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Court of Appeals
Division II
State of Washington
3/5/2018 4:12 PM

No. 50931-8-II

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

STATE OF WASHINGTON
Respondent,

v.

KELLY ALICE PETERS,
Appellant.

REPLY BRIEF OF APPELLANT

Appeal from the Superior Court of Clark County,
Cause No. 16-1-00900-0
The Honorable Susan Clark, Presiding Judge

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A. ARGUMENT

Ms. Peters challenges the lawfulness of her seizure by Dep. Messman for two reasons: (1) the facts known to Dep. Messman at the time he seized Ms. Peters did not support an objectively reasonable belief that she was involved in criminal activity; and (2) that Dep. Messman exceeded the permissible scope of the initial *Terry* stop of Ms. Peters by checking for warrants. More specifically, Ms. Peters argues that all facts Dep. Messman knew about Ms. Peters at the time he seized her come from two anonymous telephone calls describing ambiguous conduct and that Ms. Peters matched a description of the alleged perpetrator of the alleged crime and that Dep. Messman independently corroborated only innocuous details, not incriminating facts, before seizing Ms. Peters.

The State responds by arguing that citizen informants are presumed to be reliable¹ and this court can look at the veracity of the informant as well as the factual basis of the informant's knowledge to help determine the reliability of a 911 caller's tip.² The State asserts that the unknown 911 callers can be found to be reliable because there was more than one call, the callers called 911, and the callers were eyewitnesses to

¹ State's Response Brief, p. 6-7, *citing State v. Howerton*, 187. Wn.App. 357, 367, 348 P.3d 781 (2015).

² State's Response Brief, p. 6, *citing State v. Z.U.E.*, 183 Wn.2d 610, 620, 352 P.3d 796 (2015).

the alleged criminal activity.³ The State’s arguments fail because they are based on a misunderstanding and misapplication of the law regarding investigative stops conducted based on nothing more than anonymous 911 calls.

1. The State misrepresents the law regarding the determination of the credibility of an unknown citizen informant.

a. Only citizen informants whose identity is known are presumed to be reliable.

Citing *State v. Howerton*⁴ and *State v. Ollivier*⁵, the State asserts that, “citizen informants are presumed reliable.”⁶ This is a misrepresentation of the law that governs the determination of the reliability of informants whose identity is unknown by police officers acting on information from those informants.

Howerton involved a 911 call where the caller “called 911 from her cell phone to report that she just witnessed someone break into a van parked across the street from her house. She provided her name, address, and telephone number to the dispatcher.”⁷ In finding the 911 caller was sufficiently reliable for her phone call to be a sufficient basis for the officers to stop the defendant, the *Howerton* court held that “*known*

³ State’s Response Brief, p. 6-13.

⁴ 187 Wn.App. 357, 367, 348 P.3d 781 (2015).

⁵ 178 Wn.2d 813, 850, 312 P.3d 1 (2013).

⁶ State’s Response brief, p. 6.

⁷ *Howerton*, 187 Wn. App. at 362, 348 P.3d 781.

citizen informants are presumptively reliable.”⁸ The State fails to

In support of the proposition that “known citizen informants are deemed presumptively reliable,” *Howerton* cites *State v. Gaddy*.⁹ *Gaddy* discusses determining the reliability of an informant in the context of determining what test should be applied where the information that was the basis of probable cause to arrest a defendant comes from the Department of Licensing.¹⁰ An examination of the language of *Gaddy* makes clear that it is *identified* citizen informants that are deemed presumptively reliable, not *all* citizen informants:

What then is the proper test to apply in determining whether or not the information provided by DOL furnished probable cause for Gaddy's arrest? In our view, it is the *Aguilar–Spinelli* test, a test that is applied to police informants. Under that test, an informant's tip can furnish probable cause for an arrest if the State establishes (1) the basis of the informant's information and (2) the credibility of the informant or the reliability of the informant's information. *State v. Cole*, 128 Wash.2d 262, 287, 906 P.2d 925 (1995). To satisfy both parts of the *Aguilar–Spinelli* test, the State must prove the underlying circumstances which the trier of fact “may draw upon to conclude the informant was credible and obtained the information in a reliable manner.” *State v. Vickers*, 148 Wash.2d 91, 112, 59 P.3d 58 (2002).

