

NO. 40519-9-II

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

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STATE OF WASHINGTON,

Respondent,

v.

REMANDEZ MATTHEW NELSON,

Appellant.

STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION TWO  
10/20/09 PM 2:05  
BY: [Signature]

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

The Honorable John McCarthy and Bryan E. Chushcoff, Judges

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BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. The trial court erred in denying Remandez Nelson's motion to suppress evidence.

2. The trial court erred in finding a valid Terry investigative stop.

3. The trial court erred in finding it was lawful to restrain Nelson as a passenger in a car stopped for speeding.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Is an investigative detention of a car and its occupants lawful when an officer bases the stop on a hunch that crime is afoot because the car, while driving through a main arterial in a high crime area at dusk while being followed by the officer, suddenly accelerates 5-10 miles per hour over the speed limit and makes a quick turn into a business parking lot and alley before coming to an abrupt stop?

2. Alternatively, was Nelson, as a passenger in the car, lawfully detained while police investigated the driver for speeding?

**C. STATEMENT OF THE CASE**

**1. Procedural Facts.**

On April 24, 2009, the state charged appellant Remandez Matthew Nelson with possession of marijuana with intent to deliver while he or an accomplice was armed with a firearm (count I) and unlawful possession of

a firearm in a vehicle (count II). CP (“Clerk’s Papers”) 1-2; RCW 69.50.401 and RCW 9.41.050.

Nelson filed a motion to suppress all the evidence. CP 3-7. Pierce County Superior Court Judge Bryan Chushoff heard and denied the suppression motion. RP October 29, 2009 at 1-65. The court heard a CrR 3.5 hearing along with the suppression motion and ruled that Nelson’s statements were knowingly and voluntarily made. The court later entered written findings of fact and conclusions of law. CP 8-11.

The state filed an amended information charging possession of marijuana with intent to deliver within 1,000 feet of a school bus stop. CP 12-13; RCW 69.50.401 and RCW 69.50.435; RP February 1, 2010 at 6-8. Nelson waived his right to a jury trial. CP 14; RP February 1, 2010 at 8. The parties submitted certain reports and documents to the court in lieu of live testimony. February 1, 2010 at 9-11; CP 15-16. The court, Judge John McCarthy, found Nelson guilty as charged in the amended information. February 1, 2010 at 12-13, 31-33.

On February 5, 2010, Judge McCarthy sentenced Nelson to zero days on the possession with intent to deliver and 24 months on the school zone enhancement. RP February 5, 2010 at 9; CP 23. Prior to this offense, Nelson had no criminal convictions. CP 17.

Nelson filed a timely notice of appeal challenging the refusal to grant his suppression motion. CP 34-47.

## **2. Suppression Motion.**

Lakewood Police Officer Aaron Grant was the only person to testify at the suppression motion. RP October 29, 2009 at 7-45. In summary, this is what he said.

On an evening in April 2009, he was patrolling in his marked patrol car. RP October 29, 2009 at 8, 15-16. The car included a light bar on the top. RP October 29, 2009 at 8. He had been a police officer for five years. RP October 29, 2009 at 7. He was driving on South Tacoma Way. RP October 29, 2009 at 9. South Tacoma Way is a “high crime” area from the perspective of law enforcement. RP October 29, 2009 at 14.

It was still light outside. RP October 29, 2009 at 16. Officer Grant was watching the traffic coming at him from the opposite direction. He noticed a burgundy Chevy Impala in the moderate traffic flow. RP October 29, 2009 at 9.

For no particular reason, Officer Grant made a u-turn and started to follow the Impala. RP October 29, 2009 at 9. He did not turn on his lights or siren. The Impala “took off” and may have been traveling as fast as 40-45 miles per hour in the posted 35 miles per hour zone. RP October 29, 2009 at 9-10. The Impala caught up to the car in front of it and made a

quick right turn into a business parking lot and then down an adjacent alley-type roadway behind the business. RP October 29, 2009 at 11. The alley is not typically used by through traffic as it essentially dead ends in the direction in which the Impala was headed. RP October 29, 2009 at 12. It is not a complete dead end however. A car can make it through the alley and onto another main arterial. RP October 29, 2009 at 12.

Officer Grant activated his lights and siren while taking the same right turn. RP October 29, 2009 at 11, 43. He was about 200 feet behind the Impala when he made the turn. RP October 29, 2009 at 11. Officer Grant believed that the Impala accelerating away from him meant that “something was awry, crime was afoot, something was wrong.” RP October 29, 2009 at 35.

He followed the car down the alley. RP October 29, 2009 at 11.

