

NO. 37661-0-II

COURT OF APPEALS  
DIVISION II

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COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

STATE OF WASHINGTON  
BY  DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

RONALD E. GUNDERSON, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Thomas P. Larkin

No. 07-1-05390-1

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**BRIEF OF RESPONDENT**

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

1. Whether deputies had reasonable suspicion to detain the defendant for criminal activity?
2. Whether a protective frisk was authorized where there was reason to believe that the defendant presented a danger to the deputies?
3. Whether the deputies displayed guns during the detention, and if so, was such an action justified?
4. Whether deputies exceeded the lawful scope of the detention, thereby resulting in a premature arrest?
5. Whether statements made by the defendant during the detention were admissible?
6. Whether the investigative detention led to probable cause to arrest the defendant?

B. STATEMENT OF THE CASE.

1. Procedure

On November 26, 2007, the Pierce County Prosecuting Attorney charged Ronald Gunderson, hereinafter referred to as the defendant, with one count of theft in the first degree, and one count of theft in the second degree, arising from the theft of two boats on July 6, 2007. CP 1-3. The

Prosecuting Attorney later amended the Information to add the sentence aggravating factor of the multiple offense policy (RCW 9.94A.535, 589). CP 28-29.

March 24, 2008, the case was assigned to Hon. Thomas P. Larkin for trial. RP<sup>1</sup>. The defendant had filed a Motion to Suppress Evidence. CP 6-15. Before the substantive trial began, the court conducted a suppression hearing under CrR 3.6. 2 RP. The court denied the Motion to Suppress. 2 RP 52. The court later entered written Findings of Fact and Conclusions of Law. 5 RP 205, CP 125-129.

The case proceeded to trial. 3 RP. The jury found the defendant guilty of theft in the first degree, as charged in Count I. CP 91. The jury did not reach a verdict on Count II. CP 93, 94. The State later moved to dismiss Count II because the jury could not reach a verdict, and the defendant's offender score exceeded 9 already. CP 130-131.

On April 18, 2008, the court sentenced the defendant to 57 months in the Dept. of Corrections. 5 RP 212, CP 132-144. The defendant filed his Notice of appeal at that time. 5 RP 212, CP 285-298.

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<sup>1</sup> The relevant Reports of Proceedings in this case are all from Judge Larkin's court. They are labeled Vol. 1-5 and number sequentially, beginning with 1. They will be referred to as 1 RP 1, etc.

## 2. Facts<sup>2</sup>

Peter Wooding owns a waterfront home near Raft Island in rural Pierce County. 2 RP 18, 33, 35, 37. The night of July 5/morning of July 6, 2007, he and another person were camping out in his front lawn near the water. 2 RP 18, 36. Early on the morning of July 6, they noticed a man driving a boat around and then working on it nearby. 2 RP 18. They described the person as “milling around” all morning. 2 RP 19. The house nearby was vacant and for sale. 2 RP 20. They called 911 to report a burglary in progress. 2 RP 19, CP 125.

At approximately 3:55 a.m., two Pierce County Sheriff Deputies arrived. 2 RP 18. They contacted the witnesses, who pointed out the boat and person they were reporting. The witnesses told the deputies that they thought the person was stealing the boat. 2 RP 29. The witnesses and the deputies could see the silhouette of a man hunched over a boat motor. They could hear the sound of a wrench or other tools clanking as if the man was working on the boat’s motor. The deputies could hear bolts falling into the boat and rattling around. 2 RP 31. The witnesses told them that the boat did not belong to anyone in the area. 2 RP 39.

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<sup>2</sup> Facts are also taken from the trial court’s unchallenged Findings of Fact. CP 125-129. As unchallenged findings of fact, they are verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

The boat was aground at that point. The tide had gone out. 2 RP 20. The man (later identified as the defendant) was standing in the mud, at the stern of the boat. The defendant had a wrench in his hand and was unfastening bolts holding the motor onto the boat. 2 RP 20.

The deputies approached and announced “Police” and told him not to move. 2 RP 20. They requested that he show his hands. 2 RP 21, 20. The defendant dropped the wrench and folded his arms. 2 RP 21. He had a flashlight in his belt. *Id.*

The deputies advised the defendant of his *Miranda*<sup>3</sup> rights. 2 RP 23. The deputies asked the defendant what he was doing. The defendant seemed confused or bewildered. 2 RP 25. The defendant first told them that he was helping a friend by working on the motor. He said that his friend owned the boat. He did not know the friend’s name, where the friend was, or any other information regarding the friend. 2 RP 25, CP 127. Then he told police that he was digging for clams. Then the explanation changed to that he was having problems with the motor; that it had overheated. The motor was cool to the touch. 2 RP 26. When the deputies told the defendant that they did not believe him, he stopped answering questions and said he had had enough. 2 RP 27.

