

NO. 37590-7-II

FILED
COURT OF APPEALS
DIVISION II

CO STP - 08 SEP 02

STATE OF WASHINGTON
BY *[Signature]*

DEPUTY

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

STEVEN MIRANDA,
DESMOND JOHNSON, and
BASHINE RUTLEDGE

Appeal from the Superior Court of Pierce County
The Honorable Gary Steiner

Nos. 08-1-00295-2 (Miranda)
08-1-00294-4 (Johnson)
08-1-00296-1 (Rutledge)

BRIEF OF APPELLANT

GERALD A. HORNE
Prosecuting Attorney

By
STEPHEN TRINEN
Deputy Prosecuting Attorney
WSB # 30925

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A. ASSIGNMENTS OF ERROR..... 1

1. The court erred when it held that the investigative detention of Johnson, Miranda, and Rutledge was unlawful because the 911 informant’s tip was not sufficiently reliable..... 1

2. The court erred when it granted the defendants’ motion to suppress the evidence, based upon the court’s holding that the investigative detentions were unlawful. 1

3. The court erred when it dismissed the cases because the State was unable to proceed as a result of the court’s suppression ruling. 1

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

1. Did the totality of the circumstances surrounding the 911 caller’s report to police establish that the caller was reliable and was reporting first hand observations of possible criminal activity? Yes..... 1

C. STATEMENT OF THE CASE. 2

1. Procedure..... 2

2. Facts 2

D. ARGUMENT..... 7

1. INVESTIGATIVE DETENTIONS ARE LAWFUL WHERE THE TOTALITY OF THE CIRCUMSTANCES SUPPORT A REASONABLE SUSPICION OF CRIMINAL ACTIVITY. 7

2. HISTORICAL OVERVIEW TO WASHINGTON CASES WHERE INVESTIGATIVE DETENTIONS WERE BASED UPON INFORMATION SUPPLIED BY AN INFORMANT. 10

3.	THIS CASE IS DISTINGUISHABLE FROM <i>HOPKINS</i>	15
4.	THE DEFENSE RELIANCE UPON <i>HOPKINS</i> IS MISPLACED BECAUSE <i>HOPKINS</i> WAS CONTRARY TO ESTABLISHED PRECEDENT AND WRONGLY DECIDED.	16
5.	FEDERAL COURTS HAVE ROUTINELY HELD THAT CITIZEN CALLS TO 911 ARE RELIABLE FOR PURPOSES OF INVESTIGATIVE DETENTION.....	17
E.	<u>CONCLUSION</u>	29

Table of Authorities

State Cases

<i>State v. Garcia</i> , 125 Wn.2d 239, 883 P.2d 1369 (1994)	8, 9
<i>State v. Gluck</i> , 83 Wn.2d 424, 518 P.2d 703 (1974).....	17
<i>State v. Hopkins</i> , 128 Wn. App. 855, 117 P.3d 377 (2005)	15, 16, 17, 28, 29
<i>State v. Jackson</i> , 102 Wn.2d 432, 688 P.2d 136 (1984).....	8
<i>State v. Kennedy</i> , 107 Wn.2d 1, 726 P.2d 445 (1986)	9, 13, 14, 15, 17
<i>State v. Lesnick</i> , 10 Wn. App. 281, 285, 518 P.2d 199 (1973).....	11
<i>State v. Lesnick</i> , 84 Wn.2d 940, 943, 530 P.2d 243 (1975)	10, 11, 13, 14
<i>State v. Randall</i> , 73 Wn. App. 225, 868 P.2d 207 (1994).....	7, 8, 16
<i>State v. Sieler</i> , 95 Wn.2d 43, 46-47, 621 P.2d 1272 (1980)	11, 12, 13, 17, 18

Federal and Other Jurisdictions

<i>Adams v. Williams</i> , 407 U. S. 143, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972).....	10, 17
<i>Feathers v. Aey</i> , 319 F.3d 843 (6 th Cir. 2003)	23, 24
<i>Florida v. J.L.</i> 529 U.S. 266, 120 S. Ct. 1375, 146 L. Ed 2d 254 (2000).....	16, 17, 18, 19
<i>Terry v. Ohio</i> , 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).....	7, 8, 13, 17
<i>United States v. Brown</i> , 401 F.3d 588 (4 th Cir. 2005)	28, 22
<i>United States v. Brown</i> , 496 F.3d 1070 (10 th Cir. 2007)	26, 27
<i>United States v. Cohen</i> , 481 F.3d 896 (6 th Cir. 2007).....	23

<i>United States v. Cortez</i> , 449 U.S. 411, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981).....	17
<i>United States v. Drake</i> , 456 F.3d 771 (7 th Cir. 2006)	24, 25
<i>United States v. Elmore</i> , 482 F.3d 172 (2 nd Cir. 2007).....	19, 20
<i>United States v. Harris</i> , 313 F.3d 1228 (10 th Cir. 2002).....	28
<i>United States v. Jones</i> , 242 F.3d 215 (4 th Cir. 2001).....	22, 28
<i>United States v. McLeroy</i> , 584 F.2d 746, 748 (5 th Cir. 1978).....	17
<i>United States v. Quarles</i> , 330 F.3d 650 (4 th Cir. 2008)	21
<i>United States v. Romain</i> , 393 F.3d 63 (1 st Cir. 2004).....	19
<i>United States v. Terry-Crespo</i> , 356 F.3d 1170 (9 th Cir. 2004)	25, 26
<i>United States v. Torres</i> , 534 F.3d 207 (3 rd Cir. 2008)	20
 Rules and Regulations	
CrR 3.6.....	2
 Other Authorities	
3 W. LaFave, <u>Search and Seizure</u> (1978)	18

A. ASSIGNMENTS OF ERROR

1. The court erred when it held that the investigative detention of Johnson, Miranda, and Rutledge was unlawful because the 911 informant's tip was not sufficiently reliable.

