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I. ISSUES

1. Can an officer conduct a Terry Stop of a person when the officer has a reasonable suspicion that the person committed a crime or is about to commit a crime?
2. Can an officer arrest a person when the officer has probable cause to believe the person possessed a controlled substance?
3. Does a trial judge have discretion to admit evidence when the admission of the evidence does not prejudice the defendant?

II. SHORT ANSWERS

1. Yes. An officer can conduct a Terry Stop of a person when the officer has a reasonable suspicion that the person committed a crime or is about to commit a crime.
2. Yes. An officer can arrest a person when the officer has probable cause to believe the person possessed a controlled substance.
3. Yes. A trial judge does have discretion to admit evidence when the admission of the evidence does not prejudice the defendant.

III. FACTS

On May 10, 2008, at about 2:30 a.m. Officer Christopher Trevino of the Longview Police Department was dispatched to the 800 block of Ninth Avenue in the city of Longview for a report of a male subject trying to break into a silver Honda and being armed with a black pistol. The 911 caller was Cheryl Gunnells. Transcript Volume 1, p. 4-5 and 26-27. Officer Trevino responded near the scene, waited for backup to arrive, and observed the appellant trying to get into a vehicle that was parked next to the curb. The appellant stood facing the left rear window for a period of

time, at least a minute or more, and appeared to be trying to get either the window or door open. Transcript Volume 1, p. 6-7 and 17.

After trying to get access to the vehicle, the appellant walked away from the vehicle and headed towards the apartments and alley east of the road. Officer Trevino did not know if the appellant saw him and was responding to him being in the area. Transcript Volume 1, p. 7. Officer Trevino followed the appellant without back up and momentarily lost sight of the appellant as he went between two buildings and knelt down on the ground next to a townhouse. Transcript Volume 1, p. 7-8. The appellant was stationary, knelt all the way down on the ground, manipulated items on the ground, and was doing something with his hands. Transcript Volume 1, p. 9 and 18.

Officer Trevino was concern for his safety, drew his handgun, and ordered the appellant to stand up, turn around, and show his hands. Transcript Volume 1, p. 9-10. The appellant was subsequently put down on his knees and handcuffed for officer safety. Officer Trevino patted the appellant down for weapons and did not find anything of interest on the appellant. However, there was a hypodermic needle in open view on the ground in the area where the appellant was manipulating things. The needle was less than two feet from the appellant. Transcript Volume 1, p. 10-11.

The needle contained a dark liquid and based on his training and experience, Officer Trevino suspected the dark liquid to be either Heroin or Methamphetamine. Transcript Volume 1, p. 11. Officer Trevino has been employed with the Longview Police Department for nine years and has seen Heroin and Methamphetamine in a dark liquid form numerous times through the course of his employment. Transcript Volume 1, p. 5 and 11. Officer Trevino collected the needle and searched the appellant. The appellant had a fanny pack on his person and inside the fanny pack, Officer Trevino found three scales. Two of the scales had a dark residue substance on them. Officer Trevino suspected the dark residue substance to be Heroin based on his training and experience. Transcript Volume 1, p. 12.

Officer Trevino proceeded to read the appellant his Miranda warnings and the appellant voluntarily agreed to talk to Officer Trevino about the incident. Transcript Volume 1, p. 12, 22-23, 60-61, and 73-74. The appellant indicated that he did not have any knowledge about the syringe on the ground, that his friend gave the scales to the appellant, and that the appellant was in the process of getting rid of the scales. Transcript Volume 1, p. 63. The scales and needle were logged into evidence and field tested positive for Heroin. Transcript Volume 1, p. 13.

On August 19, 2008, Judge James Warne of the Cowlitz County Superior Court presided over the appellant's motion to suppress. Transcript Volume 1, p. 1-43. Judge Warne considered the evidence and found that Officer Trevino was dispatched to a call involving an attempted car prowling at night with the suspect potentially being armed with a weapon. When Officer Trevino responded to the area, he witnessed the appellant unsuccessfully try to get into the vehicle and reasonably believed that the appellant was prowling the vehicle. Transcript Volume 1, p. 39-40. When the appellant unsuccessfully entered the vehicle and moved to a dark area, Officer Trevino reasonably believed that the appellant was engaged in some type of criminal activity. Given the time of day and the circumstances, Judge Warne found that Officer Trevino was justified in initially contacting the appellant and that a full custodial arrest occurred once Officer Trevino saw the needle on the ground and the appellant was secured in handcuffs. Transcript Volume 1, p. 38 and 41. Judge Warne denied the appellant's motion to suppress. Transcript Volume 1, p. 42.

