

NO. 48629-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

MCKENNA GABRIELLE STEIN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 15-1-01301-5

BRIEF OF RESPONDENT

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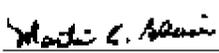
SERVICE	Jennifer Vickers Freeman 2112 N 30th St Ste E Tacoma, Wa 98403-3363 Email: vickersfreemanlaw@gmail.com	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. <i>or, if an email address appears to the left, electronically.</i> I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED September 19, 2016. Port Orchard, WA  Original e-filed at the Court of Appeals; Copy to counsel listed at left. Office ID #91103 kcpa@co.kitsap.wa.us
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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether Stein was unlawfully seized by a police question about drug paraphernalia and whether such seizure vitiated her consent to search her car?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Mckenna Gabrielle Stein was charged by information filed in Kitsap County Superior Court with possession of controlled substance (methamphetamine). CP 1. At omnibus, Stein gave notice that she would move to suppress evidence and a hearing was scheduled for that motion. CP 6.

After the CrR 3.6 hearing, the trial court entered Findings of Fact and Conclusions of Law. CP 46. The trial court denied Stein's motion. CP 50. In so doing, the trial court concluded, *inter alia*, that the interaction between Stein and the police was not a social contact; that the police contact was in the nature of a *Terry* stop, there being a well-founded reasonable suspicion that Stein was involved in criminal activity; that *State v. Soto-Garcia* does not control because in that case there was no such reasonable suspicion supporting the detention ("no basis to detain the defendant."); that Stein voluntarily admitted drug use; that Stein voluntarily gave consent for the search of her car there being no coercion

or force use to induce the giving of consent, including that Stein was advised that she was not under arrest; that Stein retrieved a bag of drug paraphernalia from the car and gave it to the police. CP 49-50.

After the denial of Stein's CrR 3.6 motion, the case proceeded to bench trial on stipulated facts. CP 25. The trial court accepted the stipulation and based thereon entered verdict of guilty. CP 29.

B. FACTS

The substantive facts are not disputed. Stein stipulated to the facts for bench trial and no argument was made in the trial court or is made on appeal that those facts are incorrect or insufficient. RP 2/22/16 (stipulated trial and sentencing). Further, the facts taken during the CrR 3.6 hearing (RP 2/16/16) are memorialized in the trial court's Findings of Fact. CP 46-49. These findings are not contested on appeal.

Police sought a suspect for who they had a felony warrant and probable cause to believe the suspect had committed delivery of heroine. CP 25-26. They found an associated vehicle near an address at which the suspect was thought to be living. CP 26. Four officers (a late arrival made it five, CP 47) approached the residence, knocked and announced their business, but got no response. Id.

The police contacted the home owner. She confirmed that the

suspect lived there and that she, the home owner, also maintained a room in the residence. Id. The home owner came to the house, opined that Stein might also be in the residence, and consented to the police entry. Id. After one more announcement, three of the police entered the residence. Id. They entered with guns drawn. Id. The suspect was quickly located and taken into custody without incident. Id. Being aware of Stein in the kitchen, the police told her to remain there while they performed the arrest. CP 47.

“At this point, the defendant walked out of the kitchen. She was compliant with the officers *and was not detained.*” CP 26, ln. 26 (emphasis added). Stein was not under arrest, not in handcuffs, not ordered from the residence. CP 48. While doing a sweep of the house, the police saw a glass smoking pipe and tinfoil with burn marks on it in plain view. CP26.

The lead officer “walked with the defendant outside and explained to her why they were there.” CP 27, ln. 1. Again, Stein was not handcuffed or under arrest and the record does not include that she was ordered outside. Outside, the officer asked her about the items seen in the house while advising her that she was not under arrest. CP 27. She was not read *Miranda* warnings. CP 48. The officer had holstered his weapon and was the only officer talking to her (i.e., she was not surrounded by police during the conversation). CP 48. Stein spoke to the

officer, stating that she struggles with heroine addiction, currently smokes it, and volunteered that there was heroine ingestion paraphernalia in the car. Id. She verified that she was the owner of the car. Id.

Next, and based on Stein's statements, the lead officer requested permission to search the car. CP 27. No *Ferrier* warnings were read. CP 48. In response, Stein (not the police officer) walked to the vehicle, opened the driver's door, and retrieved an item from her purse. CP 27. She handed this small bag to the officer saying that it contained her heroin supplies. Id. Approximately 10 to 15 minutes had elapsed between the initial entry into the residence and Stein handing the bag to the police. CP 48. The officer looked inside and verified that there was drug paraphernalia inside. CP 27. From the record, it appears that the only other actual search entailed the retrieval of a backpack from the car. Id. Later, the officer discovered a small baggie containing methamphetamine in the paraphernalia bag that Stein had handed him. Id.