2. The court erred when it granted the defendants' motion to suppress the evidence, based upon the court's holding that the investigative detentions were unlawful.

3. The court erred when it dismissed the cases because the State was unable to proceed as a result of the court's suppression ruling.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the totality of the circumstances surrounding the 911 caller's report to police establish that the caller was reliable and was reporting first hand observations of possible criminal activity?
Yes.

C. STATEMENT OF THE CASE.

1. Procedure

Johnson, Miranda, and Rutledge (hereinafter Defendants) were charged with a number of weapons and narcotics crimes.¹ Defendants brought a suppression motion.² After conclusion of the hearing, the court suppressed the evidence as the result of an unlawful search.³ Because the State was unable to proceed as a result of the suppression, the court also dismissed the cases against the defendants.⁴ The State filed this appeal.

2. Facts

On January 15, 2008 Tacoma Police Sgt. Griswold was in the area of 37th and Pacific when she observed three individuals. There were two black males and a white male, and they were walking two dogs.⁵

Around 13:01, 911 Dispatch received a call indicating that a male was carrying a silver gun. The male was described as being a black male,

¹ CP 1-3; 73-75; 150-152.

² CP 6-10; 79-86, 89-99; 30-33; 115-118; 176-179. RP 3-11-08, p. 3-4.

³ RP 03-13-08, p. 214-215. CP 43; 128; 189.

⁴ RP 03-13-08, p. 215-216. CP 43; 128; 189.

⁵ CP 60; 141; 194 (ln. 20-22). Identical copies of the “Findings and Conclusions on Admissibility of Evidence CrR 3.6” were entered on all three cases. For completeness of the record, I will cite to all three page numbers from the clerk’s papers. However, because the line numbers on the pages are identical, I will only identify those once. RP 03-11-08, p. 5, ln. 25 to p. 6, ln. 7.

about 5'11", wearing a blue/purple knit cap, green backpack and blue jeans. He was described as being accompanied by another black male wearing all blue clothing, and a third undescribed male. The party was also described as walking dogs.⁶

In the 911 call, the reporting party identified herself and gave the address she was calling from. She also reported hearing popping sounds that might be possible gunshots.⁷

The CAD log of the call listed the name of the caller, the caller's phone number, and the residential address the call came from.⁸ A radio dispatch was issued to officers.⁹

Sgt. Griswold realized that the description matched the three persons she had seen about five minutes earlier and began to look for them. She was joined in the search by Detective Krancich, who was also in the area in a separate vehicle. [They] [l]ocated the described subjects near 37th and Pacific within a couple minutes.¹⁰

⁶ CP 60-61; 141-142; 194-195 (ln. 23-25 and 1-3). RP 03-11-08, p. 26ff. Exhibit 10.

⁷ CP 61; 142; 195 (ln. 4-6). Exhibit 10.

⁸ CP 61, 142; 195 (ln. 7-8). RP 03-11-08, p. 58-59

⁹ CP 61; 142; 195 (ln. 9). RP 03-11-08, p. 27, ln. 2ff.

¹⁰ CP 61, 142, 195 (ln. 10-14). RP 03-11-08, p. 6-7, 27ff.

Sgt. Griswold contacted the party and ordered the subject (later identified as Desmond Johnson) to the ground. Johnson was initially non-compliant and appeared to be contemplating an escape. However, as other units arrived in the area Johnson then followed commands and got on the ground.¹¹

Once prone, Officer Griswold handcuffed Johnson for officer safety. She then explained the reason of the stop to him and he denied having a gun. She patted Johnson down and felt a hard object in his waist band. Believing it to be a gun, Officer Griswold removed it and found that it was a glass drug pipe with residue on it. Johnson admitted that it was a drug pipe.¹²

Johnson was arrested and searched incident to arrest. Additional controlled substances were found on Johnson.¹³

No other weapons were found on Johnson's person, however he was also carrying a backpack. Inside the pack, Officer Griwsold found a gun wrapped in an afro wig.¹⁴

¹¹ CP 61, 142, 195 (ln. 15-18). RP 03-11-08, p. 7-11.

¹² CP 61, 142, 195 (ln. 19-24). RP 03-11-08 p. 8-9.

¹³ CP 62; 143; 196 (ln. 1-2). RP 03-11-08 p. 9.

