

No. 49032-3-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

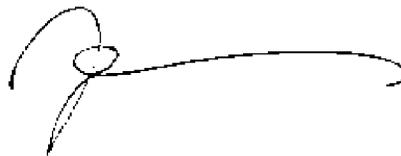
NICHOLAS EDWARD NOVION,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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By:

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TABLE OF CONTENTS

TABLE OF AUTHORITES ii

I. ISSUES.....1

II. STATEMENT OF THE CASE1

III. ARGUMENT4

 A. THE TRIAL COURT CORRECTLY DENIED NOVION’S
 MOTION TO SUPPRESS THE EVIDENCE.....4

 1. Standard Of Review5

 2. The State Concedes That The Challenged Findings
 Of Fact Are Not Fully Supported By Substantial
 Evidence.....6

 3. Officer Humphrey Had Reasonable Suspicion Novion
 Was Engaged In Criminal Activity, Making The Stop
 Valid.....8

 4. Novion Abandoned The Collected Evidence And The
 Exclusionary Rule Does Not Apply12

IV. CONCLUSION.....17

TABLE OF AUTHORITIES

Washington Cases

<i>Nord v. Eastside Ass'n Ltd.</i> , 34 Wn. App. 796, 664 P.2d 4 (1983)...	5
<i>State v. Anderson</i> , 51 Wn. App. 775, 755 P.2d 191 (1988)	9
<i>State v. Arreola</i> , 176 Wn.2d 284, 290 P.3d 983, 986 (2012)	11
<i>State v. Bray</i> , 143 Wn. App. 148, 177 P.3d 154 (2008)	9
<i>State v. Campbell</i> , 166 Wn. App. 464, 272 P.3d 859 (2011)	5
<i>State v. Dorey</i> , 145 Wn. App. 423, 186 P.3d 363 (2008)...14, 15, 16	
<i>State v. Gatewood</i> , 163 Wn.2d 534, 182 P.3d 426 (2008).....	9
<i>State v. Glover</i> , 116 Wn.2d 509, 806 P.2d 760 (1991)	8, 9
<i>State v. Hepton</i> , 113 Wn. App. 673, 54 P.3d 233 (2002).....	13
<i>State v. Hill</i> , 123 Wn.2d 641, 870 P.2d 313 (1994).....	5, 8
<i>State v. Kennedy</i> , 107 Wn.2d 1, 726 P.2d 445 (1986).....	8, 12
<i>State v. Ladson</i> , 138 Wn.2d 343, 979 P.2d 833 (1999)	10, 11, 12
<i>State v. Martinez</i> , 135 Wn. App. 174, 143 P.3d 855 (2006).....	9
<i>State v. Nettles</i> , 70 Wn. App. 706, 855 P.2d 699 (1993), <i>review denied</i> , 123 Wn.2d 1010 (1994)	13
<i>State v. O'Neill</i> , 148 Wn.2d 564, 62 P.3d 489 (2003)	12
<i>State v. Reynolds</i> , 144 Wn.2d 282, 27 P.3d 200 (2001)	13
<i>State v. Sadler</i> , 147 Wn. App. 97, 193 P.3d 1108 (2008)	6
<i>State v. Seagull</i> , 95 Wn.2d 898, 632 P.2d 44 (1981).....	9

State v. Stevenson, 128 Wn. App. 179, 114 P.3d 699 (2005).....5

State v. Whitaker, 58 Wn. App. 851, 795 P.2d 182 (1990)13, 14

State v. White, 97 Wn.2d 92, 640 P.2d 1061 (1982).....8

State v. Young, 86 Wn. App. 194, 935 P.2d 1372 (1997)13

Federal Cases

Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)....8

Constitutional Provisions

Washington Constitution, Article I, § 712

I. ISSUES

- A. Did the trial court err when it found Officer Humphrey had reasonable suspicion Novion was engaged in criminal activity and her stop of Novion was valid?
- B. Did the trial court err when it found Novion abandoned the collected evidence, making the exclusionary rule inapplicable?