III. ARGUMENT

A. STEIN WAS LAWFULLY DETAINED DURING THE SERVICE OF AN ARREST WARRANT, WAS LAWFULLY SUBJECT TO QUESTIONING, VOLUNTEERED THAT SHE WAS USING DRUG PARPHENALIA THAT WAS IN HER POSSESSION, AND NOT ONLY CONSENTED TO THE SEARCH BUT PERSONALLY PROVIDED CONTRABAND TO THE POLICE.

Stein argues that she was unlawfully seized and that such seizure and attendant police coercion vitiates her consent to search. This claim is without merit because the police were engaged in lawful activity in the serving of an arrest warrant and Stein was only briefly seized during that process. Her claim fails because items seen in the residence raised an articulable suspicion of criminal activity, and, under circumstances wherein she had no duty to do so, she voluntarily admitted drug use and voluntarily provided the police with a container in which was discovered the contraband the possession of which she was prosecuted for.

Warrantless searches and seizures are per se unreasonable. *State v. Rankin*, 151 Wn.2d 689, 695, 92 P.3d 202 (2004). Regarding seizure of a person

Under article I, section 7, a person is seized ““only when, by means of physical force or a show of authority’ ” his or her freedom of movement is restrained and a reasonable person would not have believed he or she is (1) free to leave, given all the circumstances, *State v. Young*, 135 Wash.2d 498, 510, 957 P.2d 681 (1998)

(quoting *State v. Stroud*, 30 Wash.App. 392, 394–95, 634 P.2d 316 (1981) and citing *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980)), or (2) free to otherwise decline an officer's request and terminate the encounter, see *Florida v. Bostick*, 501 U.S. 429, 436, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991); *Thorn*, 129 Wash.2d at 352, 917 P.2d 108. The standard is a “a purely objective one, looking to the actions of the law enforcement officer.” *Young*, 135 Wash.2d at 501, 957 P.2d 681 (emphasis added). Mr. O'Neill has the burden of proving that a seizure occurred in violation of article I, section 7. *Young*, 135 Wash.2d at 509, 957 P.2d 681; *Thorn*, 129 Wash.2d at 354, 917 P.2d 108; *Knox*, 86 Wash.App. at 838, 939 P.2d 710.

State v. O'Neill, 148 Wn.2d 564, 574, 62 P.3d 489 (2003). Moreover,

we reject the premise that under article I, section 7 a police officer cannot question an individual or ask for identification because the officer subjectively suspects the possibility of criminal activity, but does not have a suspicion rising to the level to justify a Terry stop.¹ Once a seizure is found, however, the reasonableness of the officer's suspicion and the factual basis for it are relevant in deciding the validity of the seizure.

Id. at 577.¹

But a citizen may be lawfully detained for investigative purposes.

A Terry stop, under either the Forth Amendment or Article 1, section 7 of the Washington Constitution is permissible if the 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, 88S.Ct. 1868, 20 L.Ed.2d 889 (1968); *State v. Armenta*, 134 Wn.2d 1, 20, 948 P.2d 1280 (1997). Although probable cause is not required to justify a Terry detention (see, e.g., *Brown v. Texas*, 443 U.S.

¹ Application of the first quoted sentence leads to the conclusion that Stein was never actually seized but the trial court ruled it a Terry seizure and the state did not cross

47, 50, 99S.Ct. 2637, 61 L.Ed.2d 357 (1979)), the officer’s articulable suspicion must rise to the level of “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 reasonable suspicion is determined by consideration of all the circumstances known to the officer at time of the detention. *State v. Lee*, 147 Wn.App. 912, 917, 199 P.3d 445 (2008), *rev. denied*, 166 Wn2d 1016 (2009). Both the content and reliability of the information are important considerations. *Id.* A particular officer’s training and experience are part of all the circumstances. *State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 760 (1991). Moreover, all the circumstances includes information told to the officer, observations she makes, and inferences and deductions drawn from the officer’s training and experience. *United States v. Cortez*, 449 U.S. 411, 66L.Ed.2d 621, 101 S.Ct. 690, 694-95 (1981).

