

**NO. 49998-3**

---

---

**COURT OF APPEALS, DIVISION II**  
**STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

LARRY SMITH, JR, APPELLANT

---

Appeal from the Superior Court of Pierce County  
The Honorable Elizabeth Martin

No. 16-1-03121-0

---

**BRIEF OF RESPONDENT**

---

MARK LINDQUIST  
Prosecuting Attorney

By  
BRITTA HALVERSON  
Deputy Prosecuting Attorney  
WSB # 44108

930 Tacoma Avenue South  
Room 946  
Tacoma, WA 98402  
PH: (253) 798-7400

## Table of Contents

A.	ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.....	1
1.	Whether defendant was seized when police approached his parked vehicle and engaged him in conversation pursuant a valid social contact, or, alternatively, even if a seizure did occur, whether police had reasonable suspicion sufficient to justify an investigatory stop based on a reliable informant's tip?.....	1
B.	STATEMENT OF THE CASE.....	1
1.	Procedure .....	1
2.	Facts .....	5
C.	ARGUMENT.....	8
1.	POLICE LAWFULLY CONTACTED DEFENDANT PURSUANT TO A VALID SOCIAL CONTACT, OR, ALTERNATIVELY, PURSUANT TO AN INVESTIGATORY STOP BASED ON REASONABLE SUSPICION.....	8
D.	CONCLUSION.....	26

## Table of Authorities

### State Cases

<i>INS v. Delgado</i> , 466 U.S. 210, 216, 104 S. Ct. 1758, 80 L. Ed. 2d 247 (1984).....	12
<i>State v. Acrey</i> , 148 Wn.2d 738, 747, 64 P.3d 594 (2003) .....	19
<i>State v. Afana</i> , 169 Wn.2d 169, 182, 233 P.3d 879 (2010).....	16
<i>State v. Allen</i> , 136 Wn. App. 463, 469, 157 P.3d 893 (2007) .....	10
<i>State v. Armenta</i> , 134 Wn.2d 1, 10-11, 948 P.2d 1280 (1997) .....	10, 12
<i>State v. Costich</i> , 152 Wn.2d 463, 477, 98 P.3d 795 (2004) .....	9, 12
<i>State v. Doughty</i> , 170 Wn.2d 57, 61, 239 P.3d 573 (2010).....	18
<i>State v. Fuentes</i> , 183 Wn.2d 149, 157-58, 352 P.3d 152 (2015) .....	10
<i>State v. Garvin</i> , 166 Wn.2d 242, 249, 207 P.3d 1266 (2009) .....	8
<i>State v. Glover</i> , 116 Wn.2d 509, 514, 806 P.2d 760 (1991).....	19
<i>State v. Harrington</i> , 167 Wn.2d 656, 663-64, 222 P.3d 92 (2009).....	11, 12, 17
<i>State v. Hill</i> , 123 Wn.2d 641, 644, 870 P.2d 313 (1994) .....	8
<i>State v. Howerton</i> , 187 Wn. App. 357, 364, 348 P.3d 781 (2015).....	19, 21, 22, 23
<i>State v. Knighten</i> , 109 Wn.2d 896, 902, 748 P.2d 1118 (1988) .....	12
<i>State v. Little</i> , 116 Wn.2d 488, 495, 806 P.2d 749 (1991) .....	19
<i>State v. Lohr</i> , 164 Wn. App. 414, 418, 263 P.3d 1287 (2011).....	8
<i>State v. Mote</i> , 129 Wn. App. 276, 292, 120 P.3d 596 (2005).....	13, 14, 15, 16, 18

<i>State v. Nettles</i> , 70 Wn. App. 706, 709, 855 P.2d 699 (1993).....	10
<i>State v. O'Neill</i> , 148 Wn.2d 564, 574, 62 P.3d 489 (2003).....	10, 13, 14, 15, 16, 17, 18
<i>State v. Ortega</i> , 177 Wn.2d 116, 122, 297 P. 3d 57 (2013) .....	8
<i>State v. Rankin</i> , 151 Wn.2d 689, 709, 92 P.3d 202 (2004).....	11
<i>State v. Sieler</i> , 95 Wn.2d 43, 621 P.2d 1272 (1980) .....	23
<i>State v. Snapp</i> , 174 Wn.2d 177, 197, 275 P.3d 289 (2012) .....	18
<i>State v. Thorn</i> , 129 Wn.2d 347, 353, 917 P.2d 108 (1996), overruled on other grounds by <i>O'Neill</i> , 148 Wn.2d at 571 .....	13
<i>State v. Trey M.</i> , 186 Wn.2d 884, 905, 383 P.3d 474 (2016).....	8
<i>State v. Young</i> , 135 Wn.2d 498, 512, 957 P.2d 681 (1998).....	11, 12, 13, 17
<i>State v. Z.U.E.</i> , 183 Wn.2d 610, 617, 352 P.3d 796 (2015).....	18, 19, 20, 23, 24, 25
<i>Truck Ins. Exchange v. Vanport Homes, Inc.</i> , 147 Wn.2d 751, 766, 58 P.3d 276 (2002).....	9
Federal and Other Jurisdictions	
<i>Mapp v. Ohio</i> , 367 U.S. 643, 655, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961).....	10
<i>Navarette v. California</i> , ___ U.S. ___, 134 S. Ct. 1683, 1686-87, 188 L. Ed. 2d 680 (2014).....	20, 22
<i>Terry v. Ohio</i> , 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).....	2, 9, 18, 19, 23
<i>United States v. Mendenhall</i> , 446 U.S. 544, 554-55, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980).....	11