Grant briefly lost sight of the Impala. RP October 29, 2009 at 11. When he saw the car again, it was parked sideways in the alley. RP October 29, 2009 at 11. Two of the car’s four occupants got out of the car quickly. RP October 29, 2009 at 13. Nelson was not the driver. He got out of the back seat. RP October 29, 2009 at 14. The car’s front tires were over an embankment. RP October 29, 2009 at 11. Nelson went to the front of the car and bent down. RP October 29, 2009 at 14.

None of the occupants tried to walk away or otherwise leave. RP October 29, 2009 at 14-15. Grant called for backup because he was alone and there is a lot of gang activity in that area. RP October 29, 2009 at 14. Instead of contacting only the car's driver, Grant ordered the four occupants over to his car thereby seizing them. RP October 29, 2009 at 14-15. The four occupants were cooperative. RP October 29, 2009 at 16; Conclusion of Law 1, CP 11.

Grant felt that an unspecified crime "was, has, or could have been committed." RP at 34. He felt that the car and its occupants had fled from him. RP October 29, 2009 at 36. "People...flee from me either have a history of criminal activity. Maybe some warrants, maybe they just robbed a business or someone." RP October 29, 2009 at 36.

While Officer Grant was talking to the car's occupants, another officer found a bag containing smaller bags of packaged marijuana near where Nelson had been bending down in front of the car. RP October 29, 2009 at 16. One of the car's occupants said that the marijuana belonged to Nelson. RP October 29, 2009 at 20. Nelson also made incriminating statements about possessing the marijuana. RP October 29, 2009 at 22-23.

#### D. ARGUMENT

##### **NELSON'S MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED BECAUSE OFFICER GRANT DID NOT CONDUCT A LAWFUL TERRY STOP.**

The trial court erred in concluding Officer Grant made a lawful Terry stop.<sup>1</sup> The Terry stop was unlawful because there were insufficient facts to show a reasonable suspicion of criminal activity. In addition, Officer Grant had no lawful authority to detain the car's passengers, to include Nelson, while he questioned the driver about any traffic infractions.

An appellate court will not independently review evidence admitted at a suppression motion. State v. Maxfield, 125 Wn.2d 378, 385, 886 P.2d 123 (1994), reversed on other grounds sub. nom., In re Pers. Restraint of Maxfield, 133 Wn.2d 332, 945 P.2d 196 (1997). Accordingly, review in this case is limited to a de novo determination of whether the trial court derived proper conclusions of law from the unchallenged findings of fact. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994); State v. O'Cain, 108 Wn. App. 542, 548, 31 P.3d 733 (2001).

##### 1. Unreasonable Terry Stop Seizures Are Prohibited.

Both the Fourth Amendment to the United States Constitution and Article I, Section 7 of the Washington Constitution protect against

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<sup>1</sup> Conclusion of Law 1 and 2.

unreasonable searches and seizures. State v. Williams, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). Warrantless searches and seizures are per se unreasonable. Id.; Minnesota v. Dickerson, 508 U.S. 366, 372, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993). A seizure occurs when “an individual’s freedom of movement is restrained and the individual would not believe he or she is free to leave or decline a request due to an officer’s use of force or display of authority.” State v. Rankin, 151 Wn.2d 689, 695, 92 P.3d 202 (2004). Nelson was unquestionably seized when Officer Grant ordered Nelson to come to his patrol car and produce identification. CP 10 (Finding of Fact 14). When challenged, the state has the “heavy burden” of proving that the warrantless search and seizure is justified under one of the “jealously and carefully drawn” exceptions to the warrant requirement. State v. Jones, 146 Wn. 2d 328, 335, 45 P.3d 1062 (2002); Williams, 102 Wn.23d at 736.

In the absence of a warrant and probable cause to arrest, police may conduct a brief investigative detention known as a Terry stop. Terry v. Ohio, 392 U.S. 1, 19-21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). An investigative stop, although less intrusive than an arrest, is nevertheless a seizure and must therefore be reasonable under the Fourth Amendment to the United States Constitution and under Article I, Section 7 of the

Washington Constitution. State v. Kennedy, 107 Wn.2d 1, 4, 726 P.2d 445 (1986).

2. The Terry Stop Was Not Supported By A Reasonable Suspicion Of Criminal Activity.

The initial interference with the suspect's freedom of movement must be justified at its inception in order for a Terry stop to be lawful. Williams, 102 Wn.2d at 739 (citing Terry, 392 U.S. at 19-20). A Terry stop must be based on a well-founded suspicion drawn from "specific and articulable facts which, taken together with rational inference from those facts, reasonably warrant that intrusion." Terry, 392 U.S. at 21; State v. Gluck, 83 Wn.2d 424, 426, 518 P.2d 703 (1974). The reasonableness of the officer's suspicion is determined by the totality of circumstances known to the officer at the inception of the stop. Kennedy, 107 Wn.2d at 6. The level of articulable suspicion required to justify a Terry stop is "a substantial possibility that criminal conduct has occurred or is about to occur." Id. The facts justifying a Terry stop must be more consistent with criminal than innocent conduct. State v. Pressley, 64 Wn. App. 591, 596, 825 P.2d 749 (1992).