On January 14, 2009, Judge Stephen Warning of the Cowlitz County Superior Court presided over the appellant's second readiness hearing and the appellant indicated that he was ready to proceed to trial on January 15, 2009. Bruce Hanify represented the appellant and indicated "the State just had the scales tested Friday and my client was sort of

asking about independent testing. And, I have explained to him with basically a general denial, unwitting possession. I don't think independent testing would add anything at all to his defense. So I advised him that we will just go tomorrow." Transcript Volume 1, p. 44. The State confirmed that the appellant had stipulated to the laboratory reports and the appellant indicated there were no other issues pending trial. The appellant was ordered to appear for his jury trial on January 15, 2009. Transcript Volume 1, p. 44-45.

On January 15, 2009, Commissioner Lisa Tabbut of the Cowlitz County Superior Court presided over the appellant's jury trial and the appellant was represented by Mr. Hanify. Transcript Volume 1, p. 46. Prior to the start of the trial, Mr. Hanify objected to the admission of the scales recovered by Officer Trevino and the laboratory tests of the scales. Mr. Hanify indicated "it was either last Thursday afternoon or last Friday that Mr. Nguyen informed me that the scales, which were in a backpack, -- apparently were in a backpack or the backpack in this case had been tested. We went along -- Mr. Riback had this case for a long time and the scales were not tested. When I informed my client that the scales had finally been tested, the first thing out of his mouth was, "Can we have an independent test?" And, I had two thoughts on that. One was our defense has always been unwitting possession. We have always been talking

about a syringe on the ground. We claimed no ownership or knowledge of the items or the substance. I don't think our defense necessarily changes but I wanted to object, on record, to the admission of the scales given that, I think, my client was prejudiced; that under normal defense sequence, I would have had the chance to interview the chemist on that or examine the scales. I am assuming the scales are coming in today and are going to be present. If the scales are not present, I'm certainly very much going to object to the admission of those test results. But, I'm making a formal objection to those test results because of the late hour in which the tests were made. I think it does prejudice my client in terms of independent testing that might have been done." Transcript Volume 1, p. 47-48.

Commissioner Tabbut denied the appellant's motion to exclude the scales and the laboratory tests of the scales because Mr. Elliott did not suffer any prejudice from their admission. The appellant and his attorney were aware from the start of the case that two pieces of evidence were collected in the case. There was a syringe loaded with Heroin and there were scales with Heroin residue. Officer Trevino had seized both items, recognized the contents in the syringe and the residue on the scales to be Heroin, and sent both the syringe and scales to the crime laboratory for testing. Transcript Volume 1, p. 48-49. The appellant's defense was unwitting possession because the syringe was not his and his friend gave

the scales to the appellant and the appellant did not know the residue on the scales to be Heroin. The actual identity of the residue on the scales was never an issue and the appellant stipulated to the laboratory tests. The appellant's defense was that he did not know the contents of the syringe and the residue on the scales were Heroin. The admission of the scales and the laboratory tests of the scales did not change the appellant's unwitting possession defense at trial. Transcript Volume 1, p. 46-50, 52-53, and 74. At the conclusion of the trial, the jury found the appellant guilty of possessing Heroin. Transcript Volume 1, p. 163-164.