The first prong of the test relates to the informant's basis of knowledge. *State v. Smith*, 102 Wash.2d 449, 455, 688 P.2d 146 (1984)...

⁸ *Howerton*, 187 Wn. App. at 366, 348 P.3d 781.

⁹ 152 Wash.2d 64, 73, 93 P.3d 872 (2004)

¹⁰ *State v. Gaddy*, 152 Wn.2d 64, 71–73, 93 P.3d 872 (2004).

The second part of the *Aguilar–Spinelli* test requires an examination of the credibility of the informant or the reliability of the informant's information. *Smith*, 102 Wash.2d at 455, 688 P.2d 146. That is the prong that is in contention here. **If the identity of an informant is known—as opposed to being anonymous or professional—the necessary showing of reliability is relaxed.** See *State v. Huft*, 106 Wash.2d 206, 211, 720 P.2d 838 (1986). This is so because there is less risk of the information being a rumor or irresponsible conjecture which may accompany anonymous informants. *State v. Northness*, 20 Wash.App. 551, 557, 582 P.2d 546 (1978). **Also, an identified informant's report is less likely to be marred by self-interest. Citizen informants are deemed presumptively reliable.** *State v. Wakeley*, 29 Wash.App. 238, 241, 628 P.2d 835, review denied, 95 Wash.2d 1032 (1981).¹¹

Emphasis added.

Similarly, in the context an affidavit for a search warrant based on facts provided by an informant, the *Ollivier* court cited *Gaddy* and made clear that it, too, was referring to named citizen informants as being presumptively reliable:

When a citizen informant provides information, a relaxed showing of reliability suffices “because there is less risk of the information being a rumor or irresponsible conjecture which may accompany anonymous informants and an identified informant's report is less likely to be marred by self-interest.” *State v. Gaddy*, 152 Wash.2d 64, 72–73, 93 P.3d 872 (2004); see *Chamberlin*, 161 Wash.2d at 42, 162 P.3d 389; *State v. Huft*, 106 Wash.2d 206, 211, 720 P.2d 838 (1986) (citing *State v. Northness*, 20 Wash.App. 551,

¹¹ *Gaddy*, 152 Wn.2d at 71–73, 93 P.3d 872.

557, 582 P.2d 546 (1978)).

Accordingly, “[c]itizen informants are deemed presumptively reliable.” *Gaddy*, 152 Wash.2d at 73, 93 P.3d 872; *see State v. Chenoweth*, 160 Wash.2d 454, 483, 158 P.3d 595 (2007) (reference to the “presumed inherent reliability of a citizen informant”); Charles W. Johnson, *Survey of Washington Search and Seizure Law: 2005 Update*, 28 *Seattle U.L.Rev.* 467, 534–35 (2005) (and cases cited therein) (**when a named informant provides information in the form of facts and circumstances sufficiently detailed to establish personal knowledge, the informant may be presumed to be reliable when his or her identity is disclosed to the issuing judge**). The defendant must rebut the presumption of reliability to overcome it. *See Gaddy*, 152 Wash.2d at 73–74, 93 P.3d 872.¹²

Emphasis added.

It is the fact the informant’s identity is known to the officer that makes the informant reliable, not the fact the informant is a citizen. The State is incorrect when it claims that **all** citizen informants are presumed reliable.

b. The Washington Supreme Court has repeatedly held that investigative seizures may not be made based on uncorroborated information from anonymous informants.

Suspicion sufficient to conduct a *Terry* stop **cannot** be based on an informant’s tip alone **unless the tip possesses sufficient “indicia of reliability.”**¹³ “Indicia of reliability” requires: (1) knowledge that the

¹² *Ollivier*, 178 Wn.2d at 850, 312 P.3d 1.