¹⁴ CP 62; 143; 196 (ln. 3-5). RP 03-11-08 p. 9

Sgt. Mueller subsequently assisted with the pat-down search of Johnson and noted what appeared to be two hard and unidentifiable objects in Johnson's pocket. He removed the items and several other items came out of the pocket, including two small plastic baggies of marijuana (and a candy mint).¹⁵

Sgt. Mueller arrived on scene while Sgt. Griswold was in the process of contacting and detaining Desmond Johnson. He let Sgt. Griswold finish her commands with the subjects, and then he contacted and detained Miranda.¹⁶

Officer Mueller placed handcuffs on Miranda and did a cursory weapons search of him. He felt a hard object in Miranda's sweatshirt pocket, and found it to be a switch-blade style knife. In Officer Mueller's mind, Miranda was under arrest at this point.¹⁷

As he continued the pat-down search of Miranda, he felt more hard objects in Miranda's pants pockets. One item turned out to be a pill container. He could see through the side of it, and it appeared to contain

¹⁵ CP 62-143-196 (ln. 6-9). RP. 03-13-08 p. 97.

¹⁶ CP 62; 143; 196 (ln. 10-13). RP 03-13-08 p. 92ff

¹⁷ CP 62; 143; 196 (ln. 14-17). RP 03-13-08 p. 93-94.

two small plastic baggies with what appeared to be powder cocaine or methamphetamine.¹⁸

Officer Reopelle arrived shortly after Officers Griswold and Krancich and detained the third person with Johnson. That person was later identified as Rutledge. Rutledge was detained in handcuffs and Officer Reopelle conducted a pat-down search of Rutledge for officer safety.¹⁹

Rutledge had a jacket pocket that was loose and open similar to a pouch and not covered. The jacket was thick, and Officer Reopelle wanted to make sure there wasn't a needle or razor blade in the pocket that might poke him.²⁰

Officer Reopelle opened the pocket and observed several baggies of marijuana.²¹ Rutledge was placed under arrest.²²

¹⁸ CP 62; 143; 196 (ln. 18-22). RP 03-13-08 p. 94-95.

¹⁹ CP 62-63; 143-144; 196-197 (ln. 23-24 and 1-2). RP 03-13-08 p. 127-128.

²⁰ CP 63; 144; 197 (ln. 3-5). RP 03-13-08 p. 128.

²¹ CP 63; 144; 197 (ln. 6). RP 03-13-08 p. 128.

²² CP 63; 144; 197 (ln. 7). RP 03-13-08 p. 128.

A search of Rutledge incident to arrest revealed bags of cocaine in Rutledge's front left pants pocket. The cocaine appeared to have been broken off a kilogram brick. It later field-tested positive as cocaine.²³

Sgt. Mueller testified regarding the 911 dispatch system. He advised that the system automatically identifies the phone number from which the call comes from. The system also identifies the location the call came from, and that in responding to such calls, the location was accurate about 99 out of 100 times. Many cell phones are GPS [global positioning satellite] activated and that dispatch can pin or triangulate those depending upon the cell service company.²⁴

The State filed charges.²⁵

D. ARGUMENT

1. INVESTIGATIVE DETENTIONS ARE LAWFUL WHERE THE TOTALITY OF THE CIRCUMSTANCES SUPPORT A REASONABLE SUSPICION OF CRIMINAL ACTIVITY.

In 1994 the Washington Court of Appeals (Division I) issued *State v. Randall* in which the court held that officers could conduct an investigatory *Terry* stop based upon information supplied to police by

²³ CP 63; 144; 197 (ln. 8-10). RP 03-13-08 p. 128-129.

²⁴ CP 63; 144; 197 (ln. 11-17). RP 03-13-08 p. 98-99.

²⁵ CP 1-3; 73-75; 150-152.

another person.²⁶ More specifically the court held the informant's information need not satisfy the *Aguilar-Spinelli* test because a *Terry* stop may be made upon a reasonable suspicion that a detainee is engaged in criminal activity, which is a lower standard than probable cause to believe that evidence of a crime will be found.²⁷ The court held that *State v. Jackson* was not applicable to the lower *Terry* stop standard, and adopted a totality of the circumstances test.²⁸ In *Randall*, the information was provided by a 911 caller.

Eight months after *Randall* was filed, The Washington Supreme Court issued *State v. Garcia*.²⁹ In *Garcia* the Supreme Court held that where the court is evaluating the validity of an investigative detention (*Terry* stop), the proper inquiry is whether, considering the totality of the circumstances, there is a substantial possibility that criminal conduct has occurred or is about to occur.³⁰

²⁶ *State v. Randall*, 73 Wn. App. 225, 868 P.2d 207 (1994).

²⁷ *Randall*, 73 Wn. App. at 228 (distinguishing as only applicable to probable cause determinations *State v. Jackson*, 102 Wn.2d 432, 688 P.2d 136 (1984) (holding the *Aguilar-Spinelli* test continues to apply to probable cause determinations in Washington.).

²⁸ *Randall*, 73 Wn. App. at 229.

²⁹ *State v. Garcia*, 125 Wn.2d 239, 883 P.2d 1369 (1994).

³⁰ *Garcia*, 125 Wn.2d at 242.

