

NO. 44107-1-II

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

STATE OF WASHINGTON, Appellant

v.

PAVEL FEDOROVICH ZALozH, Respondent

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.12-1-01105-2

BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR..... 1

 I. THE TRIAL COURT ERRED IN ENTERING CONCLUSION OF
 LAW..... 1

 II. THE TRIAL COURT ERRED IN ENTERING CONCLUSION
 OF LAW..... 1

 III. THE TRIAL COURT ERRED IN ENTERING CONCLUSION
 OF LAW..... 1

 IV. THE TRIAL COURT ERRED IN ENTERING CONCLUSION
 OF LAW..... 1

 V. THE TRIAL COURT ERRED IN CONCLUDING THAT THE
 SEIZURE OF THE DEFENDANT WAS
 UNCONSTITUTIONAL..... 1

 VI. THE TRIAL COURT ERRED IN SUPPRESSING THE
 EVIDENCE FOUND IN THE VEHICLE. 1

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR..... 1

 I. THE OFFICERS HAD REASONABLE SUSPICION TO
 BELIEVE A CRIME HAD BEEN COMMITTED OR WAS
 BEING COMMITTED AT THE TIME THEY STOPPED THE
 CAR THE DEFENDANT WAS HIDING IN..... 1

C. STATEMENT OF THE CASE..... 1

D. ARGUMENT 5

 I. THE OFFICERS HAD REASONABLE SUSPICION TO
 BELIEVE A CRIME HAD BEEN COMMITTED OR WAS
 BEING COMMITTED AT THE TIME THEY STOPPED THE
 CAR THE DEFENDANT WAS HIDING IN..... 5

E. CONCLUSION..... 13

TABLE OF AUTHORITIES

Cases

<i>Brown v. Texas</i> , 443 U.S. 47, 50, 99 S. Ct. 2637, 61 L. Ed.2d 357 (1979)	6
<i>Illinois v. Wardlow</i> , 528 U.S. 119, 125, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000)	12
<i>State v. Alvarado</i> , 56 Wn. App. 454, 456-57, 783 P.2d 1106 (1989), <i>review denied</i> , 114 Wn.2d 1015, 791 P.2d 534 (1990)	10
<i>State v. Armenta</i> , 134 Wn.2d 1, 9, 948 P.2d 1280 (1997)	6
<i>State v. Glover</i> , 116 Wn.2d 509, 514, 806 P.2d 760 (1991)	7
<i>State v. Kennedy</i> , 107 Wn.2d 1, 6, 726 P.2d 445 (1986)	6, 12
<i>State v. Lee</i> , 147 Wn. App. 912, 199 P.3d 445 (2008), <i>review denied</i> , 166 Wn.2d 1016 (2009)	7
<i>State v. Maesse</i> , 29 Wn. App. 642, 647, 629 P.2d 1349, <i>review denied</i> , 96 Wn.2d 1009 (1981)	10
<i>State v. Marcum</i> , 149 Wn.App. 894, 907, 205 P.3d 969 (2009)	11, 12
<i>State v. Moreno</i> , No. 29692-0-III (Court of Appeals Division III, ordered published on February 12, 2013, at p. 16)	7
<i>State v. O'Neill</i> , 148 Wn.2d 564, 571, 62 P.3d 489 (2003)	6
<i>State v. Quezadas-Gomez</i> , 165 Wn.App. 593, 267 P.3d 1036 (2011)	6
<i>State v. Rankin</i> , 151 Wn.2d 689, 694, 92 P.3d 202 (2004)	6
<i>State v. Samsel</i> , 39 Wn.App. 564, 570-71, 694 P.3d 670 (1985)	7
<i>State v. Williams</i> , 102 Wn.2d 733, 738-40, 689 P.2d 1065 (1984)	8
<i>Terry</i> (infra)	5, 6, 12
<i>Torrey v. City of Tukwila</i> , 76 Wn. App. 32, 39, 882 P.2d 799 (1994)	10
<i>U.S. v. Arvizu</i> , 534 U.S. 266, 122 S. Ct. 744, 151 L. Ed. 2d 740 (2002)	7, 11, 12