Constitutional Provisions

Article I, section 7, Washington State Constitution..... 9, 13, 14

Fourth Amendment, United States Constitution..... 9

Rules and Regulations

CrR 3.6..... 1, 2, 5, 8

RAP 10.3(g) ..... 8

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether defendant was seized when police approached his parked vehicle and engaged him in conversation pursuant a valid social contact, or, alternatively, even if a seizure did occur, whether police had reasonable suspicion sufficient to justify an investigatory stop based on a reliable informant's tip?

B. STATEMENT OF THE CASE.

1. Procedure

On August 3, 2016, the Pierce County Prosecutor's Office charged LARRY EUGENE SMITH, JR, hereinafter "defendant," with one count of unlawful possession of a stolen vehicle and one count of resisting arrest. CP 3-4. The case proceeded to a CrR 3.6 suppression hearing on January 10, 2017, before the Honorable Elizabeth Martin. RP<sup>1</sup> 1-3. The nature of the suppression hearing concerned whether law enforcement lawfully contacted defendant following an informant's tip of a suspicious vehicle and potential prowlers. CP 5-20, 54-67; 2RP 1-63. Defendant argued that he was unlawfully seized when police "instructed" him to turn off the

---

<sup>1</sup> The verbatim report of proceedings ("RP") is contained in four separately paginated volumes and will be referred to as follows: 1RP – 12/22/16; 2RP – 1/10/17; 3RP – 1/27/17; 4RP – 1/30/17.

vehicle's engine, because the informant's tip was not sufficiently reliable and was not corroborated by police. CP 5-20; 2RP 42-50, 53-55. The State argued that considering the totality of the circumstances, the officer had a sufficient basis to conduct an investigatory stop of defendant. CP 54-67; 2RP 38-42, 51-53.

During the CrR 3.6 hearing, Deputy Kohl Stewart testified on behalf of the State. 2RP 6. Defendant called no witnesses and did not testify. 2RP 35-36. After hearing testimony and argument, the court denied defendant's motion to suppress and found that law enforcement contacted defendant pursuant to a valid *Terry*<sup>2</sup> stop, as "the information provided by the informant was sufficiently reliable of specific criminal activity that either was occurring or about to occur." 2RP 57-60; *see also*, CP 48-51. The court entered written findings of fact and conclusions of law, which stated in relevant part:

#### **FINDINGS OF FACT**

- 1) On August 2, 2016 at 1550 hours Pierce County Sheriff's Deputy Kohl Stewart was dispatched to the Miramonte Apartments regarding a suspicious vehicle call.
- 2) A resident at the apartment complex, who asked to remain anonymous, called 911 to report that he believed that the three occupants of a black and maroon Dodge Ram truck were casing the area. The 911 caller further stated that he believed that the occupants of the truck were responsible for recent vehicle prowls.

---

<sup>2</sup> *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

- 3) The 911 dispatcher verified the caller's name, location and phone number.
- 4) The Deputy later learned, well after this incident, that the 911 caller had not provided his true name.
- 5) The 911 caller reported that the subjects in the Dodge truck were parked in the parking lot in front of his apartment in Building E.
- 6) The deputy was dispatched at 1552 hours and arrived at the Miramonte Apartments at 1602 hours.
- 7) The deputy did not locate a black and maroon Dodge Ram truck in front of Building E, but did locate one as it was backing into a parking spot in front of Building H. The truck matched the description provided by the 911 caller.
- 8) The deputy parked his patrol car approximately 10-15 feet away from the Dodge truck, but did not activate the emergency lights or siren on his patrol car, and he did not park his patrol car in a way that would have prevented the driver of the truck from pulling out of the parking spot.
- 9) The deputy did not see any suspicious behavior from any of the occupants of the truck prior to contacting the driver of the truck.
- 10) The deputy got out of his patrol car to contact the driver of the Dodge truck. He was able to see that there were three occupants in the truck, which was consistent with the information provided by the 911 caller.
- 11) The deputy initially asked the driver of the truck, Defendant Larry Smith, what he was doing at the complex. The defendant said he was there to talk to someone.
- 12) Because the truck was so loud the deputy asked the defendant to turn it off, which the defendant did. The defendant then provided additional information about why he was at the apartment complex stating that he was there to see "Mark" in the H Building.
- 13) The deputy asked the defendant for his name, which he provided, and after obtaining that information the deputy returned to his patrol car to run the defendant's name and license plate of the Dodge truck.
- 14) The deputy estimated his contact with the defendant lasted approximately two minutes before he returned to his patrol car.

15) When the deputy ran the defendant's name he learned that the defendant's driver's license was suspended in the third degree, and he further learned that the Dodge truck had previously been reported stolen.

16) The deputy then called for additional assistance, returned to the Dodge truck, and asked the defendant to step out of the truck.

