

No. 47887-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

MARVIAN CHRISTOPHER MARTIN,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 14-1-01948-5
The Honorable James Orlando & Brian Tollefson, Judges

OPENING BRIEF OF APPELLANT

STEPHANIE C. CUNNINGHAM
Attorney for Appellant
WSBA No. 26436

4616 25th Avenue NE, No. 552
Seattle, Washington 98105
Phone (206) 526-5001

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I. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied Marvian Martin's CrR 3.6 motion to suppress.
2. The trial court erred when it stated, in Finding of Fact IV, that the "information provided by the citizen [informant] was corroborated by [the arresting officer's] own observations."
3. The trial court erred when it stated, in Finding of Fact IV, that the information known to the arresting officer "formed a reasonable, articulable suspicion that allowed the officer to perform a Terry stop."
4. The trial court erred when it concluded that the Terry stop of the vehicle driven by Marvian Martin was justified because the arresting officer had a reasonable, articulable suspicion that Martin committed an assault.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Is a verbal argument between a man and woman an innocuous fact that does not corroborate information from an unknown and unnamed citizen that the man hit the woman?
(Assignments of Error 1 & 2)
2. Is information from an unknown and unnamed citizen that a man hit a woman, coupled with a police officer's observation

of nothing more than a verbal argument between the man and woman, create a reasonable and articulable suspicion of criminal activity sufficient to justify an investigative detention? (Assignments of Error 1, 3 & 4)

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Marvian Christopher Martin by Information with one count of violating a domestic violence court order (RCW 26.50.110). (CP 1-2) The State also alleged that Martin had at least two prior convictions for violating no-contact orders and that the current offense was committed against a family or household member (RCW 10.99.020). (CP 1-2)

The trial court refused Martin's motion to suppress all information (including the identity of his female companion and the existence of a no-contact order) discovered as a result of the investigative detention that led to Martins' arrest. (05/27/15 RP 40-44; CP 37-42)¹ But the court ruled that statements Martin made to the arresting officer were inadmissible because the officer failed to read Miranda warnings to Martin. (07/09/15 RP 71-72; CP 51-55)

¹ The transcripts will be referred to by the date of the proceeding contained therein.

The jury convicted Martin as charged. (07/14/15 RP 67; CP 82-83) The court imposed a drug offender alternative sentence consisting of 30 months of incarceration and 30 months of community custody. (07/22/15 RP 6; CP 104-05) The court imposed only mandatory legal financial obligations after determining that Martin does not have the means to pay any additional fines. (07/22/15 RP 6-7; CP 101) This appeal timely follows. (CP 112)

B. SUBSTANTIVE FACTS

1. *Facts from CrR 3.6 Hearing*

On May 17, 2014, Puyallup Tribal Police Officer Ryan Sales agreed to assist a bail bondsman with the apprehension of a fugitive from a recreational vehicle located in a gas station parking lot. (05/27/15 RP 5-6) As he stood by his patrol car observing the bail bondsman make contact with the fugitive, Officer Sales heard yelling coming from the area of the gas pumps. (05/27/15 RP 5-6) But Officer Sales was concentrating on the activity of the bail bondsman and did not turn his focus to what was happening at the gas pumps. (05/27/15 RP 5-6)

But an unidentified male approached Officer Sales and told him that a male hit a female in a car near the gas pumps.