II. STATEMENT OF THE CASE

On March 21, 2016, Officer Humphrey was dispatched to the 1100 block of West Plum Street in Centralia, Washington. RP¹ 4-5. Officer Humphrey was familiar with the location from previous reports of suspected drug activity in the area. RP 5. Officer Humphrey was familiar with the reporting party as someone who had provided reliable information in the past. RP 6-7, 14. Officer Humphrey was told a green Volvo was parked at the end of the block and a male had been walking back and forth to a house on the corner known for heroin and stolen property trafficking. RP 6. The male was described as wearing a sweatshirt and black backpack. RP 6.

When Officer Humphrey arrived at the scene, she observed the green Volvo parked at the end of the block with its headlights on, with a female in the driver's seat and a male rear seat passenger.

¹ The State will cite to the transcript of the jury trial, which is in consecutive paginated volumes as RP.

RP 7. After watching the vehicle for a while to see if anyone else approached, Officer Humphrey decided to contact the vehicle occupants. RP 7.

While she was speaking with the female, Officer Humphrey heard a door open and shut behind her. RP 9. Officer Humphrey turned around and saw a male wearing a sweatshirt and black backpack, coming out of the house on the corner. RP 9. She turned back to speak with the female, when she heard the reporting party yell, "There he is and he's running." RP 9. Officer Humphrey turned around again, and did not see the male in the sweatshirt anymore. RP 9. Officer Humphrey returned to her patrol vehicle and drove in the direction to which her reporting party had pointed. RP 9.

Eventually, Officer Humphrey observed the male come out from the side of a residence. RP 10. She parked the patrol vehicle in the street and activated the rear hazard lights. RP 10-11. She got out of the vehicle and said, "Hey, come here." twice to the male. RP 10. The male, later identified as Nicholas Novion, walked to the back of the patrol vehicle and Officer Humphrey spoke with him. RP 10-11.

At about the same time, the owner of the residence came out and asked why Novion was by his house. RP 11. The owner stated that he did not know Novion or why Novion was in the owner's yard.

RP 11. Officer Humphrey placed Novion in handcuffs in the back of her patrol vehicle and waited for backup. RP 11-12.

After backup arrived to watch Novion, Officer Humphrey investigated the area near the residence where she had seen him. RP 12. She found several items including prescription bottles with Novion's name on them. RP 12. Officer Humphrey also found what was later determined to be heroin and methamphetamine. RP 13, 15; CP 26.

Novion was charged with Possession of Heroin and Possession of Methamphetamine. CP 1-3. Novion moved to suppress all evidence obtained, challenging the basis of the stop. CP 6-9. At a suppression hearing, the trial court heard testimony from Officer Humphrey and Novion. RP 4, 19. After considering the testimony and arguments of the parties, the trial court denied the motion to suppress. RP 37; CP 23. The trial court found Officer Humphrey had reasonable suspicion of criminal activity under the totality of the circumstances. RP 37-38. The trial court found that at the time Officer Humphrey made contact with Novion, he was walking out from beside a home while the homeowner indicated that Novion did not have permission to be there. RP 38; CP 21. The trial court concluded Officer Humphrey had reasonable suspicion Novion

was committing a trespass and the contact was a valid *Terry* stop. RP 38; CP 22-23. The trial court additionally found the property seized by Officer Humphrey had been abandoned by Novion and the exclusionary rule would not apply even if the stop was invalid. RP 38-39; CP 22.

Novion proceeded with a stipulated facts bench trial, with the intent to appeal the trial court's ruling on the motion to suppress. RP 45. The trial court reviewed the stipulated facts and found Novion guilty of Possession of Heroin and Possession of Methamphetamine. RP 46-47. This appeal follows. CP 30.

The State will supplement the facts as necessary throughout its argument below.