17) The defendant refused to exit the truck and attempted to start the truck. He further demanded to speak to the deputy's supervisor.

18) A second deputy arrived and assisted Deputy Kohl in removing the defendant from the truck, however the defendant actively resisted and was eventually tased to gain compliance.

#### CONCLUSIONS OF LAW

...

3) A known citizen informant who provided his name, address and phone number, which was verified by 911 dispatch, provided the basis for the deputy's contact with the defendant.

4) This known citizen's tip regarding suspected criminal activity was presumptively reliable.

5) The 911 caller provided sufficient facts that allowed the deputy to believe, based upon a totality of the circumstances, that the defendant and other occupants of the Dodge Ram truck were engaged in criminal activity.

6) The deputy observed the vehicle in motion, which was consistent with possible criminal behavior, and was a corroborating factor of criminal activity.

7) The deputy conducted a valid stop of the defendant pursuant to *Terry v. Ohio*, supra.

8) The defendant's motion to suppress evidence is denied. The evidence is admissible at the defendant's trial.

CP 48-51.

The case then proceeded to a stipulated facts trial on January 27, 2017, and the court found defendant guilty of unlawful possession of a

stolen vehicle.<sup>3</sup> 3RP 1-2, 9-11. *See also*, Exhibits 1 and 2. The court entered written findings of fact and conclusions of law following the bench trial. CP 45-47. Sentencing was held on January 30, 2017. 4RP 1-2; CP 23-35. The court followed the agreed recommendation of the parties and imposed a standard range sentence of 43 months. 4RP 7-8; CP 26, 29. Defendant filed a timely notice of appeal. CP 52.

## 2. Facts<sup>4</sup>

On August 2, 2016, at 3:52 p.m., Pierce County Sheriff's Deputy Kohl Stewart was dispatched to the Miramonte Apartments located at 11228 18th Avenue South in Tacoma, Washington to investigate a suspicious vehicle and potential car prowlers in the apartment complex. 2RP 6-8, 10, 12. Deputy Stewart was personally familiar with that particular apartment complex based on his patrol experience and generally understood the location to experience vehicle prowls and other car theft activity. 2RP 8.

Deputy Stewart was specifically dispatched to the "E" Building located toward the back of the apartment complex. 2RP 10, 12. A 911 caller, who provided his name and phone number, reported that a black

---

<sup>3</sup> The State moved to dismiss the resisting arrest charge, and the court granted the State's motion. 3RP 4, 8; CP 27.

<sup>4</sup> The following are facts elicited during the CrR 3.6 hearing held January 10, 2017.

and maroon Dodge Ram truck was parked in front of “E” Building.<sup>5</sup> 2RP 10-12. The vehicle was occupied by three individuals, and they appeared to be “casing the area.” *Id.* The caller believed the occupants were the same individuals responsible for recent vehicle prowls. 2RP 33. Dispatch confirmed the 911 caller’s location. 2RP 12. *See also*, Exhibit 1.

Deputy Stewart arrived at the Miramonte Apartments at 4:02 p.m. 2RP 12. When he arrived, the deputy entered the complex and observed a black and maroon Dodge truck backing into a parking slip in front of “H” Building. 2RP 12. The Dodge truck appeared to match the description of the suspicious vehicle and looked to be occupied by at least two individuals. 2RP 12. The truck’s movement from one location of the apartment complex to a different location (i.e., from “E” Building to “H” Building) “set off a little alarm” in the deputy’s head, because “[u]sually vehicles that are kind of lurking around apartment complexes are prowling and looking for other cars to prey on.” 2RP 33-34.

Deputy Stewart parked in front of “H” Building, exited his fully marked patrol vehicle, and walked towards the truck. 2RP 13. The deputy was wearing his department-issued uniform. *Id.* The deputy did not activate his vehicle’s emergency lights or siren and did not park in such a

---

<sup>5</sup> The 911 caller also provided his exact location at the apartment complex, “E103.” 2RP 10; Exhibit 1.

way so as to block the truck's ability to exit. *Id.* The deputy estimated that he parked approximately 10-20 feet away from the truck. 2RP 29.

Deputy Stewart contacted defendant, who was in the driver's seat of the truck. 2RP 14-15. The truck's window was down, and the engine was running. 2RP 14. The deputy observed there were three occupants in the vehicle (two passengers and defendant). 2RP 15. The deputy asked defendant what he was doing in the apartment complex, and defendant responded that "he was there to see someone in the H Building." 2RP 14-15. Deputy Stewart then "asked [defendant] to turn his vehicle off because the truck was pretty loud and [the deputy] couldn't hear what he was saying." 2RP 14. Defendant told the deputy he was there to see an individual named Mark Flores. 2RP 15. Deputy Stewart was familiar with Mark Flores due to a recent investigation. *Id.* The deputy asked defendant for his name, which defendant provided, and ran both defendant's name and the truck's license plate through records. *Id.* Deputy Stewart thereafter learned that the truck was stolen and defendant's license was suspended. 2RP 15-16.