A. ASSIGNMENTS OF ERROR

I. THE TRIAL COURT ERRED IN ENTERING CONCLUSION OF LAW

II. THE TRIAL COURT ERRED IN ENTERING CONCLUSION OF LAW

III. THE TRIAL COURT ERRED IN ENTERING CONCLUSION OF LAW

IV. THE TRIAL COURT ERRED IN ENTERING CONCLUSION OF LAW

V. THE TRIAL COURT ERRED IN CONCLUDING THAT THE SEIZURE OF THE DEFENDANT WAS UNCONSTITUTIONAL.

VI. THE TRIAL COURT ERRED IN SUPPRESSING THE EVIDENCE FOUND IN THE VEHICLE.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

I. THE OFFICERS HAD REASONABLE SUSPICION TO BELIEVE A CRIME HAD BEEN COMMITTED OR WAS BEING COMMITTED AT THE TIME THEY STOPPED THE CAR THE DEFENDANT WAS HIDING IN.

C. STATEMENT OF THE CASE

On June 11, 2012, Deputy Robin Yakhour of the Clark County Sheriff's Office was trying to locate the defendant, Pavel Zalozh, because there was probable cause to arrest him for a burglary which occurred nine days earlier and because there probable cause to arrest him for violating a no contact order. RP 23, 64-65. The protected party in that no contact order was Alysa Maximenko and her two children. RP 24. The no contact

order remained in effect on June 11, 2012. RP 24. Ms. Maximenko lived at 12914 Northeast 54th Street with her two children on that date. RP 25. Deputy Yakhour was worried about Ms. Maximenko's safety based on the defendant's previous no contact order violations and because she knew he was a suspect in a burglary involving the theft of firearms, leading her to believe he might be armed. CP 28. Prior to June 11th Deputy Yakhour had investigated the possible locations where the defendant might be found. RP 27-28. Deputy Yakhour began looking for the defendant by pulling up past police reports from EPR (Clark County's "electronic police reports" system) so that she could find addresses with which he had previously been associated. RP 27. She and Deputy Butler went to the defendant's parents' address looking for him but he was not there. RP 28. The defendant's parents indicated that the defendant would be at Ms. Maximenko's house. CP 27. Deputy Yakhour also spoke with a person who had posted bail for the defendant, and that person told her that if the defendant wasn't at his parents' house he was likely with Ms. Maximenko at her house. RP 28-29, CP 27. The officers were aware that the defendant previously lived at Ms. Maximenko's house with her and that he had previously violated the no-contact order by being at her house. CP 27. A review of EPR reports did not reveal any evidence of any other males living at Ms. Maximenko's residence with her. RP 40.

Deputy Yakhour contacted Officer Brian Ford with the Department of Corrections to assist her with locating the defendant. RP 2-3, 27.

Deputy Richard Butler also assisted that day. RP 62-63. Officer Ford's role that day was to set up in his undercover car in a surveillance location near Ms. Maximenko's house. RP 3-5, 29. Deputy Yakhour has a marked patrol car and felt her presence close to the house would be too conspicuous. RP 29-30. Officer Ford had been shown a picture of the defendant prior to setting up on the house, so he knew what the defendant looked like. RP 3. About twenty minutes after taking up a surveillance position Officer Ford saw a woman come out of the house with two children and watch them as they walked to the school bus stop. RP 5.

After a few minutes the woman went back into the house. RP 6. Within a half hour of that Officer Ford saw the garage door lift and a silver BMW back out of it. RP 6. The driver of the car was the same woman who came out of the house to watch the children walk to the school bus. RP 11. She began driving west and Officer Ford, because he was in an SUV, could see down into the BMW. RP 12. He saw that an adult was lying across the back seat with a yellow hooded shirt obscuring his head. RP 11-12. In his experience with the fugitive apprehension team, he recognized this as a person trying to hide. RP 13. Officer Ford called Deputy Yakhour on the radio to let her know that the car was heading toward them. RP 13.