The court in *Garcia* relied primarily on *State v. Kennedy*,³¹ In doing so the court emphasized that:

Information from a “citizen” “does not require a showing of the same degree of reliability as the informant’s tip since it does not come from a professional informant.[³²]

In *Garcia*, the informant was a citizen who had previously identified a person carrying drugs to the same officer who was contacted in *Garcia*.³³ The person identified by the informant in the prior incident was contacted and ended up being arrested.³⁴ In *Garcia*, the informant advised the officer that a person (Garcia) had told the informant he was carrying drugs, and that he had entered the adjacent Blue Banjo Tavern.³⁵ The officer entered the tavern and observed a prostitute offering the defendant a small box of some value and the defendant making a gesture of refusal.³⁶ The court overturned the Court of Appeals and held the investigative detention valid and upheld the conviction.³⁷

³¹ *State v. Kennedy*, 107 Wn.2d 1, 726 P.2d 445 (1986).

³² *Garcia*, 125 Wn.2d at 242 (citing *Kennedy*, 107 Wn.2d at 8).

³³ *Garcia*, 125 Wn.2d at 242.

³⁴ *Garcia*, 125 Wn.2d at 242.

³⁵ *Garcia*, 125 Wn.2d at 242.

³⁶ *Garcia*, 125 Wn.2d at 242.

³⁷ *Garcia*, 125 Wn.2d at 243.

2. HISTORICAL OVERVIEW TO WASHINGTON CASES WHERE INVESTIGATIVE DETENTIONS WERE BASED UPON INFORMATION SUPPLIED BY AN INFORMANT.

In 1975 in *State v. Lesnick*, the Washington Supreme Court held that informants' tips to police must provide some indicia of reliability in order to serve as the basis for an investigative detention.³⁸ The test applied by the court in *Lesnick* is a totality of the circumstances test.

Evaluating the reasonableness of the police action and the extent of the intrusion, each case must be considered in light of the particular circumstances facing the law enforcement officer.^{39]}

In *Lesnick*, the tip consisted of a phone call to police in which said that in the city [of Kelso] there was a van pulling a trailer, the driver of which was attempting to sell punchboards.⁴⁰ The caller also provided the license number of the van.⁴¹ The caller was completely anonymous, refused to identify himself and gave no information as to the source of his knowledge.⁴² The court stated:

³⁸ *State v. Lesnick*, 84 Wn.2d 940, 943, 530 P.2d 243 (1975) (citing *Adams v. Williams*, 407 U. S. 143, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972)).

³⁹ *Lesnick*, 84 Wn.2d at 945.

⁴⁰ *Lesnick*, 84 Wn.2d at 941.

⁴¹ *Lesnick*, 84 Wn.2d at 941.

⁴² *Lesnick*, 84 Wn.2d at 941.

It is difficult to conceive of a tip more “completely lacking in indicia of reliability” than the one provided by a completely anonymous and unidentifiable informer, containing no more than a conclusory assertion that a certain individual is engaged in criminal activity. While the police may have a duty to investigate tips which sound reasonable, absent circumstances suggesting the informant’s reliability, or some corroborative observation which suggests either the presence of criminal activity or that the informer’s information was obtained in a reliable fashion, a forcible stop based solely upon such information is not permissible.^[43]

In *State v. Sieler* the court reaffirmed that police may conduct an investigatory detention if they have a “well founded suspicion based upon object facts” that the individual is connected to actual or potential criminal activity.⁴⁴ The court also reaffirmed that an informant’s tip must possess sufficient indicia of reliability in order to support a valid suspicion by police.⁴⁵

The facts in *Sieler* are instructive. James Tuntland, the father of a student at Kent-Meridian High school observed what he believed to be a drug sale in another car in the parking lot. He informed the school

⁴³ *Lesnick*, 84 Wn.2d at 944 (quoting the Court of Appeals opinion, *State v. Lesnick*, 10 Wn. App. 281, 285, 518 P.2d 199 (1973)).

⁴⁴ *State v. Sieler*, 95 Wn.2d 43, 46-47, 621 P.2d 1272 (1980).

⁴⁵ *Sieler*, 95 Wn.2d at 47.

secretary by telephone of his conclusion, described the car and reported its license number, gave his phone number and left.⁴⁶

The secretary called police. Two officers were told by radio that a drug transaction had possibly occurred in the school parking lot in a black-over-gold Dodge with a particular license plate number being identified. No details regarding the transaction were identified to the officers. When the officers asked who the informant was and how the sale was discovered, they were simply told that a Mr. Tuntland had concluded a drug transaction had occurred. All the officers had to go on was the vehicle description.⁴⁷

Before the officer went over to the vehicle, they contacted the vice-principal. He advised them that a few minutes earlier there were two females who were students along with two males who were not students, that the four were playing cards, and that he had not observed any contraband or anything unusual or suspicious. The officers detained the two males, and as a direct result of that detention, found controlled substances, leading to the arrest of the two males, one of which was Sieler.⁴⁸

⁴⁶ *Sieler*, 95 Wn.2d at 44-45.

⁴⁷ *Sieler*, 95 Wn.2d at 45.

⁴⁸ *Sieler*, 95 Wn.2d at 45.