(05/27/15 RP 7-8) When Officer Sales looked in that direction, he saw a black Mercedes Benz pulling away from the pumps and the man told him “that’s the vehicle.” (05/27/15 RP 8) Because the bail bondsman had successfully taken the fugitive into custody, Officer Sales decided to follow the black Mercedes. (05/27/15 8-9)

As the Mercedes was waiting its turn at a stop sign, Officer Sales could hear yelling coming from the car and saw the male driver waving his hands around by his head. (05/27/15 9-10) But he did not see the driver strike the female passenger and could not hear what they were arguing about. (05/27/15 RP 21, 23) Officer Sales informed dispatchers that he was investigating a report of a possible domestic assault, and activated his lights and siren. (05/27/15 RP 10) The Mercedes slowly came to a stop by the side of the road, and the male driver and a female passenger immediately exited the car. (05/27/15 RP 10-11, 23-24)

The driver, Marvian Martin asked, “Why are you stopping me?” (05/27/15 RP 11; CP 43-44) Officer Sales replied that he was investigating a report of a fight, and Martin said, “It wasn’t me.” (05/27/15 RP 11) According to Officer Sales, Martin was waving his arms, talking loudly, and acting aggressively. (05/27/15 RP 12) Martin then began to walk away, so Officer Sales stepped in front of

him, un-holstered his pepper spray, and threatened to spray Martin if he tried to leave. (05/27/15 RP 12-13) Martin complied and sat down on the curb. (05/27/15 RP 13)

Martin explained that the female passenger had been assaulted earlier in the day by two other females, so he had picked her up and was trying to protect her. (05/27/15 RP 16) Martin also explained that he was upset because the radio had been stolen from the Mercedes. (05/27/15 RP 21, 22, 24-25) Officer Sales noticed damage inside the Mercedes that was consistent with that explanation, and he did not see any injuries on the female passenger. (05/27/15 RP 24) The female also denied that Martin had assaulted her. (05/27/15 RP 24)

In the meantime, a second officer arrived to assist and made contact with the female passenger, who identified herself as Jennilee Gonzales. (05/27/15 RP 15-16, Exh. P1A) After Martin calmed down, Officer Sales obtained his identification and ran a record check. (05/27/15 RP 13, 15-16) Officer Sales discovered active warrants and a protective order prohibiting Martin from contacting Jennilee Gonzales. (05/27/15 RP 16-17; Exh. P2) Officer Sales then placed Martin under arrest for violating the no-contact order. (05/27/15 RP 17)

In his motion to suppress, Martin argued that Officer Sales used Martin's failure to fully stop at a stop sign as a pretext to investigate other criminal activity; that the officers did not have authority to question Gonzales and ask for her identification, and that Officer Sales did not have sufficient facts to support an investigative detention. (CP 5-19; 05/27/15 RP 30-34) The trial court rejected these arguments, and entered the following relevant findings and conclusions:

FINDINGS OF FACT

...
IV.

The information provided by the citizen was corroborated by Officer Sales own observations. This formed a reasonable, articulable suspicion that allowed the officer to perform a *Terry* stop. The assault had occurred in the presence of the citizen and in the proximity of the officer. The officer heard yelling from the same car and saw defendant waving his arms which corroborated the citizen's information....

V.

The stated purpose for the stop was for a possible domestic violence assault. Officer Sales activated his lights and informed dispatch hat he was pursuing a black Mercedes Benz for a possible domestic violence. Officer Sales then pulled the vehicle over for that purpose. Officer Sales did not pull the defendant over for a traffic violation or issue any kind of traffic citation....

...
IX.

Officer Sales had a basis to ask Ms. Gonzales for her identification. The officer had been informed

of a potential domestic violence assault and had an interest in identifying and checking on the health and safety of the victim of such an assault...

CONCLUSIONS OF LAW

I.

The *Terry* stop of the defendant was justified as Officer Sales had a reasonable, articulable suspicion that the defendant had committed an assault based on what he was told by the male citizen combined with what he personally heard and observed. The stop was not pretextual.

II.

The *Terry* stop was a reasonable length and was appropriately prolonged and expanded by defendant's actions as well as the existence of the warrants for defendant's arrest and a valid no contact order prohibiting defendant from contacting his passenger.

III.

Defendant does not have standing to object to Officer Sales requesting identification from the passenger as standing only exists if possession is an element of the offense. Further, Officer Sales had an independent basis ... that justified him asking for identification as he was making a routine check on the health and safety of a domestic violence victim.