Deputy Yakhour, meanwhile, had seen a person she knew was wanted on a felony warrant and was dealing with him when she received the radio call from Officer Ford. RP 25, CP 28. Deputies Butler and Buckner were with her at that time. RP 34-36. Deputy Yakhour felt that the driver of the car was most likely Ms. Maximenko. RP 33. Deputy Yakhour's emergency lights were on because of her contact with the other subject, and traffic was moving slowly as a result. RP 33-34. When Ms. Maximenko's car came upon them Deputy Buckner stepped out in the road and put his hand up to stop it. RP 34, CP 29. As soon as he did that, Ms. Maximenko stopped her car and the defendant popped up from his hiding place in the back seat. RP 35, CP 29. Deputy Yakhour immediately recognized the defendant as he sat up. RP 35-36, CP 29. Deputy Yakhour believed there was a violation of a no contact order in progress at that time. RP 36. Ms. Maximenko was, in fact, the driver of the car. RP 37. The defendant was removed from the car. RP 37.

Ms. Maximenko lawfully consented to a search of her car which resulted in the discovery of a backpack containing the evidence essential to the prosecution of this case. CP 29. The defendant moved to suppress the evidence found during the consent-based search of the vehicle, arguing that the stop of vehicle was not based on reasonable suspicion and his seizure was therefore unlawful. CP 7-10. The trial court granted the

defendant's motion and dismissed the case. CP 30-32. The State filed this timely notice of appeal. CP 33-35.

D. ARGUMENT

I. THE OFFICERS HAD REASONABLE SUSPICION TO BELIEVE A CRIME HAD BEEN COMMITTED OR WAS BEING COMMITTED AT THE TIME THEY STOPPED THE CAR THE DEFENDANT WAS HIDING IN.

The State assigns error four conclusions of law. The findings of fact are supported by the evidence adduced at the hearing and amply support the State's contention that the officers had reasonable suspicion for this traffic stop.

At the motion to suppress below, Zalozh argued only that the stop of Ms. Maximenko's car was unlawful because the officers lacked reasonable suspicion to stop the car. He conceded that the officers had probable cause to arrest him for burglary and violation of a no contact order. He conceded that the search of the car was premised upon Ms. Maximenko's valid consent and that, assuming the stop of the car was lawful under *Terry* (infra), the search of the car (and the backpack within it) was lawful. Reasonable suspicion to stop the car and Zalozh's standing¹ to challenge the seizure were the only issues argued below.

¹ The passenger in a car is seized even where he is not the driver and the car is not his. Thus, he has standing to challenge the unlawful seizure of a car in which he is a

Unchallenged findings of fact are verities on appeal. *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). Conclusions of law are reviewed de novo. *State v. Armenta*, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997). The constitutionality of a warrantless stop is a question of law reviewed de novo. *State v. Rankin*, 151 Wn.2d 689, 694, 92 P.3d 202 (2004).

Here, the officers had reasonable suspicion to support the stop of Ms. Maximenko's car because they reasonably believed that a crime had been and was being committed. A seizure for investigative purposes is permissible when a police officer can point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion. *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed.2d 889 (1968); *State v. Armenta*, supra, at 20. Probable cause is not required for this type of seizure because it is significantly less intrusive than an arrest. *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986); *State v. Quezadas-Gomez*, 165 Wn.App. 593, 267 P.3d 1036 (2011); *Brown v. Texas*, 443 U.S. 47, 50, 99 S. Ct. 2637, 61 L. Ed.2d 357 (1979).