The court held that nothing under these facts indicated the reliability of the informant any more than was the case in *Lesnick*.⁴⁹ The court held that the informant in *Sieler*, as in *Lesnick*, was named but unknown. The court also held that the information provided by the informant was nothing more than a bare conclusion.⁵⁰ Finally, the court noted that even if the officers had a well founded suspicion when they first arrived at the school, that was dispelled by the comments of the Vice-Principal.⁵¹

In *State v. Kennedy* the court upheld the search of an automobile based on an informant's tip. The court in *Kennedy* held that under Art. I § 7 less than probable cause is required to justify a *Terry* stop.⁵² The court continues:

LaFave suggests that the standard is a substantial possibility that criminal conduct has occurred or is about to occur. We believe this to be the preferred definition. It maintains the ability of law enforcement to deter criminal conduct and yet reasonably safeguards "private affairs." When the activity is consistent with criminal activity, although also consistent with noncriminal activity, it may justify a brief detention.[⁵³]

⁴⁹ *Sieler*, 95 Wn.2d at 48.

⁵⁰ *Sieler*, 95 Wn.2d at 48.

⁵¹ *Sieler*, 95 Wn.2d at 49.

⁵² *Kennedy*, 107 Wn.2d at 6.

⁵³ *Kennedy*, 107 Wn.2d at 6.

The court then goes on to reaffirm what is a totality of the circumstances test from *Lesnick*.

[...] “no single rule can be fashioned to meet every conceivable confrontation between the police and citizen. Evaluating the reasonableness of the police action and the extent of the intrusion, each case must be considered in light of the particular circumstances facing the law enforcement officer.” This is consistent with our approach to article 1, section 7 which requires us to look at the reasonableness of the officers actions to determine whether private affairs were disturbed.⁵⁴ [Citation omitted.]

The facts in *Kennedy* were as follows. Neighbors of one Rob Smith complained to police of heavy foot traffic in and out of Smith’s house involving short stays.⁵⁵ An informant also advised police that Michael Kennedy regularly purchased marijuana from Smith, and that he went to Smith’s house to do so.⁵⁶ The informant had supplied the officer with tips for several months, and had been reliable, with one tip leading to the issuance of a warrant and a subsequent conviction.⁵⁷ The informant also identified that Kennedy would drive either of two vehicles, including a maroon Oldsmobile that belonged to one Sue Sison.⁵⁸ A records check

⁵⁴ *Kennedy*, 107 Wn.2d at 7 (citing *State v. Lesnick*, 84 Wn.2d 940, 944, 530 P.2d 243 (1975)).

⁵⁵ *Kennedy*, 107 Wn.2d at 3.

⁵⁶ *Kennedy*, 107 Wn.2d at 3.

⁵⁷ *Kennedy*, 107 Wn.2d at 3.

⁵⁸ *Kennedy*, 107 Wn.2d at 3.

of the license revealed the car in fact belonged to Sison.⁵⁹ Kennedy was pulled over after he came out of the house and drove off.⁶⁰ He was pulled over even though the officer saw nothing in Kennedy's hands and no suspicious activity.⁶¹ The court held the investigative detention was valid.⁶²

3. THIS CASE IS DISTINGUISHABLE FROM
HOPKINS.

Here, the 911 informant identified both her phone number and the address she was calling from. Additionally, as Sgt. Mueller explained, the 911 system automatically picks up the number and address of the call. That factual record makes the call in this case more reliable.

Additionally, the caller explained that she personally observed the male with the gun, gave very specific descriptions of the persons and even described the gun as chrome.

These additional details distinguish this case from *Hopkins*.

⁵⁹ *Kennedy*, 107 Wn.2d at 3.

⁶⁰ *Kennedy*, 107 Wn.2d at 3.

⁶¹ *Kennedy*, 107 Wn.2d at 3.

⁶² *Kennedy*, 107 Wn.2d at 8-9.

4. THE DEFENSE RELIANCE UPON **HOPKINS** IS MISPLACED BECAUSE **HOPKINS** WAS CONTRARY TO ESTABLISHED PRECEDENT AND WRONGLY DECIDED.

For eleven years **Randall** had been the well established controlling precedent on the issue of whether officers could rely on reports to police dispatch to conduct investigative detentions. Then, in 2005, the Washington Court of Appeals (Division II) issued an opinion that **State v. Hopkins** conflicted with **Randall**.⁶³ In **Hopkins** the court overturned the defendant's conviction, holding that the investigatory stop of Hopkins was unlawful where the State failed to establish the reliability of a caller to 911.⁶⁴ Although the dissent in **Hopkins** specifically cited to **Randall** as pre-existing authority contrary to the court's holding in **Hopkins**, nonetheless, the majority did not consider or address **Randall** in the analysis.⁶⁵

In **Hopkins**, the court relies primarily on **Florida v. J.L.** That case is discussed further below. However, **Hopkins** does not properly fall under **J.L.** The court in **Hopkins** treated the informant in that case as an anonymous informant because police did not contact the caller and verify the caller's identity. However, that standard is contrary to **J.L.**

⁶³ **State v. Hopkins**, 128 Wn. App. 855, 117 P.3d 377 (2005).

⁶⁴ **State v. Hopkins**, 128 Wn. App. at 864.

⁶⁵ See **Hopkins**, 128 Wn. App. at 866 (Quinn-Brintnall dissenting).