III. ARGUMENT

A. THE TRIAL COURT CORRECTLY DENIED NOVION'S MOTION TO SUPPRESS THE EVIDENCE.

Novion argues the trial court incorrectly denied his motion to suppress the evidence found by the side of another person's home. The trial court correctly ruled Officer Humphrey had reasonable suspicion Novion was or had been engaged in criminal conduct, and it was lawful for Officer Humphrey to stop him. The trial court correctly ruled Novion abandoned the collected evidence when he stashed his belongings by the side of another person's home, making

the exclusionary rule inapplicable. The State concedes that the challenged findings of fact are not fully supported by substantial evidence. However, this Court should find that the motion to suppress the evidence obtained was correctly denied.

1. Standard Of Review.

When an appellant challenges a trial court's denial of a motion to suppress, the reviewing court determines whether there is substantial evidence to support the challenged findings of fact and whether those findings support the trial court's conclusions of law. *State v. Campbell*, 166 Wn. App. 464, 469, 272 P.3d 859 (2011). Findings of fact entered by a trial court after a suppression hearing will be reviewed by the appellate court only if the appellant has assigned error to the fact. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Findings of fact not assigned error are considered verities on appeal. *State v. Stevenson*, 128 Wn. App. 179, 193, 114 P.3d 699 (2005). Challenged trial court findings of fact that are not supported by substantial evidence will not be binding on appeal. *Hill*, at 647 (*citing Nord v. Eastside Ass'n Ltd.*, 34 Wn. App. 796, 798, 664 P.2d 4 (1983)).

A trial court's conclusions of law are reviewed de novo, with deference to the trial court on issues of weight and credibility. *State v. Sadler*, 147 Wn. App. 97, 123, 193 P.3d 1108 (2008).

2. The State Concedes That The Challenged Findings Of Fact Are Not Fully Supported By Substantial Evidence.

Novion assigns error in part to Findings of Fact 1.4, 1.5, and 1.7 from the suppression hearing. Brief of Appellant 1. Novion argues the trial court erred in finding Officer Humphrey observed or saw Novion running away, which is included in Findings 1.4 and 1.5. Brief of Appellant 7-8. Novion questions whether the trial court erred in finding Officer Humphrey identified evidence as containing heroin at the time she found the evidence, which is included in Finding 1.7. Brief of Appellant 2-3.²

The State concedes that findings of fact 1.4 and 1.5, to the extent they refer to Officer Humphrey having personally observed Novion running away, are not supported by substantial evidence and are therefore not binding on this Court. Officer Humphrey testified she initially saw Novion coming out of a house and turned away from him. RP 9. When the reporting party yelled, "There he is and he's

² Novion properly assigns error to this portion of Finding of Fact 1.7 and raises the question in his issues section, but does not discuss the finding of fact in the body of the argument.

running,” Officer Humphrey turned back around and could no longer see Novion. RP 9. Officer Humphrey testified she did not personally see Novion run. RP 17. This Court should find that, based on Officer Humphrey’s observations and the statement of the reporting party, Officer Humphrey had reason to believe Novion ran away from the residence he had exited. This Court should find that Officer Humphrey then proceeded to get in her marked patrol vehicle to search the area for Novion.

The State also concedes that finding of fact 1.7 is not supported by substantial evidence, and therefore not binding on this Court, to the extent it suggests Officer Humphrey recognized the bundle as containing black tar heroin at the time she collected the evidence. Officer Humphrey testified she found heroin with the items Novion abandoned. RP 13. However, Officer Humphrey testified that at the time she collected the evidence, she did not know what was in the bindles, as they were makeshift bindles, where the substance was tied off in the corner of a plastic shopping bag. RP 15. Novion’s argument on appeal does not appear to rely on the issue of whether Officer Humphrey immediately recognized the evidence obtained to

include heroin.³ However, where findings of fact are not supported by substantial evidence, this Court should not be bound to those facts in its review. *Hill*, at 647. The State maintains this Court should affirm the trial court's conclusions of law nevertheless.