The facts found by the trial court include: (1) Officer Grant is a 5-year police officer; (2) Grant drove a marked patrol car recognizable as such; (3) the car in which Nelson was a passenger was driving on South

Tacoma Way, a main arterial in Pierce County; (4) law enforcement considers this a high crime area; (5) the car was going with the flow of traffic meaning that it was exceeding the speed limit; (6) it was about 8 p.m. and not yet dark; (7) Grant did a u-turn putting him behind the traffic in front of him to include the car in which Nelson was a passenger; (8) after Grant did the u-turn, the car increased its speed and continued to travel in excess of the speed limit; (9) the car made an abrupt turn into an alley behind a business; (10) the alley is narrow and not typically used for through traffic although it does lead to a main arterial; (11) the car parked sideways in the alley; (12) by the time Grant stopped his car, two of the four occupants were outside of the car; (13) Nelson was bent over the front tire of the vehicle; (13) the car's front end was hanging over an embankment. CP 8-10.

In evaluating the reasonableness of an investigative stop, courts may take into account the officer's training and experience. *Id.* Although Grant had general unspecified experience as a police officer, the trial court did not enter a finding that his professional expertise contributed to his suspicion. CP 8-11. When there is an absence of a finding on a factual issue, it is presumed that the party with the burden of proof failed to sustain their burden on this issue. *State v. Cass*, 62 Wn. App. 793, 795, 816 P.2d 57 (1991). Accordingly, in reviewing the findings from this

suppression hearing, this Court must presume the state failed to prove the officer's training and experience factored into the reasonable suspicion calculus. See State v. Armenta, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997) (officer testimony that suspect gave false information could not be used as fact to support lawfulness of Terry seizure on appeal because trial court made no finding of fact on that issue.)

In State v. Gatewood, two police officers were patrolling in Seattle's Rainier Valley around midnight. State v. Gatewood, 163 Wn.2d 534, 537, 182 P.3d 426 (2008). The officer saw three or four people sitting in a bus shelter. As the officers drove past, one officer noticed that Gateway, one of the persons in the bus shelter, reacted to the officers with big eyes and a surprised look. Gateway twisted his whole body to the left inside the bus shelter "as if he was trying to hide something." Id. at 537. The officers drove past but turned around to investigate. By the time they got back, Gateway had left the bus shelter. The officers saw Gateway walk down one side of the street, jaywalk across to the other side, and then walk down yet another street. The officers used their car to block Gateway's path. An officer jumped out of the car and told Gateway, "Stop. I want to talk to you." Id. at 538. Gateway turned and kept walking despite the officer's repeated orders to stop. Gateway walked into some bushes and threw something from his waistband into the bushes.

The police recovered a gun from the bushes. Gateway could not legally possess a gun. The police also found marijuana on Gateway's person and cocaine in the bus shelter. Id. at 538.

The issue on appeal was whether the police had sufficient facts to justify a Terry detention of Gateway. Gateway, 163 Wn.2d at 539. The Court held that the police did not. Id. at 541. Although flight can be considered along with other factors in determining whether officers had reasonable suspicion of criminal activity, there was no evidence that Gatewood fled from the police simply because he walked away from the shelter. Id. at 541. The Court ultimately concluded that the seizure of Gatewood was premature. Id.

This court should reach a similar result. Given the totality of circumstances known by Officer Grant, he to was premature in his detention of Nelson. There was no evidence that the car in which Nelson was a passenger was fleeing from Officer Grant. There was no evidence that the Impala's driver or any of its occupants even knew the officer was behind them. The trial court did not make a finding that the Impala actually fled from Officer Grant. While being in a high crime area is a factor that can be considered in determining whether there was a reasonable suspicion that the Impala's occupants were about to commit or

had committed a crime,<sup>2</sup> that same could hold true for everyone driving on or near South Tacoma Way. As Officer Grant candidly admitted, “People...flee from me [because they] have a history of criminal activity. RP October 29, 2009 at 36. Nelson’s quick exit from the Impala should add nothing to the level of suspicion. Officer Grant testified that the Impala’s front wheels were over an embankment. Given the car’s precarious position, it was not unreasonable for Nelson to go to the front of the car and check out the car’s position.