IV. ARGUMENTS

1. **OFFICER TREVINO LAWFULLY CONDUCTED A TERRY STOP OF THE APPELLANT BECAUSE HE HAD A REASONABLE SUSPICION THAT THE APPELLANT HAD COMMITTED A CRIME OR IS ABOUT TO COMMIT A CRIME.**

A law enforcement officer can conduct a Terry Stop for investigative purposes. Terry v. Ohio, 392 U.S. 1, 21 (1968); State v. Armenta, 134 Wn.2d 1, 20 (1997). An officer can briefly detain and question an individual in a Terry Stop based upon a “well-founded suspicion based on objective facts that the individual is connected to actual or potential criminal activity.” State v. Sieler, 95 Wn.2d 43, 46 (1980), State v. Watkins, 76 Wn.App. 726, 729 (1995). The

reasonableness of an investigative stop is measured “not by exactitudes, but by probabilities.” State v. Pressley, 64 Wn.App. 591, 596 (1992).

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 (1991). The court takes into account an officer’s training and experience when determining the reasonableness of a Terry Stop. Id. Subsequent evidence that the officer was in error regarding some of his facts will not render a Terry Stop unreasonable. State v. Seagull, 95 Wn.2d 898, 908 (1981) (“The Fourth Amendment does not proscribe ‘inaccurate’ searches only ‘unreasonable’ ones”). Additionally, an officer having articulable suspicion of criminal activity need not go to exhaustive lengths to eliminate all possibilities of the conduct being innocent behavior before effectuating an investigatory stop. State v. Anderson, 51 Wn.App. 775, 780 (1988).

Reasonable suspicion sufficient to support an investigatory stop may be based on an informant’s tip if the tip possesses sufficient “indicia of reliability”. Adams v. Williams, 407 U.S. 143, 147 (1972); State v. Lesnick, 84 Wn.2d 940, 943 (1975). An informant’s tip may carry enough “indicia of reliability” to justify a Terry Stop, even though it would not be sufficient for an arrest or search warrant. Adams, 407 U.S. at 147; Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S.

108 (1964). To possess sufficient indicia of reliability, (1) the informant must be reliable and (2) the informant's tip must contain enough objective facts to justify detention of the suspect. State v. Hart, 66 Wn.App. 1, 6-7 (1992). If the informant's tip fails either prong, the police must independently corroborate the details of the tip to establish its reliability. State v. Jackson, 102 Wn.2d 432, 437-438 (1984); Hart, 66 Wn.App. at 6-7.

In the present case, Cheryl Gunnells called 911 at about 2:30 AM to report that a male was trying to break into a car and being armed with a firearm in the 800 block of Ninth Avenue. Ms. Gunnells did not leave a phone number and Officer Trevino did not talk to her prior to contacting the appellant. The information relayed by Ms. Gunnells did not contain any objective facts and was conclusory in nature. Therefore, Officer Trevino was required to independently corroborate the details of her call prior to conducting a Terry Stop of the appellant.

Officer Trevino was dispatched to the location reported by Ms. Gunnells around 2:30 a.m. When he arrived on scene, he witnessed a man, the appellant, try unsuccessfully to get into a parked car. The appellant stood facing the left rear window for a period of time, at least a minute or more, and appeared to be trying to get either the window or door open. After unsuccessfully getting access to the car, the appellant walked into an

alley and took what appeared to be evasive actions to avoid Officer Trevino. The appellant went between two buildings, knelt down on the ground, and remained stationary. While on the ground, the appellant manipulated items on the ground and had his back to Officer Trevino. Officer Trevino justifiably conducted a Terry Stop of the appellant to investigate potential criminal activity because he reasonably believed that the appellant was trying to break into a car and had independently corroborated Ms. Gunnells' report of a male trying to break into a car in the 800 block of Ninth Avenue at 2:30 AM.

The appellant's reliance on State v. Larson, 93 Wash.2d 638 (1980), is not persuasive as it is distinguishable from that of the appellant. In Larson, two officers stopped a car for a minor traffic infraction of parking too far from the curb. The defendant was a passenger in the car, did not commit the traffic violation, and did not act suspicious. When the officers contacted occupants in the car, there was no report of criminal activity in the area for three weeks, no suspicious activity by anyone in the car, and no indication that the occupants in the car were cruising the area to commit a crime. The court correctly found that the officers lacked an articulable suspicion that the defendant was engaged in criminal activity to conduct a Terry Stop and ask the defendant for her identification. Id. at 639-645.