In *J.L.* the caller was completely anonymous to police.⁶⁶ In Hopkins, the caller identified himself to police. Seven minutes later the informant called a second time giving an updated location for *Hopkins*. The statement of the informant also made it clear that the informant was reporting first-hand observations of the *Hopkins*.⁶⁷

5. FEDERAL COURTS HAVE ROUTINELY HELD THAT CITIZEN CALLS TO 911 ARE RELIABLE FOR PURPOSES OF INVESTIGATIVE DETENTION.

Although many Washington cases have consider investigative detentions under Art. 1 § 7, none have found a significant difference from federal law, and most of the Washington cases on the issue have relied upon the federal law regarding whether informants' reports support investigative detentions.⁶⁸ Several of the cases also rely upon Professor LaFave's multi-volume treatise on search and seizure, which is essentially

⁶⁶ *J.L.* 529 U.S. at 268 (noting that, “[s]o far as the record reveals there is no audio recording of the tip and nothing is known about the informant.”)

⁶⁷ *Hopkins*, 128 Wn. App. at 858.

⁶⁸ See *Lesnick*, 84 Wn.2d 942-945 (citing *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); *Adams v. Williams*, 407 U.S. 143, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972); and affirming Washington case law (in *State v. Gluck*, 83 Wn.2d 424, 518 P.2d 703 (1974) is consistent with the approach of the U.S. Supreme Court); *Seiler*, 95 Wn.2d at 47 and 48 (relying on *Adams*, 407 U. S. 143 and *United States v. McLeroy*, 584 F.2d 746, 748 (5th Cir. 1978); *Kennedy*, 107 Wn.2d at 6 (relying on *Terry*, 392 U.S. 1; *Adams*, 407 U.S. 143; *United States v. Cortez*, 449 U.S. 411, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981).

an analysis of federal law.⁶⁹ Accordingly, it is appropriate to look at the federal case law on the interpretation of this issue.

It appears that every federal appellate court that has considered the issue has generally held that calls to 911 are in fact reliable where the caller is not actually completely anonymous. Where courts have not found 911 calls to provide a reliable basis for an investigative detention is where there are no facts suggesting a connection between the persons contacted and the subject of the 911 report. A summary of federal appellate court cases is included below.

a. United States Supreme Court

In *Florida v. J.L.* the court held that a completely anonymous phone tip to police was not reliable to support an investigative detention where the tip merely asserted that an individual at a bus stop had a gun.⁷⁰ Because the call merely identified the subject of the tip, and did not provide any predictive information on the subject that would allow law enforcement to test the accuracy of the information.⁷¹ Neither did the

⁶⁹ See *Sieler*, 95 Wn.2d at 48 (citing 3 W. LaFave, Search and Seizure (1978); *Kennedy*, 107 Wn.2d at 6 (citing 3 W. LaFave, Search and Seizure (1978)).

⁷⁰ *Florida v. J.L.* 529 U.S. 266, 120 S. Ct. 1375, 146 L. Ed 2d 254 (2000).

⁷¹ *J.L.*, 529 U.S. at 271.

report explain how the informant knew about the gun, or provide any basis for believing that the informant had inside information.⁷²

b. First Circuit

In *United States v. Romain*, the court held that officers had a valid basis to conduct a brief investigative detention where a 911 caller who did not identify herself reported that there was a male with a gun in her friend's apartment where she was located and asked 911 to trace the call.⁷³

c. Second Circuit

In *United States v. Elmore*, the court overturned a lower court's suppression ruling and held that an informant's tip was sufficient to support an investigative detention.⁷⁴ *Elmore* also contains a good overview of federal case law on this issue.

In *Elmore*, a police detective received a call from a woman who identified her self as Dorothy and provided her home and cell phone numbers. She told the detective that Elmore was in possession of weapons and expressed concern that he might harm somebody. The detective had never spoken to the informant before, but did speak with her four times over the course of the day, obtaining more information from her. He

⁷² *J.L.*, 529 U.S. at 271.

⁷³ *United States v. Romain*, 393 F.3d 63 (1st Cir. 2004).

obtained her full name and obtained details from her regarding another incident in which Elmore had been a victim of a shooting. The detective did not go to the informant's home address, nor call her home phone number. The informant advised the detective about a number of details related to Elmore's location, vehicles and persons he was associated with and details on the guns. The detective was able to independently verify many of these facts.⁷⁵

d. Third Circuit

In *United States v. Torres*, the court held that a 911 call by a taxi driver who wanted to remain anonymous but who identified his employer was sufficient to render his call reliable.⁷⁶ The caller reported that he was pumping gas at a station when he saw another person pumping gas at an adjacent pump flashed a gun at a bum who was selling roses. The caller thought he could identify the type and caliber of the gun and that it was located in the center console of the suspect's vehicle. The caller described the suspect vehicle and reported the license plate number. In upholding the investigative detention, the court overturned a suppression ruling by the trial court.

⁷⁴ *United States v. Elmore*, 482 F.3d 172 (2nd Cir. 2007)

⁷⁵ *Elmore*, 485 F.3d at 175-177.