3. Officer Humphrey Had Reasonable Suspicion Novion Was Engaged In Criminal Activity, Making The Stop Valid.

An investigatory stop of a person is justified if the officer can "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *State v. White*, 97 Wn.2d 92, 105, 640 P.2d 1061 (1982); *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). The level of articulable suspicion necessary to support an investigatory stop is "a substantial possibility that criminal conduct has occurred or is about to occur." *Kennedy*, at 6. 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, 806 P.2d 760 (1991). The court takes into account an officer's training and experience when determining the

³ Novion stipulated to the admissibility and sufficiency of a near identical set of facts for his bench trial. CP 24-27. Were this a challenge to the sufficiency of the evidence for a finding of guilt, the State would take a different position on conceding these facts.

reasonableness of the stop. *Id.* Subsequent evidence that an officer was in error regarding some of her facts will not render an investigatory stop unreasonable. *State v. Seagull*, 95 Wn.2d 898, 908, 632 P.2d 44 (1981). An investigatory stop will also not be rendered unreasonable solely because the officer did not rule out all possibilities of innocent behavior prior to the stop. *State v. Anderson*, 51 Wn. App. 775, 780, 755 P.2d 191 (1988).

Past reports of criminal activity in a high crime area will not provide an officer with particularized suspicion necessary to stop an individual merely seen walking through the area at night. *State v. Martinez*, 135 Wn. App. 174, 143 P.3d 855 (2006). However, past reports of criminal activity in an area, coupled with current suspicious behavior, can support an investigatory stop. *State v. Bray*, 143 Wn. App. 148, 177 P.3d 154 (2008). Startled reactions to seeing the police do not create reasonable suspicion, however, flight from officers may be considered in conjunction with other factors in determining whether the officer had reasonable suspicion of criminal activity. *State v. Gatewood*, 163 Wn.2d 534, 182 P.3d 426 (2008) (internal citations omitted).

Here, Officer Humphrey responded to a call from a known citizen informant reporting suspicious behavior in an area known for

drug activity. RP 4-7; CP 19-20; When Officer Humphrey arrived in the area, she saw a vehicle matching the description reported and eventually saw a person matching the reported description of the suspicious person. RP 7-9; CP 20. Although Officer Humphrey did not personally see the suspect flee, she reasonably inferred that Novion had run away based on the reporting party's statement, "There he is and he's running." and the fact that Novion was no longer visible when she turned back around. RP 9. These factors taken together should reasonably warrant a minimally intrusive investigatory stop of Novion. However, by the time Officer Humphrey stopped Novion, there was a more explicit reason for contacting him, which was the criminal trespass committed in Officer Humphrey's presence.

Novion argues the criminal trespass cannot justify Officer Humphrey's stop because she actually wanted to contact Novion about the prior suspicious behavior relating to possible drug activity. Brief of Appellant 11-12. Novion cites *State v. Ladson*, 138 Wn.2d 343, 979 P.2d 833 (1999), which pertains to pretextual investigatory stops. However, *Ladson* can be distinguished from this case.

In *Ladson*, officers tailed a vehicle looking for a justification to stop the car to investigate unsubstantiated rumors the driver was

involved in drug dealing. 138 Wn.2d at 343. The officers pulled over the vehicle after noticing expired license plate tabs. *Id.* The officers ultimately searched the passenger Ladson, finding drugs and a firearm. *Id.* The Washington State Supreme Court held the existence of a traffic infraction may not be used as a pretext to stop a vehicle in order to conduct a criminal investigation. *Id.*

However, in *State v. Arreola*, 176 Wn.2d 284, 297-98, 290 P.3d 983, 986 (2012), the Washington State Supreme Court held mixed motive stops may be permissible if “the officer actually and consciously makes an appropriate and independent determination that addressing the suspected traffic infraction (or multiple suspected infractions) is reasonably necessary in furtherance of traffic safety and the general welfare.”