Deputy Stewart requested a second unit and asked defendant to step out of the vehicle. 2RP 16. Defendant refused and attempted to start the truck. 2RP 17. Deputy Finnerty arrived on scene and both deputies attempted to pull defendant out of the vehicle. *Id.* Defendant resisted and

had to be tased in order to be placed into custody. *Id.* The deputy later discovered that the truck's ignition was punched. 2RP 18.

C. ARGUMENT.

1. POLICE LAWFULLY CONTACTED  
DEFENDANT PURSUANT TO A VALID  
SOCIAL CONTACT, OR, ALTERNATIVELY,  
PURSUANT TO AN INVESTIGATORY STOP  
BASED ON REASONABLE SUSPICION.

a. Standard of Review.

When reviewing a trial court's denial of a CrR 3.6 suppression motion, the court determines whether substantial evidence supports the challenged findings of fact and whether those findings support the challenged conclusions of law. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). The court defers to the fact finder on issues of conflicting testimony, witness credibility, and persuasiveness of evidence. *State v. Trey M.*, 186 Wn.2d 884, 905, 383 P.3d 474 (2016). Here, appellant does not assign error to the trial court's CrR 3.6 findings of fact, and therefore, they are considered verities on appeal. RAP 10.3(g); *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994); *State v. Lohr*, 164 Wn. App. 414, 418, 263 P.3d 1287 (2011). The court reviews de novo conclusions of law from an order pertaining to the suppression of evidence. *State v. Ortega*, 177 Wn.2d 116, 122, 297 P. 3d 57 (2013); *Garvin*, 166 Wn.2d at 249.

On review, the court may affirm the trial court on any grounds established by the pleadings and supported by the record. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004); *Truck Ins. Exchange v. Vanport Homes, Inc.*, 147 Wn.2d 751, 766, 58 P.3d 276 (2002).

Here, defendant assigns error to the trial court's Conclusions of Law Nos. 3-8. See Brief of Appellant at 1. Defendant claims the trial court erred in concluding that Deputy Stewart had reasonable suspicion justifying a *Terry* stop based on a citizen informant's tip and the deputy's corroborating observations. Brf. of App. at 1, 7, 19-20. Defendant's claim fails. As argued below, Deputy Stewart did not seize defendant by approaching him in a parked vehicle and asking him questions. This was a lawful social contact which led to a lawful detention. However, even if this Court finds that defendant was seized during the initial contact, the seizure was lawful as Deputy Stewart had reasonable suspicion of criminal activity based on a reliable citizen informant's tip and the deputy's corroborating observations.

- b. No seizure occurred when Deputy Stewart approached defendant's parked vehicle, engaged defendant in conversation, and asked for defendant's name.

In general, the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution

prohibit police from seizing individuals absent a warrant. *State v. Fuentes*, 183 Wn.2d 149, 157-58, 352 P.3d 152 (2015). Evidence produced as the result of an unlawful seizure is not admissible against the accused. *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961); *State v. Allen*, 136 Wn. App. 463, 469, 157 P.3d 893 (2007).

However, “[n]ot every encounter between an officer and an individual amounts to a seizure.” *State v. Nettles*, 70 Wn. App. 706, 709, 855 P.2d 699 (1993). In determining whether a seizure has occurred, the essential inquiry is whether in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave, or free to otherwise decline an officer’s request. *State v. O’Neill*, 148 Wn.2d 564, 574, 62 P.3d 489 (2003); *State v. Armenta*, 134 Wn.2d 1, 10-11, 948 P.2d 1280 (1997). “Whether a seizure *occurs* does not turn upon the officer’s suspicions,” rather, “[w]hether a person has been restrained by a police officer must be determined based upon the interaction between the person and the officer.” *O’Neill*, 148 Wn.2d at 575 (further noting that “the nature of the officer’s subjective suspicion [is] generally irrelevant to the question whether a seizure has occurred”). The defendant bears the burden of proving that a seizure occurred. *O’Neill*, 148 Wn.2d at 574.

Encounters between civilians and police are consensual if a reasonable person would feel free to leave. *State v. Harrington*, 167 Wn.2d 656, 663-64, 222 P.3d 92 (2009). Such encounters may become “seizures” if accompanied by:

- (1) The threatening presence of several officers;
- (2) The display of a weapon by an officer;
- (3) Physical touching of the defendant by the officer;
- (4) Language or tone indicating mandatory compliance; or
- (5) A progressive intrusion culminating in a request to frisk.

*Id.* at 664 (citing *State v. Young*, 135 Wn.2d 498, 512, 957 P.2d 681 (1998), which adopted the factors identified by *United States v. Mendenhall*, 446 U.S. 544, 554-55, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980)). The court reviews de novo whether the facts surrounding a police encounter amount to a seizure.<sup>6</sup> *State v. Rankin*, 151 Wn.2d 689, 709, 92 P.3d 202 (2004).

Here, the State argued below that the deputy’s contact with defendant was not a social contact but rather a “Terry stop right from the get-go.” 2RP 38. *See also*, CP 5-14, 58. However, a party’s concession regarding a matter of law is not binding on this Court. *See State v.*

---

<sup>6</sup> “Whether police have seized a person is a mixed question of law and fact...but ‘the ultimate determination of whether those facts constitute a seizure is one of law and is reviewed de novo.’” *Harrington*, 167 Wn.2d at 662 (internal citations omitted).