⁷⁶ *United States v. Torres*, 534 F.3d 207 (3rd Cir. 2008).

e. Fourth Circuit

In *United States v. Quarles* the court held that a 911 caller's report to local police that the suspect was walking and carrying a gun in a bag was sufficiently reliable to support an investigative detention where the caller gave his name, indicated that the defendant was wanted by the U.S. Attorney's office on a warrant for carrying a gun.⁷⁷ The court upheld the report even where the caller related that the suspect had killed the caller's brother, but "beat the case." The suspect was not carrying a bag when contacted by the officer. However, the officer was able to find a bag in a bush where the suspects had been standing when the officer turned the corner.⁷⁸

On the other hand, in *United States v. Brown*, the court held that an anonymous telephone tip was not sufficient to support an investigative detention where the tip was that a black male with glasses was carrying a firearm outside an apartment complex.⁷⁹ Police arrived and observed individuals inside the apartment motioning and telling a person (the defendant) to leave the apartment. He stepped out. Officers contacted him and he appeared intoxicated. The officers were about to arrest him for

⁷⁷ *United States v. Quarles*, 330 F.3d 650 (4th Cir. 2008).

⁷⁸ *Quarles*, 330 F.3d at 651-653.

⁷⁹ *United States v. Brown*, 401 F.3d 588 (4th Cir. 2005). Ultimately the court did not determine whether the stop was an investigative detention or a consensual police-citizen encounter because either way the evidence was obtained unlawfully.

public intoxication when a fight broke out in the apartment. They called for back-up and for officer safety had the defendant put his hands on the vehicle which cause him to bend over and revealed the bulge of a weapon in his back pocket.⁸⁰ The court held the informant's tip was unreliable because it was anonymous and because it did not predict the suspect's future behavior, so the officers could not independently corroborate it.⁸¹

Similarly, in *United States v. Jones*, the court held a caller's report was not sufficiently reliable to support the investigative detention of a vehicle containing four black males where an anonymous caller had previously complained that "several black males" were drinking beer and causing a disturbance near a particular intersection two tenths of a mile away from the stop.⁸² The caller did not provide any further physical description and did not state if they were in or near a vehicle. Two officers responded, scouted the reported area and found it was clear. While they were leaving the area, about two tenths of a mile away the officers noticed a car coming into the area. It was not committing any traffic infractions, but contained four black males, so the officer stopped the vehicle based solely on the telephone complaint.⁸³

⁸⁰ *Brown*, 401 F.3d at 590-592.

⁸¹ *Brown*, 401 F.3d at 596.

⁸² *United States v. Jones*, 242 F.3d 215 (4th Cir. 2001)

⁸³ *Jones*, 242 F.3d at 216-217.

f. Fifth Circuit

No cases addressing the issue were found.

g. Sixth Circuit

In *United States v. Cohen*, the court held an investigative detention invalid where police responded to a silent 911 hang-up call at a particular address and as the officers approached the general area they observed a car leaving the general area and pulled it over.⁸⁴ The address the call came from was a cul de sac with five or six houses running off of another dead end street. Even so, the court held that silent hang-up call did not provide a lawful basis to conduct an investigatory stop because it did not identify a determinate person.⁸⁵

In *Feathers v. Aey*, a civil lawsuit against two officers and the City of Akron, the court held the investigative detention was an unlawful violation of the defendant's rights, but nonetheless held summary judgment was proper under the defendants' claim of qualified immunity.⁸⁶ Police received a 911 call in which the caller refused to identify himself by name. He said that moments earlier a male with a beard on a porch had pointed something at the caller and told him to shut up. The caller also said that he looked like he was drunk and that although he didn't know the

⁸⁴ *United States v. Cohen*, 481 F.3d 896 (6th Cir. 2007).

⁸⁵ *Cohen*, 481 F.3d at 899-900.

address, the house was two from the corner. Officers were told to look for a suspicious, possibly intoxicated person, possibly with a weapon. There was no sign of the persons at the address listed by dispatch, but a nearby house did have persons matching the description and officers concluded it was the suspect. Officers attempted to contact the suspect, Feathers and ultimately arrested him after his refusal to show his hands. The court held that for purposes of the civil rights violation, they treated the call as a tip by an anonymous informant, but for purposes of the qualified immunity analysis, the officers treated it as a dispatch case.⁸⁷

h. Seventh Circuit

In *United States v. Drake*, the court held that an investigative detention was warranted where the 911 caller was not asked to identify herself until police were arriving on the scene, but did so in the course of her call, when asked by 911 and it took only a short period of time for the police to arrive.⁸⁸ The caller used a cell phone to report on a situation she saw from her nearby car. She reported that a group of four black men in a Cadillac and two women in a LeSabre were involved in a disturbance and that each group had a gun. The caller stated that she witnessed the occupants exit the car and watched one of them pull a gun on the caller's

⁸⁶ *Feathers v. Aey*, 319 F.3d 843 (6th Cir. 2003)

⁸⁷ *Feathers*, 319 F.3d at 846 to 849.

son-in-law. She then saw the cars drive away, described the cars, the occupants and their locations and asked if police were on the way. The caller was asked her name and responded, “Police coming down the street. My name is Linda Williams...” Officers stopped the vehicle. Drake was the driver and officers recovered a revolver from the floorboard beneath his feet. The court presumed the reliability of a 911 caller reporting an emergency.⁸⁹

As the court noted:

Requiring further indicia of reliability would only jeopardize the usefulness of the 911 system and the ability of officers to prevent further danger to the public.^[90]

i. Eighth Circuit

No cases addressing the issue were found.

j. Ninth Circuit

In *United States v. Terry-Crespo*, the court held that a 911 caller’s report provided a valid basis for an investigative detention even though in his initial call he did not know the number of his cell phone, did not respond to a query for another number and listed a nonexistent intersection

⁸⁸ *United States v. Drake*, 456 F.3d 771 (7th Cir. 2006)

⁸⁹ *Drake*, 456 F.3d at 772-775.