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<sup>3</sup> *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)

Deputies found a car registered to the defendant parked in the driveway of the vacant house. 2 RP 28. The deputies ran the registration on the boat. It was registered to a homeowner further down the waterway. 2 RP 40. One of the deputies contacted the registered owner. The owner reported that the boat was stolen. 2 RP 40, CP 128.

The deputies arrested the defendant for theft. 2 RP 30.

C. ARGUMENT.

1. THE DEPUTIES CONDUCTED A LAWFUL **TERRY** STOP OF THE DEFENDANT.

a. The deputies had reason to suspect the defendant was engaged in criminal activity.

To justify an investigative detention or “**Terry** stop” under the Fourth Amendment, and art. I, § 7, a 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." **Terry v. Ohio**, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L.Ed.2d 889 (1968); **State v. Armenta**, 134 Wn.2d 1, 20, 948 P.2d 1280 (1997). The level of articulable suspicion necessary to support an investigative detention is "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). Probable cause is not

required for a Terry stop because a stop is significantly less intrusive than an arrest. *Id.*

A *Terry* stop of a person is justified if the officer can "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry*, 392 U.S. at 21; *State v. White*, 97 Wn.2d 92, 105, 640 P.2d 1061 (1982); *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). When reviewing the merits of an investigatory stop, a court must evaluate the totality of circumstances presented to the investigating officer. *State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 760 (1991). The court takes into account an officer's training and experience when determining the reasonableness of a *Terry* stop. *Id.* Also, a *Terry* stop is not rendered unreasonable solely because the officer did not rule out all possibilities of innocent behavior before initiating the stop. *State v. Anderson*, 51 Wn. App. 775, 780, 755 P.2d 191 (1988).

The facts in cases where investigative detentions have been upheld reflect the many different situations police are confronted with in their daily work. In *Terry*, a detective saw a man, later detained and arrested, walk several times past a store window at about 2:30 in the afternoon. The man looked into the store. The man later spoke with his companion, who

also walked past the store and looked into the window. The two did this 5-6 times each. Based upon his training and experience, the detective suspected the men were planning a robbery, and stopped them to investigate.

In *Glover*, Seattle police saw the defendant at a public housing apartment block. The officers did not recognize him as a resident, so they attempted to stop him to investigate criminal trespassing.

In *State v. Miller*, 91 Wn. App. 181, 955 P.2d 810 (1998), police saw the defendant and another man arguing on a sidewalk at 3:45 a.m. The defendant was pointing his finger at the other man. Police stopped the two to investigate whether they had been fighting, or a fight was about to begin. The two men walked in opposite directions as police approached.

In *State v. Bray*, 143 Wn. App. 148, 177 P.3d 154 (2008), police saw the defendant in a storage unit yard at 2:30 a.m. The defendant was looking at the doors of storage units. Police stopped the defendant to investigate burglary and theft.

Here, the deputies had as much or more to go on. The witnesses reported their observations. The deputies could also see suspicious activity. At nearly 4:00 a.m. in a secluded area, the defendant possessed a boat belonging to someone else. He was trying to remove the motor. He gave conflicting, untrue explanations for his activity. There was reason to suspect criminal activity.

b. A protective frisk was justified under the circumstances.

During a *Terry* stop, police may frisk a person for weapons if the officer has reason to believe that the person poses a danger to the officer or others. In evaluating such cases:

“[C]ourts are reluctant to substitute their judgment for that of police officers in the field. “A founded suspicion is all that is necessary, some basis from which the court can determine that the [frisk] was not arbitrary or harassing.”

*State v. Collins*, 121 Wn.2d 168, 173-174, 847 P.2d 919 (1993), quoting *State v. Belieu*, 112 Wn.2d 587, 601-02, 773 P.2d 46 (1989) (quoting, in turn, *Wilson v. Porter*, 361 F.2d 412, 415 (9th Cir.1966)).

In *Collins*, police stopped the car the defendant was driving for an equipment infraction. One of the officers recognized the defendant from a traffic stop and warrant arrest approximately 2 months before. During the earlier stop, police had discovered ammunition and a holster in the defendant’s nearby truck. Based upon these circumstances, even though the current stop was for a minor infraction, the police had the defendant exit his vehicle and conducted a weapons frisk. Police found a knife and drugs in his pocket.