Here, Officer Humphrey contacted Novion after she found him committing a criminal trespass. RP 10; CP 21. An officer observing a crime being committed in her presence is distinctly different than an officer waiting for the suspect to commit an infraction as an excuse to stop him for investigation. Officer Humphrey testified she detained Novion because she did not know what he was doing in another person’s yard. RP 11. On cross-examination, Officer Humphrey testified at the time she stopped Novion, he was

trespassing. RP 18. Officer Humphrey did acknowledge the trespassing had not been the reason she was looking for him and she had wanted to see what he was doing in connection with his earlier activity. RP 18. However, this does not negate the fact that Officer Humphrey also stopped Novion for the crime of trespass. Because at least reasonable suspicion existed to stop Novion for criminal activity, this Court should affirm the trial court's ruling denying the motion to suppress.

4. Novion Abandoned The Collected Evidence And The Exclusionary Rule Does Not Apply.

The Washington Constitution mandates that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." Const. art. I, § 7. The article I, section 7 provision "recognizes a person's right to privacy with no express limitations." *State v. O'Neill*, 148 Wn.2d 564, 584, 62 P.3d 489 (2003). The Washington State Supreme court has held "[w]hen an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed." *State v. Ladson*, 138 Wn.2d 343, 359, 979 P.2d 833 (1999) (*citing State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986)). When an initial stop is unlawful, "the subsequent search and fruits of that search are inadmissible...." *Id.*

However, police may retrieve voluntarily abandoned property without violating the expectation of privacy of the person who discarded the property. *See, e.g., State v. Reynolds*, 144 Wn.2d 282, 27 P.3d 200 (2001) (coat discarded by passenger onto the pavement of the lawfully stopped vehicle was legally searched by police); *State v. Hepton*, 113 Wn. App. 673, 54 P.3d 233 (2002) (refuse placed in a neighbor's garbage can); *State v. Young*, 86 Wn. App. 194, 935 P.2d 1372 (1997) (drugs thrown into the bushes by defendant before the defendant was actually seized by police were lawfully searched without a warrant); *State v. Nettles*, 70 Wn. App. 706, 855 P.2d 699 (1993), *review denied*, 123 Wn.2d 1010 (1994) (drugs dropped by defendant before the defendant was actually seized by police were lawfully searched without a warrant). However, property cannot be deemed voluntarily abandoned if a person abandons it because of unlawful police conduct. *State v. Whitaker*, 58 Wn. App. 851, 853, 795 P.2d 182 (1990).

In *Whitaker*, officers routinely patrolled a park that had high gang activity. *Id.* at 852. They would regularly encounter Whitaker, a known gang leader, and pat him down for weapons. *Id.* One night, officers exited their patrol vehicle and approached a group of people at a picnic table. *Id.* As the officers approached, Whitaker dropped a

plastic bottle on the ground, which was then confiscated and found to contain rock cocaine. *Id.*

The Court found the police had not engaged in unlawful conduct prior to the abandonment of the drugs. *Id.* at 856. The Court noted Whitaker had dropped the bottle when the officers were several feet away from him, had not yet said a word to him, nor made any gestures, such as hand movements or drawing of weapons. *Id.* at 854. The Court held Whitaker chose to drop the bottle “not as a result of police misconduct, but as a result of his own free will” and the officers were allowed to pick up the voluntarily abandoned property. *Id.* at 856.

Here, Novion abandoned his property prior to having any interaction with Officer Humphrey. RP 9-10; CP 20-21. When Officer Humphrey first briefly saw Novion, she did not speak or gesture to him. RP 9; CP 20. When Officer Humphrey next saw Novion, he was already coming out from beside the residence where he had stashed his belongings. RP 10; CP 21. Novion abandoned his property before Officer Humphrey stopped her car in the street, got out, and asked him to come over to her. RP 10; CP 21.

Novion cites *State v. Dorey*, 145 Wn. App. 423, 186 P.3d 363 (2008) to argue when a defendant is seized without lawful authority,

any property he abandoned must still be suppressed under the exclusionary rule. Brief of Appellant 12-13. However, Dorey can be distinguished from this case for multiple reasons.