*Knighen*, 109 Wn.2d 896, 902, 748 P.2d 1118 (1988). This Court may affirm on any grounds adequately supported by the record. *Costich*, 152 Wn.2d at 477. In this case, the record supports that Deputy Stewart did not seize defendant by approaching his parked vehicle, engaging him in conversation, and asking for his name. The encounter was a valid social contact.

A “social contact” does not amount to a seizure. *Harrington*, 167 Wn.2d at 664-65. A social contact is a type of interaction that “occupies an amorphous area...resting someplace between an officer’s saying ‘hello’ to a stranger on the street and, at the other end of the spectrum, an investigative detention.” *Id.* at 664. Without more, “engaging a defendant in conversation in a public place and asking for identification” does not transform the encounter from a social contact into a seizure.<sup>7</sup> *State v. Young*, 135 Wn.2d 498, 511, 957 P.2d 681 (1998) (citing *Armenta*, 134 Wn.2d at 11). Similarly, no seizure occurs when a police officer approaches a parked car, asks an occupant to roll down the window, and asks questions, including the occupant’s name. *See, e.g., State v. O’Neill*,

---

<sup>7</sup> “While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response.” *INS v. Delgado*, 466 U.S. 210, 216, 104 S. Ct. 1758, 80 L. Ed. 2d 247 (1984).

148 Wn.2d 564, 579-81, 62 P.3d 489 (2003); *see also*, ***State v. Mote***, 129 Wn. App. 276, 292, 120 P.3d 596 (2005).

In determining whether a seizure occurred in violation of article I, section 7 of the Washington Constitution, the court applies a purely objective standard “looking to the actions of the law enforcement officer.” ***O’Neill***, 148 Wn.2d at 574 (quoting ***Young***, 135 Wn.2d at 501). “[T]he focus of the inquiry is not on whether the defendant’s movements are confined due to circumstances independent of police action[, such as occupying a parked vehicle,] but on whether the police conduct was coercive.” ***State v. Thorn***, 129 Wn.2d 347, 353, 917 P.2d 108 (1996), *overruled on other grounds by O’Neill*, 148 Wn.2d at 571.

In ***O’Neill***, a police officer observed a car parked in front of a business that was closed and had recently been burglarized. 148 Wn.2d at 571-72. The officer pulled behind the car, activated his spotlight, and ran a computer check on the license plate. *Id.* at 572. He learned that the vehicle had been impounded within the previous two months. *Id.* The vehicle’s windows were fogged over and the vehicle appeared to be occupied. *Id.*

The officer approached the driver’s side of the parked vehicle, shined his flashlight on the driver’s face, and asked him to roll down the window. *Id.* The driver, later identified as O’Neill, complied. *Id.* The

officer then asked O'Neill what he was doing there, and O'Neill responded that his car had broken down and would not start. *Id.* The officer asked O'Neill to try and start the vehicle. *Id.* O'Neill tried, but the vehicle would not start. *Id.* The officer then asked O'Neill for identification. *Id.* O'Neill responded he had no identification and his license had been revoked, and he gave the officer a name that turned out to be false. *Id.* The officer asked O'Neill to step out of the vehicle, and subsequent events led to O'Neill's arrest. *Id.* at 572-73.

The Washington Supreme Court held that under article I, section 7, O'Neill was not seized until he was asked to step out of the vehicle. *O'Neill*, 148 Wn.2d at 574. Before that point, the officer neither used physical force nor displayed any show of authority. *Id.* at 577-81. The court observed,

It is important to bear in mind that the relevant question is whether a reasonable person in O'Neill's position would feel he or she was being detained. The reasonable person standard does not mean that when a uniformed law enforcement officer, with holstered weapon and official vehicle, approaches and asks questions, he has made such a show of authority as to rise to the level of a *Terry* stop. If that were true, then the vast majority of encounters between citizens and law enforcement officers would be seizures.

*O'Neill*, 148 Wn.2d at 581.

Similarly, in *Mote*, a police officer observed two people sitting in a car parked in a residential neighborhood late at night with its rear and

dome lights activated. *Mote*, 129 Wn. App. at 279-80. The officer was driving a fully marked police vehicle and wearing a standard police uniform. *Id.* at 279. “Concerned about drug activity and frequent vehicle prowls in the area,” the officer parked behind the other vehicle, approached the driver’s side, and asked the occupants “what they were up to.” *Id.* at 280. The officer also asked the occupants for identification, and they complied. *Id.* at 280-81.