The Supreme Court found the weapons frisk reasonable. The first factor the Court considered in determining if the weapons frisk was reasonable was the time of day. The Court noted that the stop occurred in the dark, early morning hours. That it would be difficult for police to see

the defendant's movements and whether there other accomplices about. The court noted that a person might be more inclined to commit violence against a police officer at a time and in circumstances when there were few witnesses around. *Id.*, at 174-175.

In *State v. Harvey*, 41 Wn. App. 870, 707 P.2d 146 (1985), the officer had been told of a burglary in progress. The defendant fit the description and had been pointed out as the suspect. The court noted that it was well known that burglars often carry weapons. The Court held that the pat-down fell within the self-protective frisk permitted by *Terry* and necessary to effective law enforcement. *Id.* at 874-875, citing *Terry*, 392 U.S. at 27.

Here, the circumstances of the time, location, defendant's actions, and seriousness of the suspected crime justified a protective frisk.

c. Use of weapons by the deputies during the detention would have been justified.

The defendant cannot show that the deputies drew their weapons during the initial detention. It is unknown if the deputies drew their guns during this investigative detention. Dep. Hales testified that they "might have" drawn their weapons (2 RP 36), but he was not sure (2 RP 38). The trial court made no finding regarding the deputies' use of weapons during the detention. CP 125-129. However, if they had drawn their weapons, the deputies would have been justified in doing so.

Police may draw their guns in the course of a *Terry* stop without turning the detention into an arrest. As with the detention itself and decision to frisk for weapons, the question of whether police drawing of weapons was reasonable is determined by the circumstances of each case:

No hard and fast rule governs the display of weapons in an investigatory stop. Rather, the court must look at the nature of the crime under investigation, the degree of suspicion, the location of the stop, the time of day and the reaction of the suspect to the police, all of which bear on the issue of reasonableness

*State v. Belieu*, 112 Wn.2d at 600.

In *Belieu*, a Spokane resident called police when men came to his door. It was nighttime and the resident suspected they were “casing” his house for a burglary. Undercover officers were nearby investigating another case. One officer went to the scene and saw two men walking, one of whom matched the description given. Other undercover officers arrived and saw the two men on the street. As one officer parked behind a nearby car, the driver slouched down. Officers in the area continued to watch the car and follow the men. Eventually, the men cut through some yards out of police sight and met up with the car. As the car was attempting to leave the area, police could see one of the passengers slouched down as if doing something. Police stopped the car. Officers pointed their guns at the

occupants and ordered them out. Police found guns and stolen property in the car and on the defendants. The defendants were later convicted of burglary and illegally possessing firearms.

The Supreme Court held this to be a lawful *Terry* stop. Further, the Court held that use of weapons by police under these facts was reasonable and did not turn the investigative detention into an arrest. *Belieu*, 112 Wn. 2d at 604. In so doing, the Court analyzed and distinguished its fairly recent decision in *State v. Williams*, 102 Wn.2d 733, 689 P.2d 1065 (1984).

In *Williams*, police responded to a burglar alarm one night in Kirkland. Police arrived to find the defendant parked in front of the house. He began to pull away as police pulled up. Police detained him. They found the house unsecured and ransacked and a television outside near the carport. The defendant had no plausible explanation for being in the area. An inventory of the defendant's car found stolen property. He was later convicted of burglary and theft.

The Court found that the initial stop was lawful under *Terry*. *Id.*, at 736. The Court went on to hold that the stop later exceeded the scope of the investigative detention. The officers failed to focus their inquiry with the defendant and the detention took too long. *Id.*, at 740-741.

As in *Belieu*, *Williams*, *Bray*, and *Harvey*, in the present case, the deputies were responding in the early morning hours to a report of a burglary in progress. They could see the defendant, but the light was dim.

As the deputies got closer, they could see that the defendant was holding a wrench. When the deputies ordered him to show his hands, the defendant did not respond at first. 2 RP 20. He then dropped the wrench and folded his arms as if nothing was going on. 2 RP 21.

Under the totality of the circumstances, it was reasonable for the deputies to control the defendant by the use of handcuffs or the display of weapons and frisk him for any other items that he could possibly assault them with during the investigative detention. The frisk disclosed the pliers and screwdriver in his back pocket. The deputies' control of the situation did not transform the investigative detention into an arrest.

- d. The statements were made during the scope of a lawful investigative detention.