(CP 37-42)

2. *Facts from Trial*

Officer Sales testified at trial consistently with his CrR 3.6 testimony. (07/09/15 RP 23-31) In addition, Officer Sales testified that Martin's and Gonzales' home addresses were the same on their Washington State identification cards. (07/09/15 RP 28, 30) He testified that the no-contact order prohibited Martin from

contacting Gonzales, and that it was valid on May 17, 2014 and that it appeared to have been signed by Marvian Martin. (07/09/15 RP 31-33; Exh. P2) The order also stated that Martin and Gonzales were “current or former cohabitants” or “intimate partners.” (07/09/15 RP 33-34; Exh. P2)

The State presented the Judgment and Sentences of four prior convictions against Martin for violating a protective order. (07/09/15 RP 38; Exh. P5, P6, P7, P8) The State also played a recording taken by Officer Sales’ patrol vehicle dash camera showing the entire contact. In the video, the female passenger can be heard identifying herself as Jennilee Gonzales. (07/09/15 RP 35; Exh. P1A) Martin stipulated that he was the man driving the Mercedes. (07/09/15 RP 38-39; CP43-44)

IV. ARGUMENT & AUTHORITIES

In Finding of Fact IV and again in Conclusion of Law I, the trial court holds that the information provided by the citizen witness was corroborated by Officer Sales’ own observations, and together these facts and circumstances created a reasonable, articulable suspicion of criminal behavior that allowed Officer Sales to perform a Terry investigative stop. (CP 38, 41)

When reviewing the denial of a motion to suppress, the court

should determine whether substantial evidence supports the challenged findings of fact. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999) (citing State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994)). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. Mendez, 137 Wn.2d at 214 (citing Hill, 123 Wn.2d at 644). The trial court's conclusions of law are reviewed *de novo*. Mendez, 137 Wn.2d at 214 (citing State v. Johnson, 128 Wn.2d 431, 443, 909 P.2d 293 (1996)). However, where, as here, some findings are actually conclusions of law or mixed findings of fact and conclusions of law, the court should review the factual components under the substantial evidence standard, and the conclusions of law, including those mistakenly characterized as findings of fact, *de novo*. See In re Estate of Haviland, 162 Wn. App. 548, 561, 255 P.3d 854 (2011).

First, the record does not support the trial court's factual finding that the information provided by the citizen was corroborated by Officer Sales' own observations. (CP 38, Finding of Fact IV) The citizen told Officer Sales that there was "an assault going on" in the black Mercedes and that the man hit the woman. (05/27/15 RP 8) Officer Sales testified that he heard yelling coming

from the Mercedes and saw the male driver waving his arms around his head. (05/27/15 RP 9-10) Officer Sales did not see Martin hit Gonzales and observed no sign of injury to Gonzales. (05/27/15 RP 23, 24) Officer Sales only observed a verbal argument, which does not corroborate the citizen's statement that Martin hit Gonzales. Therefore, the trial court erred when it found that Officer Sales' observations corroborated the citizen informant's tip. (CP 38)

The trial court also erred when it concluded that the information from the citizen, coupled with Officer Sales' observations, justified detaining Martin for investigation of assault. (CP 41) Generally, warrantless seizures are per se unreasonable under the Fourth Amendment of the United States Constitution and Article I, section 7 of the Washington State Constitution. State v. Kinzy, 141 Wn.2d 373, 384, 5 P.3d 668 (2000), cert. denied, 531 U.S. 1104, 121 S. Ct. 843, 148 L. Ed. 2d 723 (2001).² One exception to this requirement is the investigative Terry stop, which allows for brief detention when there is a reasonable suspicion of

² Art. I, § 7 provides greater protection of a person's right to privacy than the Fourth Amendment, including in Terry stop situations. See State v. Young, 135 Wn.2d 498, 510, 957 P.2d 681 (1998); State v. Ferrier, 136 Wn.2d 103, 111, 960 P.2d 927 (1998); State v. Hendrickson, 129 Wn.2d 61, 69 n. 1, 917 P.2d 563 (1996); State v. O'Neill, 148 Wn.2d 564, 584, 62 P.3d 489 (2003).

criminal activity. Terry v. Ohio, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); Kinzy, 141 Wn.2d at 384-85.