When reviewing a police officer's seizure of an individual for an investigatory reason, the reviewing court should look at the "whole picture" to determine whether the police officer's suspicion of criminal

passenger. If the evidence seized was the fruit of the tainted seizure, it must be suppressed. *State v. Byrd*, 110 Wn.App. 259, 262, 39 P.3d 1010 (2002).

activity was reasonable. *State v. Lee*, 147 Wn. App. 912, 199 P.3d 445 (2008), *review denied*, 166 Wn.2d 1016 (2009). The reasonableness of the officer's suspicion is determined by the totality of the circumstances known to the officer at the inception of the stop. *State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 760 (1991). Not only should a reviewing court evaluate the totality of the circumstances presented to the investigating officer, but it should also take into account the officer's training and experience when determining the reasonableness of the Terry stop, as well as other factors such as the location of the seizure and the conduct of the person detained. *Glover* at 514.

Under this test, an officer may rely on a combination of otherwise innocent observations to briefly stop a suspect:

A police officer may rely on his experience to evaluate apparently innocuous facts. Facts "which appear innocuous to the average person may appear incriminating to a police officer in light of past experience." Police officers are not required to set aside that experience.

State v. Moreno, No. 29692-0-III (Court of Appeals Division III, ordered published on February 12, 2013, at p. 16), quoting *State v. Samsel*, 39 Wn.App. 564, 570-71, 694 P.3d 670 (1985); (other internal citations omitted). See also *U.S. v. Arvizu*, 534 U.S. 266, 122 S. Ct. 744, 151 L. Ed. 2d 740 (2002).

The investigative detention must last no longer than is necessary to verify or dispel the officer's suspicion, and the investigative methods employed must be the least intrusive means reasonably available to effectuate the purpose of the detention. *State v. Williams*, 102 Wn.2d 733, 738-40, 689 P.2d 1065 (1984).

Applying the totality of the circumstances test and looking at the "whole picture," the officers in this case had more than enough specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warranted this minimal intrusion. First, the officers had a well-founded suspicion that the defendant was located at Ms. Maximenko's house based upon the fact that he used to live there, his prior no-contact order violations committed at that house, and that fact that both his parents and his friend told the police he would likely be found there. Second, the officers had a well-founded suspicion that the woman who pulled out of the garage of Ms. Maximenko's house was, in fact, Ms. Maximenko. Half an hour before pulling out of the garage she was seen sending her two children off to the school bus stop. Clearly the children lived there, and clearly the woman was their mother. The officers knew, prior to this date, that Ms. Maximenko had two children (both of whom were also protected parties in the no contact order restraining the defendant). Because Officer Ford saw that the same woman who had seen

the children off to school was the same woman driving the BMW (that had been parked *inside the garage* of Ms. Maximenko's house), he had specific and articulable facts which, taken together with the rational inferences from those facts, suggested that Ms. Maximenko was the driver of the BMW.

Third, Officer Ford knew from his training and experience in fugitive apprehension that people will hide or obscure themselves in vehicles in an effort not to be found. See RP at 13. When Ms. Maximenko pulled out of the garage he saw an adult lying across the back seat of the car with a hood over his head. RP at 12. This person was clearly hiding. Given that the defendant had previously violated the no contact order by contacting Ms. Maximenko, that he had done it *at that house*, and that there was an adult now hiding in the backseat of Ms. Maximenko's car, these facts lead reasonably if not inexorably to the conclusion that the defendant was the person hiding in the backseat of the car. Thus, at the time Deputy Buckner stepped into the roadway to stop Ms. Maximenko's car, the officers had reasonable suspicion to believe that the defendant, for whom there was probable cause to arrest for burglary and violation of a no

contact order, and who was in the present act of again violating the no contact order, was in fact the person hiding in the backseat of the car.²