Unlike the officers in Larson, Officer Trevino had an articulable suspicion that the appellant was engaged in criminal activity and was permitted to conduct a Terry Stop of the appellant. Cheryl Gunnells called 911 at about 2:30AM and reported that a male was trying to break into a car in the 800 block of Ninth Avenue. When Officer Trevino arrived at the location around 2:30 a.m., he witnessed the appellant try unsuccessfully to get into a parked car for a period of time. After unsuccessfully getting access to the car, the appellant walked into an alley and took what appeared to be evasive actions to avoid Officer Trevino. Eventually, Officer Trevino located the appellant kneeling on the ground in between two buildings and manipulating items on the ground. Based on the totality of the events, Officer Trevino reasonably believed that the appellant was attempting to break into a car and was justified in conducting a Terry Stop of the appellant to investigate potential criminal activity.

Likewise, the appellant's reliance on State v. Hopkins, 128 Wash.App. 855 (2005), is not persuasive. In Hopkins, the police relied on a citizen informant who called 911 to report that a "minor might be carrying a gun." The informant described Hopkins as a "light-skinned black male, 17 [years of age], 5'9[\"], thin, Afro, goatee, dark shirt, tan pants, carrying a green backpack and a black backpack." and provided that Hopkins was "scratching his leg [with] what looked like a gun." Id. at

858. This description proved to be significantly inaccurate because Hopkins was actually “21 years old, six-feet, three inches tall, and weighed 200 pounds.” Id. A few minutes later, the informant called again and informed the police that Hopkins was in a phone booth at a certain address and had now put the gun in his pocket. Id. The informant requested that the police not contact him. Id. at 858-59. Dispatch informed the police that the informant was a citizen but did not provide the police with his name. Id. at 858.

When the police approached Hopkins, they did not see any suspicious behavior or a bulge in his pocket resembling the presence of a gun. The police contacted Hopkins and ordered him to put his hands up. Id. at 859-860. They then searched him and found that he was in possession of both a loaded revolver and a small bag of methamphetamine. Id. The Court found that the State failed to establish the informant’s reliability because the tip did not contain objective facts and the officers did not independently corroborate the informant’s tip. The officers did not call the informant back and “just assumed everything this guy told them was true.” Id. at 863-865.

The appellant’s case is distinguishable from Hopkins because unlike the officers in Hopkins, who did not independently corroborate an unreliable informant’s tip, Officer Trevino independently corroborated

Ms. Gunnells' report of a male trying to break into a car in the 800 block of Ninth Avenue at 2:30 a.m. As indicated above, Officer Trevino witnessed the appellant engage in activities that gave him a reasonable belief that the appellant was attempting to break into a car. Officer's Trevino's observations were consistent with the information reported by Ms. Gunnells. Based on the totality of the events, Officer Trevino was justified in conducting a Terry Stop of the appellant to investigate potential criminal activity because he reasonably believed that the appellant was attempting to break into a car and had independently corroborated Ms. Gunnells' 911 call.

2. OFFICER TREVINO LAWFULLY ARRESTED THE APPELLANT BECAUSE HE HAD PROBABLE CAUSE TO BELIEVE THAT THE APPELLANT POSSESSED A CONTROLLED SUBSTANCE.

"Probable cause is an objective inquiry," State v. O'Neill, 104 Wn.App. 850, 868 (2001), that requires more than a "bare suspicion of criminal activity," but does not require facts that would establish guilt beyond a reasonable doubt. State v. Gillenwater, 96 Wn.App. 667, 670 (1999) (quoting State v. Terrovona, 105 Wn.2d 632, 643 (1986)). The expertise of trained officers should be taken into consideration in determining where or not there was probable cause to arrest the defendant. "An officer of a narcotics detail may find probable cause in activities of a

suspect and in the appearance of paraphernalia or physical characteristics which, to the eye of a lay man, could be without significance. His action should not, therefore, be measured by what might or might not be probable cause to an untrained civilian passer-by, but by a standard appropriate for a reasonable, cautious and prudent narcotics officer under the circumstances of the moment.” State v. Patterson, 83 Wn.2d 49, 57 (1973).