While an initial detention for investigative reasons may be lawful, evidence may be suppressed if it is discovered beyond the scope of the detention. In *State v. Williams*, *supra*, the Supreme Court found the initial stop valid, but suppressed the evidence discovered because police exceeded the permissible scope of the stop. Instead of questioning the suspect about his presence and activity, the police detained him and went to check the nearby house and called for a canine unit. 102 Wn. 2d at 740-741.

In the present case, unlike *Williams*, the detention focused on the defendant and his activities. As soon as they had controlled the situation, the deputies advised the defendant of his Miranda rights, out of an

abundance of caution. The deputies immediately asked him what he was doing there and what was going on. The deputies listened and checked out his explanations. They found each, in turn, was false. He admitted that the boat and motor was not his. It was therefore appropriate for the scope of the detention to include time for the deputies to run the boat registration. Only after they had spoken with the defendant and checked his stories did the deputies investigate the rest of the scene. That is when they found the defendant's car and the second boat near it.

The investigative detention in the present case is amply supported by the facts and circumstances. Although *Terry* and its progeny permit the courts to take into account an officers training and experience, in this case the circumstances were sufficiently obvious that the neighbor suspected that the defendant was stealing the boat and called 911. At nearly 4:00 a.m., near a vacant house, in tidal mudflats, the defendant was removing the bolts attaching a motor to a boat that was aground. The deputies and the witnesses watched the defendant's behavior before contacting him. The boat did not belong to the defendant. He gave three conflicting stories regarding what was going on. The boat was registered to a person who lived nearby, whom the defendant did not know.

The court committed no error in concluding that the deputies had reasonable suspicion that the defendant was engaged in criminal activity.

Under the circumstances, the deputies were justified in controlling the defendant and frisking him for weapons. The initial contact with the defendant was an investigative detention, not an arrest.

2. THE INVESTIGATIVE DETENTION LED TO PROBABLE CAUSE TO ARREST THE DEFENDANT.

The question of probable cause is a mixed question of law and fact, and it involves a review of both facts and law. *State v. Vasquez*, 73 Wn. App. 310, 317, 34 P.3d 1255 (2001). In the present case, the defendant does not challenge the court's findings of fact. The reviewing court then decides whether the facts support the legal conclusion--probable cause. *Vasquez*, 73 Wn. App. at 317. This is a legal question that the court reviews de novo. *Id.*

“Probable cause exists ‘where the facts and circumstances within the arresting officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in a belief that an offense has been . . . committed.’” *State v. Herzog*, 73 Wn. App. 34, 53, 867 P.2d 648 (1994) (citations omitted). “The question of probable cause should not be viewed in a hypertechnical manner.” *State v. Remboldt*, 64 Wn. App. 505, 510, 827 P.2d 282, *review denied*, 119 Wn.2d 1005 (1992).

The point at which the defendant was under arrest is a legal conclusion determined by the court, not by the deputies. An officer informing a suspect that he is under arrest does not necessarily turn a lawful investigative detention into an arrest. *See, State v. Lyons*, 85 Wn. App. 268, 270, 932 P.2d 188 (1997). Here, the deputies had lawfully detained the defendant in a theft or burglary investigation. Out of an abundance of caution, they advised him of his *Miranda* rights. The defendant made several statements. The determination of probable cause does not require police to believe or trust a suspect's explanation or defense. *McBride v. Walla Walla County*, 95 Wn. App. 33, 975 P.2d 1029 (1999).

The combination of the deputies' observations, the circumstances, defendant's prevarications, and the independent confirmation that the boat was missing from its rightful owner quickly supplied probable cause to arrest the defendant for theft or possession of stolen property. Even if the deputies articulated, or failed to articulate, a different crime for which they believed probable cause existed, it does not affect the legal determination. An arrest supported by probable cause is not made unlawful by the officer's "choice" of an offense other than one for which probable cause exists. *State v. Huff*, 64 Wn. App. 641, 826 P.2d 698 (1992). Here, Dep. Hales said that he arrested the defendant for theft of the boat and for trespassing. 2 RP 29, 30. The court committed no error in concluding that the deputies had probable cause to arrest the defendant.

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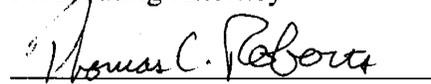
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

D. CONCLUSION.

The defendant received a full, fair trial. The court correctly concluded that the deputies lawfully detained and then arrested him. The evidence gathered at the scene was admissible. The State respectfully requests that the conviction be affirmed.

DATED: May 19, 2009.

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Prosecuting Attorney



Thomas C. Roberts  
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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

5.20.09   
Date Signature