¹³ *State v. Sieler*, 95 Wn.2d 43, 47, 621 P.2d 1272 (1980) (emphasis added).

source of the information is reliable, **and** (2) a sufficient factual basis for the informant's tip or corroboration by independent police observation.¹⁴

The Supreme Court has address the determination of reliability of an informant where the identity of an informant is unknown to police:

It is difficult to conceive of a tip more 'completely lacking in indicia of reliability' than one provided by a completely anonymous and unidentifiable informer, containing no more than a conclusionary assertion that a certain individual is engaged in criminal activity. While the police may have a duty to investigate tips which sound reasonable, (1) absent circumstances suggesting the informant's reliability, or some corroborative observation which suggests either (2) the presence of criminal activity or (3) that the informer's information was obtained in a reliable fashion, a forcible stop based solely upon such information is not permissible.¹⁵

In *Lesnick*, an anonymous telephone informant told police that a van was carrying illegal gambling devices. He did not indicate how he reached this conclusion but did describe the van and report its license number. The police quickly located a van fitting the description provided by the informant, but some of the numerals of the license number had been transposed. The police followed the van for a short distance, and although they had observed no criminal activity, the police pulled the van over.

¹⁴ *Campbell v. Department of Licensing*, 31 Wn.App. 833, 835, 644 P.2d 1219 (1982) (emphasis added).

¹⁵ *State v. Lesnick*, 84 Wn.2d 940, 944, 530 P.2d 243, cert. denied 423 U.S. 891, 96 S.Ct. 187, 46 L.Ed.2d 122 (1975).

Gambling devices were in plain view after the stop.¹⁶

The *Lesnick* court held that the anonymous informant's accurate description of the vehicle was "not such corroboration or indicia of reliability" which would provide the police with a well-founded suspicion to justify an investigatory detention, and held that the seizure and search of the van were unconstitutional.¹⁷

In *Sieler*, a parent picking up his child from school observed what he thought was a drug sale in another car in the parking lot. The parent informed the school secretary by telephone of his conclusion, described the other car, reported its license number, apparently gave her his telephone number, and left.

The secretary called the police and officers were quickly informed by radio that a drug transaction had possibly occurred in the school parking lot in a black-over-gold Dodge with a certain license number. No details of the transaction were given. While proceeding to the high school, one of the officers radioed for information on how the sale was discovered and asked if the informant had been identified. The officers were simply told that a named person had concluded a drug transaction had occurred, but that he was not available. The officers knew nothing about the

¹⁶ *Lesnick*, 84 Wn.2d at 941-42, 530 P.2d 243.

¹⁷ *Lesnick*, 84 Wn.2d at 943, 530 P.2d 243.

informant beyond his name, nor why he concluded a drug transaction had occurred. One officer, by radio, attempted to obtain a description of the suspects, but apparently none was available. In the officer's words, "all we had to go on was the vehicle description."

The school vice-principal had talked to the occupants of the car a few minutes before the officers' arrival. He identified two girls as students. The defendants were not students. The four were playing cards. The vice-principal informed the officers before they went over to the car containing the defendants that he had not observed any contraband, nor even anything unusual or suspicious.

The car fit the description given by the informant, except one letter of the license number was incorrect. The driver was approached by one officer and the front passenger was approached by another officer. While talking to the driver, an officer smelled the faint odor of stale burnt marijuana. The officer examined the driver's identification and asked him to enter his police car for questioning. After the driver had exited, the officer who contacted the front passenger saw three pills of "speed" on the driver's seat which he had been unable to observe prior to the driver's departure from the car. The officer picked up the pills, and immediately after he did so, the passenger handed the officer a film container containing speed. Both defendants were arrested and confessed.

Pre-trial, both defendants moved to suppress the pills and the confessions, but the motion was denied. Both defendants were found guilty of delivering amphetamines and the Court of Appeals affirmed their convictions. The defendants appealed to the Washington Supreme Court arguing, *inter alia*, the tip provided by the parent did not justify investigatory detention and questioning of the defendants, since it did not provide the police with a well-founded suspicion of criminal activity by the defendants.