Probable cause to warrant an arrest can be based upon odor alone, State v. Hammond, 24 Wn.App. 596, 603 (1979), or a combination of the senses and the presence of the officer in a place to observe facts. Snohomish v. Swoboda, 1 Wn.App. 292, 294-295 (1969). “When an officer who is trained and experienced in marijuana detection actually detects the odor of marijuana, this by itself provides sufficient evidence to constitute probable cause justifying a search.” State v. Olson, 73 Wn.App. 348, 356 (1994) (citing State v. Huff, 64 Wn.App. 641, 647-48 (1992); State v. Hammond, 24 Wn.App. 596, 598-99 (1979); State v. Compton, 13 Wn.App. 863, 865-66 (1975)).

In State v. Neeley, 52 P.3d 539 (2002), officers saw the defendant’s vehicle parked at 2:00 a.m. in a high-crime area. All the area businesses were closed and no residence existed in the area. The officers were suspicious of the defendant’s vehicle, approached the vehicle on

foot, and shined a light into the vehicle. The officers saw drug paraphernalia in the vehicle and the defendant behaving as if he was using the drug paraphernalia. The officers arrested the defendant and a search incident to the arrest uncovered cocaine on the defendant's person. Defendant was found guilty of possession of cocaine after a stipulated facts trial. Id. at 541. The defendant's conviction was affirmed because "the officers saw the drug paraphernalia in open view and that observation and other evidence afforded them probable cause to arrest [the defendant] for using that paraphernalia." Id. at 545.

Like the officers in Neely, Officer Trevino had probable cause to arrest the defendant. Pursuant to RCW 69.50.4013(1), it is unlawful for any person to possess a controlled substance. When Officer Trevino contacted the appellant, he observed a hypodermic needle in open view on the ground. The needle contained a dark liquid that Officer Trevino, based on his training and experience, suspected to be either Heroin or Methamphetamine. The needle was within two feet of where the appellant knelt on the ground and manipulated things on the ground. Officer Trevino justifiably arrested the appellant and searched the appellant incident to his arrest because Officer Trevino had probable cause to arrest the appellant for possession of a controlled substance.

3. COMMISSIONER TABBUT CORRECTLY DENIED THE APPELLANT'S MOTION TO EXCLUDE THE LABORATORY RESULTS OF THE SCALES FOUND ON THE APPELLANT BECAUSE THE ADMISSION OF THE LABORATORY RESULTS DID NOT PREJUDICE THE APPELLANT.

An appellate court reviews a trial court's admission of evidence for abuse of discretion. State v. Lane, 125 Wash.2d 825, 831 (1995). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. State v. Rohrich, 149 Wash.2d 647, 654 (2003). In the present case, Commissioner Tabbut correctly denied the appellant's motion to exclude the laboratory results of the scales found on the appellant's person because the admission of the laboratory results did not prejudice the appellant.

On May 10, 2008, Officer Trevino arrested the appellant for possession of a suspected controlled substance, Heroin. There was a needle with a dark liquid resembling Heroin within two feet of the appellant and there were two scales on the appellant's person having a dark residue resembling Heroin. Officer Trevino collected both the needle and scales as evidence, and verified the presence of Heroin in both the needle and scales through field tests. Subsequent to the appellant's arrest, the crime laboratory tested and confirmed the presence of Heroin in the needle and on the scales.

The appellant claimed the needle was not his and that he was in the process of getting rid of the scales that were given to him by a friend. The appellant's defense was unwitting possession because the needle was not his and he did not know the residue on the scales was Heroin. The appellant never challenged the identity of either the liquid in the needle or the residue on the scales as being anything other than Heroin. Prior to trial, the appellant stipulated to the laboratory reports confirming that the liquid in the needle and the residue on the scales contained Heroin.

On January 14, 2009, Judge Warning presided over the appellant's second readiness hearing and the appellant indicated that he was ready to proceed to trial. Mr. Hanify indicated "the State just had the scales tested Friday and my client was sort of asking about independent testing. And, I have explained to him with basically a general denial, unwitting possession. I don't think independent testing would add anything at all to his defense. So I advised him that we will just go tomorrow." Transcript Volume 1, p. 44. The State confirmed that the appellant had stipulated to the laboratory reports and the appellant indicated there were no other issues pending trial.