⁹⁰ *Drake*, 456 F.3d at 775.

for his location.⁹¹ The caller, who claimed that three minutes earlier a suspect had threatened him with a .45 handgun, described the suspect's attire in detail and said he was attired like a "gang member." In the initial call the caller also gave an unusual spelling for his surname, and after giving the non-existent intersection for his location finished by stammering, "I don't want...I don't want...I don't want...." apparently indicating he did not want police contact. An operator dispatched officers. The caller called again and identified himself and Domingis identified himself by name, and although claiming to be almost a mile and a half away from the suspect, reported the suspect's location. Officers arrived, detained the suspect, patted him down for weapons and found a gun on him.

The court held that the initial call possessed a sufficient indicia of reliability where the call was not anonymous because the recorded 911 call narrowed the likely class of informants.⁹²

k. Tenth Circuit

In *United States v. Brown*, the court held that a man's call to 911 reporting that a woman was being held against her will at a particular address was sufficient to support an investigative detention even though

⁹¹ *United States v. Terry-Crespo*, 356 F.3d 1170 (9th Cir. 2004).

⁹² *Terry-Crespo*, 356 F.3d at 1174.

the caller only gave his first name and subsequently said he wanted to remain anonymous.⁹³ The caller claimed to have been in the apartment and let when threatened by the man with the gun, Brown. Officers were able to verify that a vehicle outside the apartment was registered to the reported victim, who was listed as resided at the address indicated by the caller. Officers attempted to call back the phone the 911 call was made from, but got no response. While the officers were outside the apartment and preparing to go and knock on the door, the suspect came out. The officers drew their weapons and ordered the Brown to show his hands. Brown complied, was detained and when asked acknowledged that he had a gun in his left front pocket.⁹⁴

The court held that the caller was not anonymous because, having identified himself by his first name and having identified himself as a friend of the victim and as having been present in the apartment when the incident occurred, the caller belonged to a relatively small population.⁹⁵ The court also held it important that the caller also had first-hand knowledge that the victim was being held against her will, having been in the apartment when the incident began.⁹⁶

⁹³ *United States v. Brown*, 496 F.3d 1070 (10th Cir. 2007).

⁹⁴ *Brown*, 496 F.3d at 1070-1073.

⁹⁵ *Brown*, 496 F.3d at 1076.

⁹⁶ *Brown*, 496 F.3d at 1076-1077.

In *United States v. Harris*, the court held that an investigative detention was lawful where an employee at a restaurant called the sheriff's department to report that two men were smoking marijuana outside the restaurant's drive through window.⁹⁷ She called back a second time to report that the two were walking to a nearby car wash.⁹⁸ Because the employee gave her name and place of employment, the court held that she was not an anonymous caller and the officer could rely on her report.⁹⁹

1. Eleventh Circuit

No cases addressing the issue were found.

In summary, of all the cases reviewed, the only cases where the courts held that tips from 911 callers did not provide a valid basis for an investigative detention were where there was no factual basis to believe that the person(s) contacted were the subjects of the reports.¹⁰⁰

State v. Hopkins clearly runs contrary to the federal cases. In *Hopkins* the 911 dispatch had the caller's name and phone number, which also appeared on the computers in the patrol car. Additionally, the caller called back to make a second updated report, gave a generally accurate

⁹⁷ *United States v. Harris*, 313 F.3d 1228 (10th Cir. 2002).

⁹⁸ *Harris*, 313 F.3d at 1231.

⁹⁹ *Harris*, 313 F.3d at 1235-1236.

¹⁰⁰ See *United States v. Brown*, 401 F.3d 588 (4th Cir. 2005); *United States v. Jones*, 242 F.3d 215 (4th Cir. 2001).

description of the suspect and that he was scratching his leg with what looked like a gun. All of this provides an factual basis warranting an investigative detention of the suspect. In short, *Hopkins* runs contrary to the full weight of federal authority.¹⁰¹

D. CONCLUSION.

The court should reverse the trial court's suppression ruling and resultant dismissal order where the totality of the circumstances establishes that the 911 informant's report was sufficient to justify an investigative detention of Johnson, Miranda and Rutledge.

DATED: September 8, 2008.

GERALD A. HORNE
Pierce County
Prosecuting Attorney



STEPHEN TRINEN
Deputy Prosecuting Attorney
WSB # 30925

¹⁰¹ See *Hopkins*, 128 Wn. App. 855.

FILED
COURT OF APPEALS
CRIMINAL

00 SEP -08 PM 2: 02

STATE OF WASHINGTON
BY [Signature]
DEPUTY

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

9/8/08 [Signature]
Date Signature