The Washington Supreme Court held that the trial court erred in denying the motion to suppress the pills and confessions, finding that the facts of the case were insufficient to satisfy the three *Lesnick* criteria to establish the credibility of an informant's tip:

The *Sieler* court held that the first *Lesnick* factor, "circumstances suggesting the informant's reliability," could not be met because,

the facts of [*Sieler*] indicate reliability no more than those of *Lesnick*. To distinguish *Lesnick*, the Court of Appeals relied upon the fact that the informant had given his name to the school secretary. We are not persuaded by this attempted distinction. **The reliability of an anonymous telephone informant is not significantly different from the reliability of a named but unknown telephone informant.** Such an informant could easily fabricate an alias, and thereby remain, like an anonymous informant, unidentifiable.

Even assuming that an unknown but named telephone informant was adequately reliable, thereby distinguishing

this case from *Lesnick*, **this reliability by itself generally does not justify an investigatory detention.** Although there is some authority to the contrary, **the State generally should not be allowed to detain and question an individual based on a reliable informant’s tip which is merely a bare conclusion unsupported by a sufficient factual basis which is disclosed to the police prior to the detention.** Some underlying factual justification for the informant’s conclusion must be revealed so that an assessment of the probable accuracy of the informant’s conclusion can be made. **It simply “makes no sense to require some ‘indicia of reliability’ that the informer is personally reliable but nothing at all concerning the source of his information ...”** This additional requirement helps prevent investigatory detentions made on the basis of a tip provided by an honest informant who misconstrued innocent conduct. It also reduces such detentions when an informant, who has given accurate information in the past, decides to fabricate an allegation of criminal activity.

Even if the reliability of the informant had been established in this case, the detention and questioning of defendants was unconstitutional. *The police conducted an investigatory detention based upon an informant’s bare conclusion unsupported by any factual foundation known to the police.*¹⁸

The *Sieler* court also held that the facts of that case did not satisfy the second *Lesnick*, criterion, independent police observation of activity which suggests criminal activity: “The State clearly cannot satisfy *Lesnick*’s second criterion. After arriving at the scene, the police proceeded almost immediately to the car containing the defendants. Prior to their approach to the car, they did not observe any conduct which

¹⁸ *Sieler*, 95 Wn.2d at 48-49, 621 P.2d 1272 (internal citations omitted) (emphasis added).

tended to corroborate the informant's tip that criminal activity was present."¹⁹

Finally, the *Sieler* court held that the facts of the case also did not meet the third *Lesnick* criterion, independent police observation of facts that suggest that the informant's information was obtained in a reliable fashion: "Nor can the State satisfy *Lesnick*'s third criterion. As we held in that case, police observation of a vehicle which substantially conforms to the description given by an unknown informant does not constitute sufficient corroboration to indicate that the informant obtained his information in a reliable fashion."²⁰

This case is almost identical to *Sieler* and *Lesnick*. Dep. Messman did not know the identity of either caller. While Dep. Messman was aware the callers claimed to be the victim of the alleged criminal activity and a neighbor who heard the activity occurring, at best this would establish only that the callers obtained their information in a reliable manner. Dep. Messman seized Ms. Peters immediately upon seeing her and without performing any independent corroboration of the caller's claims or uncovering any evidence of the callers' reliability. The only thing Dep. Messman corroborated was the description of Ms. Peters given

¹⁹ *Sieler*, 95 Wn.2d at 49, 621 P.2d 1272.