1. ***Stein does not challenge the substantive facts, which include that the officer and Stein simply walked out of the house together.***

In her assignments of error, Stein assails the trial court for making various “findings.” But each of these assignments of error go the trial court’s Conclusions of Law. She argues error in “finding” that she was

appeal.

not unlawfully detained, which issue is raised by Conclusion V. CP 49. She argues error in “finding” that during the conversation outside the house, she was subject to a valid *Terry* stop, which issue is raised by Conclusion VI. Id. She argues error in “finding” the drug paraphernalia in the house provided reasonable suspicion for a *Terry* stop, which issue is raised by Conclusion VI. Id. She claims error for “finding” that *State v. Soto-Garcia* is distinguishable, which issue is raised by Conclusion VIII. Id. She claims error in “finding” that Stein voluntarily admitted to drug use, which issue is raised by Conclusion IX. CP 50. And, finally, she claims error in “finding” that the search of the car was lawful via consent, which issue is raised by Conclusion XI. Id.

Thus, in each instance that Stein challenges a finding she is actually challenging a Conclusion of Law. Nowhere in this record does Stein challenge the trial court’s Findings of Fact. Thus those findings are binding as supported by substantial evidence and are verities on appeal. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Stein has now had three opportunities to challenge the substantive facts of the case and has failed to do so; she did not challenge the entry of the Findings of Fact and Conclusions of Law for Hearing on CrR 3.6, she stipulated to essentially the same facts in her bench trial stipulation, and she fails to assign error to any finding of fact herein.

In particular, Stein speculates that if the officer asked her to go

outside, she was therefore seized when she did. Brief at 12. However, this speculation ignores the verity that “the defendant came out of the kitchen and *went outside with Sergeant Heffernan*” as found in the CrR 3.6 F and C (CP 48 (emphasis added) or “Sergeant Heffernan walked with the defendant outside” as stipulated to by Stein. CP 27. As found, and as stipulated to, this is simply an innocuous fact and as a verity does not support Stein’s attempt to insert some sinister police behavior into this part of Stein’s contact with the police. The record reflects that the two simply walked outside together.²

But Stein claims that the failure of the officer to remember the actual words spoken weakens the state’s burden on the suppression issue. Brief at 13, 14. This bald assertion of course ignores the trial court’s findings. Moreover, no authority is cited to support that assertion. In fact, omission of a particular fact by a fact finder may allow a court on review to presume that the party with the burden of proof failed to meet its burden. *See State v. Rose*, 175 Wn.2d 10, 21, 282 P.3d 1087 (2012), *citing State v. Armenta*, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997). But this rule “presupposes factual issues in dispute.” *Rose, supra* at 20. Here, as argued, no factual findings are disputed by Stein.

But the exiting the house situation is crucial to Stein’s argument.

² If we do care to speculate as to why Stein went outside, it should be noted that when she got outside she had a cigarette. If she went outside to smoke, once again there is no

Stein asserts no claim that it was unlawful for her to be seized inside the house, simply remarking that under the circumstances inside the house she was seized. Brief at 8. She concedes that the initial police entry into the residence was not unlawful. Id. She does not claim impropriety in the police actions toward her in the house. Id. In fact, the police neither used force nor threatened use of force on Stein. As they were arresting the suspect, they simply told her to remain in the kitchen until they were done. The record does not support a supposition that officers pointed guns at her. She was not handcuffed or otherwise physically restrained. She was not questioned while inside the house. Essentially, she was merely told to stay out of the way until the police finished their lawful business. If seized she was, then only by a lawful, and expedient, command intended only to lessen possible danger to Stein and the police.

Conceptually, then, this incident has two parts: the time inside and the time outside. Inside, the very minimal intrusion on Stein's private affairs was necessary and is not challenged by Stein. The issue must, then, turn on the behavior of the police officer after he and Stein walked outside.

sinister agenda by the policeman.

2. *If Stein was seized outside the house, such seizure was based on a reasonable articulable suspicion that she was engaged in criminal conduct.*

Stein claims that the officer's questions to her about the drug paraphernalia found in the house constituted a seizure. She makes much of the fact that the mere possession of drug paraphernalia does not constitute a crime. Brief at 9. That is likely a correct statement of law as far as it goes and the record reflects that Stein was not arrested for that charge. But Stein asserts no authority for the proposition that when an officer sees such things, he has no power to investigate them even though probable cause may be lacking. Further, Stein cites no authority for the proposition that the officer's reasonable suspicion should immediately evaporate when the officer asked about the items in the house and Stein denied that they were hers. Brief at 9. Such a rule would allow anyone subject to investigation to veto a police investigation by the simple expedient of denial. *See State v. Fisher*, 132 Wn. App. 26, 30, 130 P.3d 382 (2006), *rev denied*, 158 Wn.2d 1021 (2006) (denial of ownership of pipe in detainee's possession and without further explanation gave officer reasonable grounds to disbelieve denial).