On appeal, the court in *Mote* held that even assuming the officer used a spotlight when he approached the vehicle, his “actions in their entirety, viewed objectively, did not create such a show of authority that there would be a seizure.” *Id.* at 292. The court noted that the officer did not activate his vehicle’s siren or overhead lights, he did not display his weapon or make physical contact with the defendant, he was alone, and he requested, rather than demanded, the defendant’s identification. *Id.*

Here, as in *O’Neill* and *Mote*, defendant was not seized when Deputy Stewart approached defendant’s parked vehicle, asked what he was doing, and requested identification. This was a valid social contact. The deputy did not activate his vehicle’s siren or overhead lights. 2RP 13; CP 49 (FOF<sup>8</sup> No. 8). The deputy parked his vehicle so that it was not

---

<sup>8</sup> “FOF” refers to Finding of Fact.

blocking defendant's access to the exit area. 2RP 13; CP 49 (FOF No. 8). The deputy did not pull defendant over, but rather approached defendant's vehicle after defendant finished backing into a parking spot. 2RP 12-13; CP 49 (FOF Nos. 7, 8, 10). The deputy asked defendant to turn off the vehicle's engine to facilitate their conversation, much like the officer asked O'Neill to roll down his window. 2RP 14; CP 49 (FOF No. 12). See *O'Neill*, 148 Wn.2d at 572. Deputy Stewart then engaged defendant in conversation and asked what he was doing in the apartment complex, just as the officers in *O'Neill* and *Mote* asked the defendants what they were up to. 2RP 14; CP 49 (FOF Nos. 11, 12). See *O'Neill*, 148 Wn.2d at 572; *Mote*, 129 Wn. App. at 280. Finally, Deputy Stewart asked defendant for his name, and defendant complied. 2RP 15; CP 49 (FOF No. 13).

Defendant was not seized until Deputy Stewart asked him to exit the vehicle following the records check. 2RP 15-16. See *O'Neill*, 148 Wn.2d at 574. At that point, the officer had, at a minimum, reasonable suspicion (if not probable cause<sup>9</sup>) to believe that defendant was involved in criminal activity: possession of a stolen vehicle and driving with a

---

<sup>9</sup> "Probable cause exists when the arresting officer is aware of facts and circumstances, based on reasonably trustworthy information, sufficient to cause a reasonable officer to believe that a suspect has committed or is committing a crime." *State v. Afana*, 169 Wn.2d 169, 182, 233 P.3d 879 (2010).

suspended license. *See* RP 15-16. Before he asked defendant to exit the stolen vehicle, the officer neither used physical force nor displayed any show of authority. *See O'Neill*, 148 Wn.2d at 577-81.

The factors cited in *Harrington* support that Deputy Stewart's initial contact with defendant did not amount to a seizure. *See Harrington*, 167 Wn.2d at 664 (citing *Young*, 135 Wn.2d at 512). Deputy Stewart was the only officer who initially contacted defendant. 2RP 7, 13, 16. There is no indication that the deputy displayed his weapon, physically touched defendant, or used language or tone indicating mandatory compliance. *See* 2RP 13-16, 29-31. Rather, the deputy "asked" defendant to turn off the vehicle and "asked" defendant for his name. 2RP 14-15, 30-31; CP 49 (FOF Nos. 12, 13). There is no indication the deputy requested to frisk defendant. *See* 2RP 13-16, 29-31. Without evidence to the contrary, it cannot be said that Deputy Stewart's initial contact with defendant amounted to a seizure. *Harrington*, 167 Wn.2d at 664.

Deputy Stewart's actions in their entirety, viewed objectively, did not create such a show of authority that there would be a seizure. The deputy lawfully approached defendant, engaged him in conversation, and asked for identifying information as part of a social contact. There is nothing in the record that indicates the deputy told defendant to stop or

that he was not free to leave. The deputy's subjective suspicions of criminal activity are irrelevant. *O'Neill*, 148 Wn.2d at 575. Under *O'Neill* and *Mote*, the deputy's initial encounter with defendant was lawful. Defendant was not seized.

- c. Alternatively, even if this Court finds that defendant was seized during the initial contact, the deputy had reasonable suspicion sufficient to justify an investigatory stop based on a reliable citizen informant's tip and the deputy's corroborating observations.

Even if Deputy Stewart "seized" defendant when he asked defendant to turn off the vehicle or otherwise engaged him in conversation, the deputy had reasonable suspicion to justify an investigative *Terry* stop.

"[W]arrantless seizures are per se unreasonable, and the State bears the burden of demonstrating that a warrantless seizure falls into a narrow exception to the rule." *State v. Doughty*, 170 Wn.2d 57, 61, 239 P.3d 573 (2010). A *Terry* stop, a brief investigatory seizure, is an exception to the warrant requirement. *Doughty*, 170 Wn.2d at 61-62; *State v. Z.U.E.*, 183 Wn.2d 610, 617, 352 P.3d 796 (2015); *see also, State v. Snapp*, 174 Wn.2d 177, 197, 275 P.3d 289 (2012). Whether a warrantless seizure or *Terry* stop passes constitutional muster is a question

of law the appellate court reviews de novo. *State v. Howerton*, 187 Wn. App. 357, 364, 348 P.3d 781 (2015).

A *Terry* stop is justified when the officer can “point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” *Terry*, 392 U.S. at 21. “For a *Terry* stop to be permissible, the State must show that the officer had ‘reasonable suspicion’ that the detained person was, or was about to be involved in a crime.” *Z.U.E.*, 183 Wn.2d at 617 (quoting *State v. Acrey*, 148 Wn.2d 738, 747, 64 P.3d 594 (2003)). When considering the reasonableness of a stop, the court must evaluate it based on a totality of the circumstances. *State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 760 (1991). An officer’s training and experience is taken into account when determining the reasonableness of a *Terry* stop. *Glover*, 116 Wn.2d at 514.