The State must show by clear and convincing evidence that the Terry stop was justified. State v. Garvin, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009). A Terry stop is justified only if the police officer can point to “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” Mendez, 137 Wn.2d at 223 (quoting Terry, 392 U.S. at 21). The necessary level of articulable suspicion 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).

“The circumstances must suggest a substantial possibility that the particular person has committed a specific crime or is about to do so.” State v. Martinez, 135 Wn. App. 174, 180, 143 P.3d 855 (2006) (citing State v. Garcia, 125 Wn.2d 239, 242, 883 P.2d 1369 (1994)). But an important safeguard to individual liberty in a Terry stop analysis is the principle that the circumstances justifying a Terry stop must be more consistent with criminal conduct than with innocent conduct. State v. Pressley, 64 Wn. App. 591, 596, 825 P.2d 749 (1992); State v. Thierry, 60 Wn. App. 445, 448, 803 P.2d 844 (1991).

When an officer bases his or her suspicion on an informant's tip, the State must show that the tip bears some "indicia of reliability" under the totality of the circumstances. State v. Z.U.E., 183 Wn.2d 610, 618, 352 P.3d 796 (2015). The bare conclusions of even a reliable informant, without more, cannot give rise to a reasonable suspicion of criminal activity. State v. Lesnick, 84 Wn.2d 940, 944, 530 P.2d 243 (1975).

There must be some corroborative observation by the officer that shows either (a) the presence of criminal activity or (b) that the informer's information was obtained in a reliable fashion. State v. Sieler, 95 Wn.2d 43, 47, 621 P.2d 1272 (1980); Lesnick, 84 Wn.2d at 944. These corroborative observations do not need to consist of particularly blatant criminal activity, but they must corroborate more than just innocuous facts. Z.U.E., 183 Wn.2d at 618-19 (citing State v. Wakeley, 29 Wn. App. 238, 241-43, 628 P.2d 835 (1981)).

In this case, Officer Sales observed nothing but innocuous facts. He observed a couple arguing. There is nothing illegal or suspicious about a couple having a verbal argument. Couples argue, and the vast majority of those arguments do not turn physical. Officer Sales did not observe any actual use of force or threat of force by Martin towards Gonzales. The uncorroborated

citizen tip and Officer Sales' observation of innocuous facts do not rise to the level of a reasonable, articulable suspicion of criminal behavior that allowed Officer Sales to perform a Terry investigative stop.

Because the initial contact was a seizure and detention, conducted without a reasonable and articulable suspicion of criminal activity, all evidence and statements obtained as a result of the contact should have been suppressed. State v. Kennedy, 107 Wn.2d at 4 (citing Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L.Ed.2d 441 (1963)).

V. CONCLUSION

Information from an unknown and unnamed citizen that a man hit a woman, coupled with a police officer's observation of nothing but a verbal argument between the man and woman, is insufficient to justify a warrantless detention and investigation. The Terry stop in this case was not justified by the facts and circumstances known by Officer Sales, and all evidence obtained as a result should have been suppressed. Martin's conviction should therefore be reversed and the charges dismissed with prejudice.

///

DATED: December 7, 2015

Stephanie Cunningham

STEPHANIE C. CUNNINGHAM

WSB #26436

Attorney for Marvian C. Martin

CERTIFICATE OF MAILING

I certify that on 12/07/2015, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Marvian C. Martin, DOC# 737095, Coyote Ridge Corrections Center, P.O. Box 769, Connell, WA 99326-0769.

Stephanie Cunningham

STEPHANIE C. CUNNINGHAM, WSBA #26436

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