As the cases require, and if this case is properly viewed as a *Terry* stop case, the reasonableness of the officer's suspicion is to be viewed under all the circumstances known to the officer. *See State v. Lee, supra*. Here, the police were making an arrest in the house based in part on

probable cause to believe the arrestee had delivered heroine. CP 25-26. Stein was known to be the arrestee's girlfriend and was found in the same house with the alleged heroine dealer. RP, 2/16/16, 10. Stein was a regular visitor to the heroine dealer's house as can be reasonably inferred by the homeowner's accurate prediction that she would be found inside on this occasion (at 5 a.m.). CP 26.

Given these facts, facts that were known to the officers at the time, it is entirely reasonable for the officer to enquire of the person present and in proximity to the seen paraphernalia as to the provenance of that paraphernalia. A police officer would be remiss in simply ignoring this fact, which is essentially what Stein thinks he should have done here. As the *O'Neill* Court observed

Citizens of this state expect police officers to do more than react to crimes that have already occurred. They also expect the police to investigate when circumstances are suspicious, to interact with citizens to keep informed about what is happening in a neighborhood, and to be available for citizens' questions, comments, and information citizens may offer.

148 Wn.2d 564, 576. The seeing of the drug paraphernalia coupled with all the other circumstances known to the police essentially changed Stein's status from that of a person who just happened to be there when the arrest was effected to a person who might well have information about ongoing criminal activity—possession and distribution of controlled substances.

The officer conversed with Stein for “maybe a few minutes.” RP,

2/16/16, 13. Eventually, he asked if there was anything of interest in her car. *Id.* Here, she responded with a non-sequitur, saying that she struggles with drug addiction. RP, 2/16/16, 13; CP 27. Her particular problems with drug addiction is clearly not directly responsive to the officer's inquiry about what was in her car. On this record, Stein continued, responding more directly to the question, and said that there was drug paraphernalia in the car. *Id.* The scope of a *Terry* detention may be expanded based upon the answers given to police questions (of course, assuming the lawfulness of the initial detention). *See State v. Smith*, 115 Wn.2d 775, 778, 785, 801 P.2d 975 (1990) (scope of detention may be enlarged or prolonged if information provided either confirms the suspicion or arouses further suspicion); *see also State v. Hoesch*, 176 Wn.App. 1029, (UNPUBLISHED), 2013 WL 5336653 (9/2013) (“a suspect's reaction to the police helps determine the reasonableness of an officer's actions during a *Terry* stop”), *citing State v. Belieu*, 112 Wn.2d 587, 600, 773 P.2d 46 (1989).

Not until after Stein's un-coerced statements did the officer ask to search her car. That is, after she told him that there was contraband in the car, he asked to search for it.³ Here, the record does not support an

³ It should be noted that the word “contraband” is accurate here: Stein told the officer that she uses and that her use was accomplished by the paraphernalia in her car. Possession of paraphernalia coupled with an admission that it is used for that purpose is more than mere possession of paraphernalia.

argument that Stein was compelled or commanded in any way to answer the officer; she could have simply walked away or declined to answer with no apparent consequences. And, in the course of consenting, Stein actually retrieved the item for the officer before he had even had an opportunity to search the vehicle.

Further, Stein argues, regarding the paraphernalia in the house, that the officer had no reason to believe she “*used*” that paraphernalia. Brief at 9. Although this may be true of the paraphernalia in the house, to the contrary, outside, she both admitted to drug use, under circumstances where she was not required to answer, and, at the same time, admitted that the paraphernalia with which she uses drugs is found in her car. At that point, the officer’s reason to believe that the paraphernalia he sought was *used* was provided by Stein herself by admission. *But see* RCW 10.31.100(1) (arrest for use must be committed in officer’s presence). Still, she was not arrested at any point of the encounter for either possession or use of paraphernalia.

Again, Stein argues that the officer’s questioning outside, where he arguably lacked sufficient facts to establish use, was a “fishing expedition.” Brief at 10. But she cites no authority that says that based on reasonable articulable suspicion, the police may not troll for further information. That in fact is the purpose of an investigatory detention.