In *Dorey*, an officer was investigating a complaint of a disturbance involving a black man and a man in a black shirt. 145 Wn. App. at 426. The officer found nothing at the scene and went to a nearby convenience store. *Id.* The officer saw a man in a black shirt, Dorey, squatting near a car in the car wash stall. *Id.* The officer spoke with the store clerk, who had no information. *Id.* When the officer went to speak with Dorey, Dorey was already getting in his car to leave. *Id.* The officer yelled at Dorey to hold on a minute, and Dorey stopped his car and got out to speak with the officer. *Id.* When asked if he had seen anything, Dorey said he saw a group of people but they had just left. *Id.* The officer obtained Dorey's identification and ran a warrants check as he watched Dorey leave. *Id.* When the check showed open warrants, the officer found Dorey walking away from his car. *Id.* The officer saw Dorey throw a fanny pack into the bushes, which the officer retrieved and found to contain methamphetamine. *Id.* at 426-27. The Court was asked to decide the single issue of whether an officer may stop a potential witness to a disturbance complaint without exigent circumstances. *Id.* at 426.

The Court found the officer had no reason to believe a dangerous crime had been committed or that Dorey had information to aid an investigation which would necessitate stopping him. *Id.* at 432. The Court held the stop was not reasonable and Dorey did not provide enough meaningful information to make him a witness such that obtaining his information would be reasonable under the circumstances. *Id.* at 434-35. The Court found, had Dorey not been improperly stopped and his information recorded, the warrant would not have been discovered and therefore the methamphetamine would not have been discovered. *Id.* at 435. The Court held the methamphetamine must be suppressed as a result. *Id.*

Here, at the point in time Officer Humphrey stopped Novion, she had a least reasonable suspicion to believe he had just committed criminal trespass. RP 10; CP 21. And again, Novion abandoned his property prior to any contact with Officer Humphrey. RP 10; CP 21.

The State maintains Officer Humphrey's stop of Novion was lawful. However, even if Novion was unlawfully seized at the moment Officer Humphrey told him to come over for a second time, Novion had already voluntarily abandoned his property, which Officer Humphrey was then allowed to collect. Because the property was

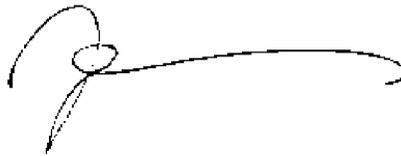
abandoned, the exclusionary rule should not apply, and this Court should affirm the trial court's ruling denying the motion to suppress.

IV. CONCLUSION

Officer Humphrey had reasonable suspicion to stop Novion for criminal trespass and the fact that Officer Humphrey was already investigating Novion for other suspected criminal activity should not negate the lawfulness of the stop. Regardless of the lawfulness of the stop, Officer Humphrey was allowed to collect evidence voluntarily abandoned by Novion prior to Officer Humphrey's contact with him. This Court should affirm the trial court's conclusions of law from the CrR 3.6 Hearing and Novion's conviction for Possession of Heroin and Possession of Methamphetamine.

RESPECTFULLY submitted this 3rd day of February, 2017.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney



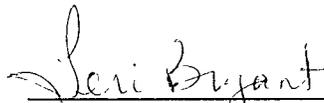
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**COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II**

STATE OF WASHINGTON, Respondent, vs. NICHOLAS E. NOVION, Appellant.	No. 49032-3-II DECLARATION OF SERVICE
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Ms. Teri Bryant, paralegal for Jessica L. Blye, Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On February 3, 2017, the appellant was served with a copy of the **Respondent's Brief** by email via the COA electronic filing portal to Jennifer D. Stutzer, attorney for appellant, at the following email address: jennifer@stutzerlaw.com.

DATED this 3rd day of February, 2017, at Chehalis, Washington.



Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office

LEWIS COUNTY PROSECUTOR

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