²⁰ *Sieler*, 95 Wn.2d at 49-50, 621 P.2d 1272.

by the anonymous callers. The Washington Supreme Court has held that an investigative stop conducted in circumstances such as those in this case is unlawful:

When an officer bases his or her suspicion on an informant's tip, the State must show that the tip bears some "indicia of reliability" under the totality of the circumstances. We require that there either be (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. *State v. Sieler*, 95 Wash.2d 43, 47, 621 P.2d 1272 (1980); *State v. Lesnick*, 84 Wash.2d 940, 944, 530 P.2d 243 (1975). 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. *See State v. Wakeley*, 29 Wash.App. 238, 241–43, 628 P.2d 835 (1981).²¹

Under the totality of the circumstances of this case, the facts known to Dep. Messman at the time he seized Ms. Peters were insufficient for an investigative seizure. There were no circumstances establishing the reliability of the unknown telephonic informants. Contrary to the State's mistaken assertion, the fact the informants were citizens does not create a presumption that the informants were reliable. Dep. Messman's observations corroborated only the innocuous facts of Ms. Peters' identity and did not show that the anonymous telephone informers obtained their information in a reliable manner.

²¹ *State v. Z.U.E.*, 183 Wn.2d 610, 618–19, 352 P.3d 796, 800 (2015).

- c. *The factors that make up the test are those identified by the Supreme Court in Z.U.E., not the numerous factors made up by the State.*

The *Z.U.E.* court set out a clear test for the reliability of an anonymous informant tip that the State must satisfy when police acted based on that tip. This test, based on *Sieler* and *Lesnick*, requires:

(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.²²

While the State is permitted to rely on the totality of the circumstances in attempting to meet this test, the factors cited above are the only factors identified by the *Z.U.E.* court as part of the test the State must satisfy.

In arguing that the anonymous tips in this case were sufficiently reliable to allow Deputy Messman to seize Ms. Peters without conducting any additional corroborative investigation the State claims to identify a number of factors that are “relevant to determining reliability” including: if the caller is an eyewitness to the alleged crime, if the caller made the report contemporaneously, if the caller used the 911 emergency system,

²² *State v. Z.U.E.*, 183 Wn.2d 610, 618–19, 352 P.3d 796, 800 (2015).

the seriousness of the reported crime, and whether the informant is the victim of the reported crime.²³ The State draws these factors from *Z.U.E.* and *Z.U.E.*²⁴ and *State v. Howerton*.²⁵ However, the State confuses the *Z.U.E.* court's discussion of the totality of the circumstances in that case and the *Howerton* court's discussion of why the known citizen informant was presumptively reliable in that case.

The *Z.U.E.* court walked through the proper application of the totality of the circumstances to the two part test it adopted for determining the reliability of an informant's tip.²⁶ The first step is to determine the crime the officers believed they were investigating and whether the informant's tip was sufficiently reliable to support the action taken by police.²⁷ As in *Sieler*, *Lesnick*, and *Z.U.E.*, Dep. Messman did not know the identity of the anonymous callers and never contacted the anonymous callers prior to seizing Ms. Peters to determine whether the callers had a factual basis to support their claims or if their information was gathered in a reliable manner. As the court concluded in *Z.U.E.*, even if the anonymous callers in this case reported honestly, Dep. Messman had no

²³ Brief of Respondent, p. 6-7.

²⁴ 183 Wn.2d 610, 352 P.3d 796.

²⁵ 187 Wn.App. 357, 348 P.3d 781 (2015).

²⁶ *Z.U.E.*, 183 Wn.2d at 621-625, 352 P.3d 796.

²⁷ *Z.U.E.*, 183 Wn.2d at 621-623, 352 P.3d 796.

basis on which to evaluate the accuracy of the callers' information.²⁸

“Absent circumstances sufficiently establishing the reliability of the tip, the officers must be able to independently corroborate ‘either [2] the presence of criminal activity or [3] that the informer's information was obtained in a reliable fashion.’”²⁹ Here, Dep. Messman believed he was investigating a possible assault between two sisters. Ms. Peters matched the appearance of the reported assailant, but Dep. Messman did not observe any facts corroborating the report that Ms. Peters had assaulted anyone or that the callers information was obtained in a reliable fashion. Further, Dep. Messman did not know the identities of the callers and had no reason to believe the callers were telling the truth when they spoke to the 911 operator or had gathered their evidence in a reliable manner. The facts known to Dep. Messman simply did not support a conclusion that the anonymous callers were reliable or that Ms. Peters was involved in any criminal activity.