Similarly, Stein argues that she was seized “when the officer

continued to question her outside the residence.” Brief at 10. (emphasis added). The implication of this assertion is that there was questioning inside, which continued outside. But the state can find no fact in the CrR 3.6 findings, the stipulated facts, or the CrR 3.6 testimony indicating that any questioning occurred inside the residence. Moreover, it is not manifest in the record that *continued* questioning occurred outside either. In fact the officer was clear that the conversation commenced with the officer’s desire to explain the police activity to Stein. Telling her the reason for the police activity is not questioning. Then, the record reflects that the officer asked the single question about the paraphernalia in the house. Only then did Stein volunteer the information about her drug addiction and the location of her paraphernalia. And, only after that did the officer ask to look for that admitted to contraband.

That there was a “progressive intrusion” is unlikely under these facts. Brief at 11. Stein was barely seized while inside the house, being asked to remain in the kitchen only. This under circumstances where the police may well have been justified in taking more aggressive actions to alleviate the obvious danger that attends any such entry into a private residence in order to effect an arrest. And, the record does not support her assertion that she was seized at gun point. Brief at 13. In fact, the officer testified that he could not even see her when he told her to stay in the kitchen. CP 47. The single lawful order directed at Stein under all the

circumstances is simply not that coercive. Then, as we have seen, they simply walk outside together, where the officer explained the reason for the police presence while Stein, who is not in custody and told that she would not be arrested, smoked a cigarette.

Stein cites *State v. Soto-Garcia*, 68 Wn. App. 20, 841 P.2d 1271, in support of this progressive intrusion argument. Brief at 11. The trial court expressly ruled that that case is distinguishable. CP 49. There, Soto-Garcia was initially detained because of where he was and because he looked away from the officer. *Id.* at 22. The police there saw nothing at all indicating that Soto-Garcia was engaged in or about to be engaged in criminal activity. Then, the police asked about where he had been and where he was going and then they asked him to identify himself and then they ran a records check, then they interrogated about drug possession and then, finally, after all these intrusions while the police had no articulable facts, they asked to search. From these “progressive intrusions” the Court of Appeals determined that a reasonable person would not believe she was free to go. *Id.* at 22.

In the present case, the initial contact with Stein was in the course of lawful police activity. The police already knew who she was. And, the crucial distinction from *Soto-Garcia*, when the officer conversed with Stein, he had already seen the drug related material that provided a reasonable suspicion. Stein was not questioned in a factless vacuum.

Evidence of drug activity permeated all the circumstances of the present case, including actually seeing physical evidence of drug activity. Even so, the record shows no impediment to Stein simply declining to converse with the officer.

Similarly, *State v. Gonzales*, 46 Wn. App. 388, 731 P.2d 1101 (1986), does not support Stein's claim. There was an issue in that case only because the consent to search was sought after an unlawful arrest. *Id.* at 398. There, even the unlawfulness of the arrest, however, did not serve to make the consent unlawful. In the present case, Stein was never arrested. Here, the officer's question may arguably have constituted a seizure. However, this relatively minor intrusion is far from the coercion attendant in a formal arrest as in *Gonzales*. The case, then, is distinguishable on that basis. But there is also a similarity in that the Court held that *Gonzales* volunteered his consent. Stein too volunteered information about her drug usage and the presence of drug paraphernalia in her car. No discussion of the items in the house warranted a response about her drug problems or the contents of her car. Moreover, it should be observed once more that Stein was never arrested at the scene.

The initial interference with Stein's freedom of movement in the house was justified by the arrest warrant and is not challenged by Stein. That interference passed and outside a single question was asked about the seen paraphernalia. The purpose of the question was clearly to investigate

drug activity, was accomplished with minimal physical intrusion, if any, and the question was asked a short time after the initial lawful seizure in the house. *See State v. Belieu*, 112 Wn.2d 587, 595-96, 773 P.2d 46 (1989), *citing State v. Williams*, 102 Wn.2d 733, 689 P.2d 1065 (1984). Stein's rights were not violated. Her claim fails.

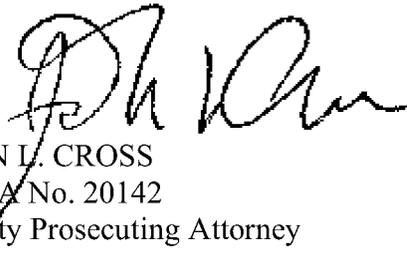
IV. CONCLUSION

For the foregoing reasons, Stein's conviction and sentence should be affirmed.

DATED September 19, 2016.

Respectfully submitted,

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