient to support seizing a citizen, such as Mr. Clinton. Because there was not a reasonable suspicion that Mr. Clinton was engaged in or about to engage in criminal activity at the time he was seized, the seizure was unlawful. The fruits of that seizure, all of which formed the entire basis for the convictions, should have been suppressed. State v. Schlieker, 115 Wn. App. 264, 272, 62 P.3d 520 (2003).

The same result obtains even if the seizure of Mr. Clinton was deemed to have occurred later, when the officer asked for his identification. The Supreme Court has now settled the question of whether a passenger in a car is “seized” for the purposes of the Washington constitution when an officer asks for his identification. He is. State v. Rankin, 151 Wn.2d 689, 699, 92 P.3d 202 (2004); Brown, 154 Wn.2d at 797 (seizure even if officer does not take license away to run warrants check). At the time the officer asked for identification, the only additional facts he knew were the driver’s saying they were “hanging out,” the driver’s lack of response when the officer told him that some kids had said “their” vehicle had been parked here for awhile and people had been coming and going from it, and the driver’s first answering the officer’s question of why he was driving away by saying that he thought the officer was there to open the gate, then responding to the officer’s declaration that

he did not carry keys to public parks by saying they were waiting for a friend. RP 8-9. The officer said he thought the things the driver was saying were “inconsistent” and a “line of lies.” RP 17. But that is not necessarily so. Someone could be hanging out, hoping someone would come open a gate, while waiting for a friend. It is not as if the driver said something truly inconsistent, like he was there waiting for a friend to come out of a house so they could go to a party and then said he was there because he had pulled over to look at a map.

Further, the “inconsistencies” evidence is simply not enough to tip the balance and render the seizure here reasonable. The driver was being asked by an officer who had clearly stopped him why he was driving away when the officer arrived. This was immediately after being told the officer effectively suspected him of criminal activity. The normal nervousness a citizen feels when approached by an officer is certainly going to be enhanced when the officer has *stopped* them and then told them that they have been reported to have engaged in suspicious activity. It would not be surprising for someone to come up with a lame excuse for pulling away when they saw an officer rather than admit they were trying to avoid contact, especially where the officer had made it clear they were under his suspicion. But that does not amount to a specific articulable fact supporting the conclusion that the back seat passenger in that car was engaged in or about to engage in criminal activity.

The facts known to the officer before the seizure here were insufficient to support it, whether it occurred when the car and its occupants were stopped for investigation or when the officer asked for

identification. This Court should so hold and, because the convictions depended entirely on the evidence which should have been suppressed, reverse and dismiss the convictions for second-degree identity theft and second-degree possession of stolen property.

E. CONCLUSION

For the reasons stated herein, this Court should reverse.

DATED this 13th day of February, 2007.

Respectfully submitted,



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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Ms. Kathleen Proctor, Esq., Pierce County Prosecutor's Office,
946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402;
to Mr. Timothy Clinton, 36015-52nd Ave. S., Auburn, WA.
98001.

DATED this 13th day of February, 2007.


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