The facts justifying a Terry stop must be more consistent with criminal than with innocent conduct to give rise to reasonable suspicion. Pressley, 64 Wn. App. at 591. The actions of Nelson and the Impala’s driver were innocuous and were certainly not *more* consistent with criminal activity. The facts of this case as found by the trial court were therefore insufficient to justify a Terry stop.

3. Officer Grant Had No Right To Detain Nelson, A Passenger, As Part Of The Traffic Stop.

A traffic stop is a “seizure” for the purpose of constitutional analysis, no matter how brief. Ladson, 138 Wn.2d 343, 350, 979 P.2d 833 (1999). An ordinary traffic stop has been analogized to an investigative

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<sup>2</sup> State v. Richardson, 64 Wn. App. 693, 825 P.2d 754 (1992)

detention subject to the criteria of reasonableness set forth in Terry v. Ohio, 392 U.S. 1. A law enforcement officer is entitled to stop a vehicle without a warrant when the officer has probable cause to believe that a traffic infraction has been committed in his presence. RCW 46.64.030; Ladson, 138 Wn.2d at 361. The probable cause required before an officer stops a vehicle to enforce the traffic code is a reasonable articulable suspicion that a traffic infraction has occurred. Id. at 349.

A Terry investigative stop only authorizes police officers to briefly detain a person for questioning without grounds for arrest if they reasonably suspect, based on specific, objective facts, that the person detained is engaged in criminal activity or a traffic violation. State v. Day, 161 Wn.2d 889, 896, 168 P.3d 1265 (2007) (citing State v. Duncan, 146 Wn.2d 166, 172-74, 43 P.3d 513 (2002) for its citation of Terry, 392 U.S. 1). Merely being a witness to criminal activity or an infraction does not justify a stop unless the person is reasonably suspected to be involved in the wrongdoing. See Smith v. Carney, 142 Wn.App. 197, 203-04, 174 P.3d 142 (2007), review denied, 164 Wn.2d 1009 (2008).

Nelson, as a passenger and only a witness to a possible driving infraction could not lawfully be detained by Officer Grant.

4. The Proper Remedy Is Exclusion Of All Incriminating Evidence As Fruit Of The Poisonous Tree.

“When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed.” Ladson, 138 Wn.2d at 359; accord Williams, 102 Wn.2d at 742 (suppressing evidence found as a result of unreasonably invasive Terry stop). The exclusionary rule requires suppression of evidence obtained as a result of an unlawful seizure under the Fourth Amendment and Article I, Section 7 of the Washington constitution. Wong Sun v. United States, 371 U.S. 471, 484, 83 S. Ct. 407, 9 L.Ed. 2nd 441 (1963); Ladson, 138 Wn.2d at 359. When the initial Terry stop is unlawful, the ensuing search and its results are inadmissible as “fruits of the poisonous tree.” Kennedy, 107 Wn.2d at 4.

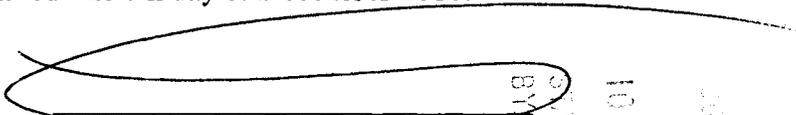
In determining whether evidence is part of the fruits of an illegal search, courts look to whether the evidence “has been come at by exploitation of that illegality.” Wong Sun, 371 U.S. at 488. Here, the marijuana as well as any statements made to the police, are fruits of the poisonous tree that must be excluded as evidence at trial because they were obtained as a direct result of an unlawful seizure. The proper remedy

is reversal of the conviction and dismissal of the charges. State v. Brown, 119 Wn. App. 473, 474, 81 P.3d 916 (2003); State v. Sweeney, 56 Wn. App. 42, 51, 782 P.2d 562 (1989).

**E. CONCLUSION**

For the foregoing reasons, Remandez Nelson's suppression motion should have been granted.

Respectfully submitted this 6th day of December 2010.

  
LISA E. TABBUT, WSBA #21344  
Attorney for Remandez Nelson

**CERTIFICATE OF MAILING**

I certify that on December 6, 2010, I deposited in the mails of the United States, first class postage pre-paid, a copy of this document addressed to (1) Kathleen Proctor, Pierce County Prosecutor's Office, 930 Tacoma Ave. S. Rm. 946, Tacoma, WA 98402-2171; (2) Remandez Nelson, Inmate No. 2010323041, Pierce County Jail, 910 Tacoma Ave. S., Tacoma, WA 98402; and (3) the original, ~~plus one copy~~, the Court of Appeals, Division 2.

  
LISA E. TABBUT, WSBA #21344