On January 15, 2009, Commissioner Lisa Tabbut presided over the appellant's jury trial. Prior to the start of the trial, Mr. Hanify objected to the admission of the scales recovered by Officer Trevino and the

laboratory tests of the scales. Mr. Hanify indicated "it was either last Thursday afternoon or last Friday that Mr. Nguyen informed me that the scales, which were in a backpack, -- apparently were in a backpack or the backpack in this case had been tested. We went along -- Mr. Riback had this case for a long time and the scales were not tested. When I informed my client that the scales had finally been tested, the first thing out of his mouth was, "Can we have an independent test?" And, I had two thoughts on that. One was our defense has always been unwitting possession. We have always been talking about a syringe on the ground. We claimed no ownership or knowledge of the items or the substance. I don't think our defense necessarily changes but I wanted to object, on record, to the admission of the scales given that, I think, my client was prejudiced; that under normal defense sequence, I would have had the chance to interview the chemist on that or examine the scales. I am assuming the scales are coming in today and are going to be present. If the scales are not present, I'm certainly very much going to object to the admission of those test results. But, I'm making a formal objection to those test results because of the late hour in which the tests were made. I think it does prejudice my client in terms of independent testing that might have been done."

Transcript Volume 1, p. 47-48.

Commissioner Tabbut correctly denied the appellant's motion to exclude the scales and the laboratory tests of the scales because the appellant did not suffer any prejudice from their admission. The appellant and his attorney were aware from the start of the case that two pieces of evidence were collected in the case. There was a syringe loaded with Heroin and there were scales with Heroin residue. Officer Trevino had seized both items, recognized the contents in the syringe and the residue on the scales to be Heroin, and sent both the syringe and scales to the crime laboratory for testing. The appellant's defense was unwitting possession because the syringe was not his and he did not know the residue on the scales to be Heroin. The actual identity of the residue on the scales was never an issue and the appellant stipulated to the laboratory tests. The appellant's defense with regards to the scales was that he did not know the residue on the scales was Heroin. The admission of the scales and the laboratory tests of the scales did not change the appellant's unwitting possession defense at trial and did not bar him from exerting that defense.

V. CONCLUSION

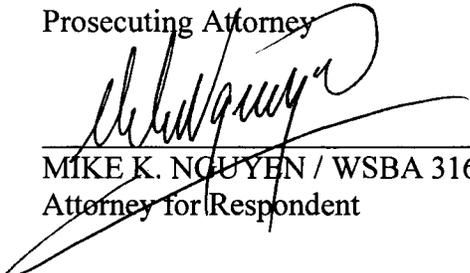
The appellant's appeal should be denied because the officer had a reasonable suspicion that the appellant had committed a crime or was about to commit a crime to conduct a Terry Stop, the officer had probable

cause to arrest the appellant for possession of a controlled substance, and the appellant did not suffer any prejudice from the trial court's admission of the scales and the laboratory tests of the scales found on the appellant's person.

Respectfully submitted this 16th day of March 2010.

SUSAN I. BAUR
Prosecuting Attorney

By:


MIKE K. NGUYEN / WSBA 31641
Attorney for Respondent

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COURT OF APPEALS, STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

STATE OF WASHINGTON,)	NO. 38943-6-H	BY <u>Cs</u>
)	Cowlitz County No.	DEPUTY
Respondent,)	08-1-00517-5	
)		
vs.)	CERTIFICATE OF	
)	MAILING	
BARRY D. ELLIOTT,)		
)		
Appellant.)		
)		

I, Michelle Sasser, certify and declare:

That on the 17th day of March, 2010, I deposited in the mails of the United States Postal Service, first class mail, a properly stamped and address envelope, containing Brief of Respondent addressed to the following parties:

Court of Appeals
950 Broadway, Suite 300
Tacoma, WA 98402

Mr. John Hays
Attorney at Law
1402 Broadway
Longview, WA 98632

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

Dated this 17th day of March, 2010.

Michelle Sasser
Michelle Sasser