If an officer has reasonable articulable suspicion that a suspect is involved in criminal activity, the officer may detain the suspect, request him to produce identification, and ask him about his activities. *State v. Little*, 116 Wn.2d 488, 495, 806 P.2d 749 (1991). If an officer bases his suspicion on an informant’s tip, the tip must bear some “indicia of reliability under the totality of the circumstances.” *Z.U.E.*, 183 Wn.2d at

618 (internal quotations omitted). To show some indicia of reliability, there must be either:

- (1) circumstances establishing the informant's reliability or
- (2) some corroborative observation, usually by the officers, that shows either (a) the presence of criminal activity or (b) that the informer's information was obtained in a reliable fashion. These corroborative observations do not need to be of particularly blatant criminal activity, but they must corroborate more than just innocuous facts, such as an individual's appearance or clothing.

*Z.U.E.*, 183 Wn.2d at 618-19 (internal citations omitted).

In *Navarette v. California*, an unknown 911 caller reported to dispatch that she was run off the road by another vehicle about five minutes prior and provided dispatch with her location; the direction the other driver was headed; and the color, make, model and license plate number of the other vehicle. *Navarette v. California*, \_\_\_ U.S. \_\_\_, 134 S. Ct. 1683, 1686-87, 188 L. Ed. 2d 680 (2014). An officer headed towards the caller's location and spotted a vehicle matching the caller's description about 13 minutes later. *Id.* at 1687. The officer pulled the vehicle over and subsequently arrested the occupants after finding 30 pounds of marijuana. *Id.*

The occupants later moved to suppress the evidence, arguing the stop was unlawful because the officer lacked reasonable suspicion of criminal activity. *Id.* The court held that the anonymous 911 caller's tip

was reliable. *Id.* at 1688, 1692. Considering the totality of the circumstances, the informant's tip had sufficient indicia of reliability to support the officer's investigatory stop. *Id.* The caller was an eyewitness to potential criminal activity who made the report at the time of the incident and was accountable for the information provided by utilizing the emergency 911 line. *Id.* at 1689-90.

In *State v. Howerton*, a named citizen informant called 911 to report that she just witnessed an individual break into a van parked across the street from her house. 187 Wn. App. at 362. The caller provided her name, phone number and location, as well as a physical description of the male suspect and the direction he was heading. *Id.* An officer was dispatched to the area and saw Howerton, who matched the description of the suspect. *Id.* When Howerton saw the officer's patrol vehicle, he turned around and walked in the opposite direction. *Id.* at 362-63. The officer detained Howerton and subsequently placed him under arrest. *Id.* at 363.

On appeal, the court found that the informant's tip "possessed adequate indicia of reliability to justify an investigative detention." *Id.* at 367. Relevant to the court's decision were the following: the 911 caller indicated she was an eyewitness; she provided her name, phone number and location to dispatch; she indicated a willingness to speak with the

police; she told the dispatcher the crime occurred “directly across the street” from her house; and she provided a detailed description of the suspect. *Id.* at 368.

Here, as in *Navarette* and *Howerton*, the citizen informant’s tip possessed adequate indicia of reliability to justify the investigatory detention. First, the informant’s use of the 911 system enhanced the reliability of his tip. *See Navarette*, 134 S. Ct. at 1689-90. The citizen called 911 and reported the occupants of a black and maroon Dodge Ram truck were “casing the area,” and the caller believed they were responsible for recent vehicle prowls. 2RP 8, 10-11, 33; CP 48 (FOF No. 2); Exhibit 1. The caller thus reported ongoing vehicle prowling. The caller reported that the suspicious vehicle was parked in the parking lot in front of his apartment, which indicated he was an eyewitness. *See* 2RP 10-11; CP 49 (FOF No. 5); Exhibit 1. The caller provided a name, phone number and address, and the caller’s location was verified by dispatch. 2RP 10-12, 32; CP 48 (FOF No. 3). The caller provided a detailed description of the suspicious truck, including make, model and color, as well as the number of occupants inside. 2RP 11, 32; CP 48 (FOF No. 2); Exhibit 1.

Considering the totality of the circumstances, the informant’s tip had sufficient indicia of reliability to support the deputy’s investigatory stop. Moreover, Deputy Stewart arrived on scene just ten minutes after

dispatched and observed a vehicle matching the suspicious vehicle's description in apartment parking lot. 2RP 12, 15, 33; CP 49 (FOF Nos. 6, 7, 10). The vehicle's movement from the location of "E" Building to "H" Building (approximately "a hundred yards") over that period of time was potentially consistent with "vehicles that are kind of lurking around apartment complexes... prowling and looking for other cars to prey on." 2RP 30, 33-34. "Facts that appear innocuous to an average person may appear suspicious to a police officer in light of past experience." *Howerton*, 187 Wn. App. at 375. The deputy's observations thus corroborated the informant's tip.<sup>10</sup>

Defendant cites to *State v. Z.U.E.* in support of his argument, but that case is distinguishable from the present matter.<sup>11</sup> See Brf. of App. at 12-14. In *Z.U.E.*, a named but otherwise unknown 911 caller reported that she saw a 17-year-old girl hand a gun to a shirtless man, who then carried

---

<sup>10</sup> Again, "corroborative observations do not need to be of particularly blatant criminal activity." *Z.U.E.*, 183 Wn.2d at 618-19.