2. *State v. Delp-Marquez* may be considered by this court only as non-binding persuasive authority and is factually distinguishable from this case.

The State cites *State v. Delp-Marquez*, 199 Wn.App. 1046 (2017), an unpublished case, for the proposition that a *Terry* stop based on 911

²⁸ *Z.U.E.*, 183 Wn.2d at 623, 352 P.3d 796.

²⁹ *State v. Z.U.E.*, 183 Wn.2d at 623, 352 P.3d 796, citing *Sieler*, 95 Wash.2d at 47, 621 P.2d 1272 (alterations in original) (quoting *Lesnick*, 84 Wash.2d at 944, 530 P.2d 243)

calls is lawful where multiple 911 calls provide consistent information.³⁰

GR 14.1(a) provides, in pertinent part,

unpublished opinions of the Court of Appeals have no precedential value and are not binding upon any court. However, unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as non-binding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate.

Accordingly, the State may now cite to unpublished opinions, but those opinions are non-binding authority and, at most, are accorded the persuasive value that this court gives them, if any.

However, even if this court chooses give some persuasive value to a case it has already determined has no precedential value, *Delp-Marquez* is factually distinguishable from this case. The *Delp-Marquez* court upheld a *Terry* stop based on numerous tips from various informants. Applying the totality of the circumstances test adopted in *Z.U.E.*, the *Delp-Marquez* court found the tips were sufficiently reliable to allow the officer to perform a *Terry* stop with no knowledge other than what she knew from the tips.³¹ However, unlike the two anonymous callers in this case, in *Delp-Marquez* one caller was a public transport dispatcher reporting on behalf of an eye-witness driver, one caller provided their name, address, and telephone number, multiple other callers gave their

³⁰ Brief of Respondent, p. 11-13.

³¹ *Delp-Marquez*, 199 Wn. App. 1046, *4.

names or phone numbers, and the officer visually confirmed information that all four callers had provided.³² There are numerous significant differences between this case and *Delp-Marquez*. There were only two callers in this case as opposed to four (or more) in *Delp-Marquez*. All callers in *Delp-Marquez* gave some form of identifier to the 911 dispatcher, some gave explicit detail of their identities as opposed to the two callers in this case remaining anonymous. Finally, all this information was known to the officer conducting the *Terry* stop in *Delp-Marquez* and the officer had confirmed some of the details given by callers. This is directly contrary to the facts of this case where Dep. Messman knew nothing about the callers and confirmed no facts provided by the callers other than Ms. Peters' appearance.

The totality of the circumstances in *Delp-Marquez* was completely different that the totality of the circumstances in this case. *Delp-Marquez* is of no precedential value and of less persuasive value to this court in determining whether Dep. Messman had knowledge of facts sufficient to seize Ms. Peters.

B. CONCLUSION

For the reasons stated above and in Ms. Peters' Opening Brief, this court should vacate Ms. Peters' convictions and remand for dismissal of

³² *Delp-Marquez*, 199 Wn. App. 1046, *1-4.

the charges with prejudice.

DATED this 5th day of March, 2018.

Respectfully submitted,



Reed Speir, WSBA No. 36270
Attorney for Appellant

CERTIFICATE OF SERVICE

Reed Speir hereby certifies under penalty of perjury under the laws of the State of Washington that on the 5th day of March, 2018, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

Clark County Prosecutor's Office
1013 Franklin Center
PO Box 5000, Vancouver WA 98666-5000

And to:

Ms. Kelly Peters
1844 NE 104th Loop
Vancouver, WA 98686

Signed at Tacoma, Washington this 5th day of March, 2018.



Reed Speir, WSBA No. 36270

LAW OFFICE OF REED SPEIR

March 05, 2018 - 4:12 PM

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Appellate Court Case Title: State of Washington, Respondent v Kelly Alice Peters, Appellant
Superior Court Case Number: 16-1-00900-0

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