In her oral ruling and written conclusions of law the trial court focused too heavily on the seemingly innocuous component parts of this event, and she applied the incorrect standard of proof. The court opined “there was no evidence...the Defendant was at the residence or in the vehicle before the stop.” RP at 77, CP 29 (Conclusion of Law 1). To reach this conclusion requires the willing suspension of disbelief. As noted above, there was ample and compelling evidence that the defendant was the person hiding in the backseat of Ms. Maximenko’s vehicle. And because Ms. Maximenko pulled out of a closed garage, the defendant had, of course, been at her residence prior to the stop. Because there was reasonable suspicion to believe that the defendant was the person hiding in the backseat of the car, the officers did, in fact, have information that Ms. Maximenko was at risk (see Conclusion of Law 2, CP 29), and they did, in fact, have reasonable and articulable facts showing that there was current violation of the no contact order (Conclusion of Law 3, CP 29). The protected party in a domestic violence no contact order is always at some

² Under the "fellow officer" rule, cumulative knowledge of all officers acting as a unit may be considered in determining whether an officer had sufficient cause to act. *Torrey v. City of Tukwila*, 76 Wn. App. 32, 39, 882 P.2d 799 (1994); see *State v. Alvarado*, 56 Wn. App. 454, 456-57, 783 P.2d 1106 (1989), *review denied*, 114 Wn.2d 1015, 791 P.2d 534 (1990); *State v. Maesse*, 29 Wn. App. 642, 647, 629 P.2d 1349, *review denied*, 96 Wn.2d 1009 (1981).

degree of risk when he/she is in the presence of the restrained party. Further, in this case, the defendant was *hiding* in her backseat. When the court opined that the officers had no “knowledge” that there was a current violation of the no contact order, she employed the wrong standard. The officers need not have actual knowledge that a crime is being committed before they can seize a person under either article 1, §7 or the Fourth Amendment. The officers need only have specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant the intrusion.

The court, in both her oral ruling and conclusions of law, gave undue weight to the fact that the BMW was driving normally and there was “nothing outstanding” about her car. See RP at 78, CP 30 (Conclusion of Law 4). This innocuous fact does not negate the numerous other facts pointing to the reasonable belief that the defendant was the person hiding in the backseat of the BMW. As the Court of Appeals noted in *State v. Marcum*, the “divide-and-conquer” approach to evaluating reasonable suspicion is inconsistent with the totality of the circumstances test. *State v. Marcum*, 149 Wn.App. 894, 907, 205 P.3d 969 (2009), citing *U.S. v. Arvizu*, *supra*, at 274. The *Marcum* Court said:

Contrary to the trial court's implication in its order. determination that reasonable suspicion exists ... need not rule out the possibility of innocent conduct.” *Arvizu*, 534

U.S. at 277; *see also Kennedy*, 107 Wn.2d at 6 (explaining that activity consistent with both criminal and noncriminal activity may justify a brief detention). Rather, “the determination of reasonable suspicion must be based on commonsense judgment and inferences about human behavior.” *Illinois v. Wardlow*, 528 U.S. 119, 125, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000). “In allowing [investigative] detentions, *Terry* accepts the risk that officers may stop innocent people.” *Wardlow*, 528 U.S. at 126.

Marcum at 907-08.

In this case the officers possessed specific and articulable facts which, taken together with their rational inferences, more than support their belief that the person hiding beneath a hooded sweatshirt in the back of Ms. Maximenko’s car was, in fact, the defendant.

Finally, this seizure was minimally intrusive. The seizure must last no longer than is necessary to dispel or confirm the officers’ suspicions, and this seizure complied with that rule. The defendant popped up in the back seat of the car almost immediately after it was stopped by Deputy Buckner. At that moment he was positively identified as Pavel Zalozh by Deputy Yakhour. Because there was probable cause to arrest Zalozh for burglary and violation of a no contact order, and because he was committing a crime at that moment, he was arrested. Zalozh conceded below that if the initial stop of the car was lawful, the subsequent search of the car, including the backpack, was also lawful.

The trial court erred in concluding that this seizure violated the state and federal constitutions, and likewise erred in suppressing the evidence found during the search of the car. The trial court's suppression order, and order dismissing the case, should be reversed.

E. CONCLUSION

The trial court's order of suppression and dismissal should be reversed.

DATED this 27th day of September, 2013.

Respectfully submitted:

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