<sup>11</sup> Defendant also cites to *State v. Sieler*, 95 Wn.2d 43, 621 P.2d 1272 (1980), in support of his position that Deputy Stewart lacked reasonable suspicion to conduct a *Terry* stop. See Brf. of App. at 10, 13-16. That case is also factually distinguishable from the present matter. In *Sieler*, the informant did not call 911 but rather "informed the school secretary by telephone of his conclusion." 95 Wn.2d at 44. Police had no information as to why the informant believed a drug transaction had occurred and had no description of the suspects involved in the drug activity. *Id.* at 45. The *only* information provided was the vehicle description. *Id.* Additionally, the school vice-principal contacted the occupants of the suspected vehicle before police arrived, did not observe contraband or anything "unusual or suspicious," and informed police of the same. *Id.* at 45.

the gun through the park. *Z.U.E.*, 183 Wn.2d at 614. The caller provided a detailed description of the girl's appearance but not why she thought the girl was 17 years old. *Id.* Multiple people called 911 to report the shirtless man carrying the gun, but only one caller reported the girl. *Id.* The shirtless man reportedly entered a white or gray two-door vehicle with approximately eight other people. *Id.* at 613-14.

Officers dispatched to the location could not find the shirtless man but located a female who matched the description provided. *Id.* at 614-15. Officers observed the female enter the backseat of a gray four-door vehicle. *Id.* As part of their investigation for minor in possession of a firearm, the officers approached the vehicle and ordered the occupants to exit. *Id.* at 615-16. One of the occupants, defendant *Z.U.E.*, was subsequently arrested for obstruction of law enforcement and possession of marijuana. *Id.* at 616.

The *Z.U.E.* court held that the 911 caller's tip was unreliable and did not create a sufficient basis to justify the stop. *Id.* at 622-23. The caller did not offer any factual basis to support the allegation that the female suspect committed the crime of minor in possession of a firearm. *Id.* at 622-23. Specifically problematic was the caller's report that the female was 17 years old. *Id.* The female's alleged age, which made her a minor, was the "only 'fact' that potentially [made] the girl's possession of

the gun unlawful for the articulated crime...[B]ecause the caller did not offer any factual basis in support of that allegation, the officers could not ascertain how the caller knew the girl was 17 rather than, say, 18 years old.” *Id.*

In contrast to *Z.U.E.*, the caller’s tip here provided a factual basis to support the allegation that a crime was being committed. The 911 caller reported that three occupants of a black and maroon Dodge Ram truck, who the caller believed were responsible for recent vehicle prowls, were parked in front of his apartment and were casing the area (i.e., the parking lot). Whereas the caller in *Z.U.E.* did not provide a factual basis for the alleged crime of *minor* in possession of a firearm, the caller’s report here of vehicle prowling, along with the deputy’s observations, showed that the caller’s tip possessed an indicia of reliability and provided a reasonable suspicion for the stop. Under the totality of the circumstances, Deputy Stewart had sufficient reasonable suspicion to detain defendant. The trial court thus properly denied defendant’s motion to suppress.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court affirm defendant's conviction.

DATED: October 11, 2017

MARK LINDQUIST  
Pierce County  
Prosecuting Attorney



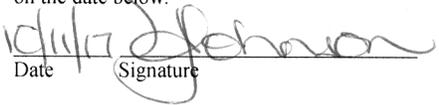
---

BRITTA HALVERSON  
Deputy Prosecuting Attorney  
WSB # 44108

Certificate of Service:

The undersigned certifies that on this day she delivered by <sup>efile</sup> U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

10/11/17



---

Signature

**PIERCE COUNTY PROSECUTING ATTORNEY**

**October 11, 2017 - 10:48 AM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 49998-3  
**Appellate Court Case Title:** State of Washington, Respondent v. Larry Smith, Jr., Appellant  
**Superior Court Case Number:** 16-1-03121-0

**The following documents have been uploaded:**

- 3-499983\_Briefs\_20171011104725D2407324\_5911.pdf  
This File Contains:  
Briefs - Respondents  
*The Original File Name was Smith Response Brief.pdf*
- 3-499983\_Designation\_of\_Clerks\_Papers\_20171011104725D2407324\_8504.pdf  
This File Contains:  
Designation of Clerks Papers - Modifier: Supplemental  
*The Original File Name was SMITH DESIGNATION.pdf*

**A copy of the uploaded files will be sent to:**

- swiftm@nwattorney.net

**Comments:**

---

Sender Name: Heather Johnson - Email: hjohns2@co.pierce.wa.us

**Filing on Behalf of:** Britta Ann Halverson - Email: bhalver@co.pierce.wa.us (Alternate Email: PCpatcecf@co.pierce.wa.us)

Address:  
930 Tacoma Ave S, Rm 946  
Tacoma, WA, 98402  
Phone: (253) 798-7875

**Note: The Filing Id is 20171011104725D2407324**