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Division II
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NO. 51905-4-II

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

STATE OF WASHINGTON,
Respondent,

v.

RUSHELLE RENEE STOKEN,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE DAVID L. EDWARDS, JUDGE

BRIEF OF RESPONDENT

KATHERINE L. SVOBODA
Prosecuting Attorney
for Grays Harbor County

BY: 
JASON F. WALKER
Chief Criminal Deputy
WSBA # 44358

OFFICE AND POST OFFICE ADDRESS
Grays Harbor County Prosecuting Attorney
102 West Broadway Room 102
Montesano, WA 98563
(360) 249-3951

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RESPONSE TO ASSIGNMENTS OF ERROR

1. **Denial of the suppression motion was proper.**
2. **The court did not abuse its discretion in denying a Drug Offender Sentencing Alternative.**

RESPONDENT'S COUNTER STATEMENT OF THE CASE

The Defendant's statement is sufficient.

ARGUMENT

1. **The trial court properly denied the motion to suppress.**

The Defendant claims that the trial court erred in denying her motion to suppress evidence. However, Detective Perkinson did not violate the Defendant's rights by pausing his criminal investigation to ascertain if the Defendant was in distress when he found her slumped over in her car. Further, the Defendant's later motion to reopen the issue was properly denied because the color photo was of no relevance to the question of whether Detective Perkinson thought the slumped over person in the car could have been who he was looking for.

Standard of review.

Because "the trier of fact is in a better position to assess the credibility of witnesses, take evidence, and observe the demeanor of those

testifying[,]” Appellate courts do not independently review evidence in a suppression motion, *State v. Maxfield*, 125 Wn.2d 378, 385, 886 P.2d 123, 127 (1994) (citing *State v. Hill*, 123 Wn.2d at 646, 870 P.2d 313 (1994).) Rather, findings of fact of a suppression motion are reviewed for substantial evidence. *Id.* (citing *Hill*.) “Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding.” *Id.* (citing *Hill* and *State v. Hagen*, 55 Wn.App. 494, 498, 781 P.2d 892 (1989).)

A police officer’s community caretaking duties are not legally segregated from law enforcement duties.

As observed in *Cady v. Dombrowski*, 413 U.S. 433, 441, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973), local police officers are tasked with a “community caretaking function,” which involve rendering emergency aid and making routine checks on health and safety. *See State v. Kinzy*, 141 Wn.2d 373, 385-86, 5 P.3d 668 (2000). *Cady* describes this function as being “totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.” *Cady* at 441.

The Defendant argues that this phrase in *Cady* requires police officers who are engaged in detecting crime to somehow separate those duties from community caretaking, or perhaps refrain from

engaging in community caretaking functions when in the pursuit of suspected criminals. However, the facts of *Cady* do not bear out this argument, since the officers in that case discovered a murder while engaging in a community caretaking function.

In *Cady*, an off-duty Chicago police officer named Dombrowski was arrested for drunken driving in Washington County, Wisconsin after wrecking a rented 1967 maroon Ford Thunderbird into a bridge abutment. *Cady* at 435-36. The Thunderbird was impounded. *Id.* at 436. The local authorities, knowing that the respondent was a police officer, went to the yard where the Thunderbird was impounded because they believed that Chicago police officers were required to carry their service revolvers at all times, and they had not recovered a firearm from Dombrowski, who was comatose. *Id.* at 436-37. The police wanted to make sure the revolver was in safe hands, as was their standard procedure. *Id.* at 443. Upon opening the trunk of the Thunderbird to look for the revolver, the officer sent to recover the weapon found a various items, some identifiable to Dombrowski, covered in someone else's blood. *Id.* at 437. The police later recovered a body and other evidence circumstantially linking Dombrowski to the corpse. *Id.* at 437-38.

The respondent was eventually tried and convicted of murdering the person whose blood was in the trunk. *Id.* at 438-39.

In *Cady*, the police were engaging in what the court called the community caretaking function in attempting to retrieve Dombrowski's revolver, even though they were doing so subsequent to a criminal investigation for drunken driving. In the course of this function, they inadvertently uncovered evidence that led them to a murder. Like the instant case, the criminal investigations and community caretaking functions in *Cady* are inextricably intertwined, and the U.S. Supreme Court took no special notice that the officer who went to retrieve the revolver transitioned to being a criminal investigator upon finding the blood.

Further, the Defendant cites to no subsequent authority interpreting *Cady* in this manner. To the contrary, the case of *State v. Acrey*, 148 Wn.2d 738, 750, 64 P.3d 594, 600 (2003) would appear to contradict the Defendant's position.

In *Acrey* several police officers responded to a call of juveniles fighting in a commercial area at 12:41 a.m. on a week night. *Acrey* at 742. The police officers determined that no criminal activity was underway, but detained the youths because of their age, the hour,

the location, and the fact that it was a week night. *Id.* The defendant gave a false name, but his real phone number and mother's name. *Id.* The defendant's mother asked the police to bring the defendant home. *Id.* The police found marijuana on the defendant as they searched him before allowing him into the police car. *Id.* The Supreme Court upheld the trial court's decision to uphold the seizure of the defendant as part of the community caretaking function of the police. *Id.* at 754.

It is difficult to fathom how such a complete divorce of the functions of the police would be in practical application. What should Detective Perkinson have done if police functions are to be partitioned in such a manner? Leave the Defendant slumped over in the car? Help only those persons who are not of the same race, gender and build as his suspect while on his daily business? Must police agencies dedicate officers to community caretaking functions and forbid criminal investigators from engaging in tasks unrelated to enforcing the criminal code? All these options would seem to be poor policy decisions.

In the context of the overall *Cady* decision, the court's point seemed to be that these duties were of a distinct nature from a local police officer's criminal investigation function, not that the two functions must be cordoned off in watertight compartments. Subsequent case law bears

this interpretation out. Detective Perkinson was justified in contacting the Defendant as he did and the motion to suppress was properly denied. This court should uphold that decision.

Detective Perkinson's *Terry* stop of the Defendant was justified.

A brief investigative stop ("*Terry* stop") is permissible whenever the police officer has a reasonable suspicion, grounded in specific and articulable facts, that the person stopped has been or is about to be involved in a crime." *Acrey*, 148 Wn.2d at 747. To justify a "*Terry* stop" under the fourth amendment and art. I, § 7, a police officer must be able to "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, 21, 88 S. Ct. 1868, 20 L. Ed.2d 889 (1968); *State v. Armenta*, 134 Wn.2d 1, 20, 948 P.2d 1280 (1997). The level of articulable suspicion necessary to support an investigative detention is "a substantial possibility that criminal conduct has occurred or is about to occur." *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). Probable cause is not required for a *Terry* stop because a stop is significantly less intrusive than an arrest. *Id.*; *Brown v. Texas*, 443 U.S. 47, 50, 99 S. Ct. 2637, 61 L. Ed.2d 357 (1979).

In the instant case Detective Perkinson believed that the Defendant may have been the woman he was looking for. Additionally, the car she was in matched the car in the surveillance video that he had seen the woman in. Finally, based upon the smell of heroin and the Defendant apparently being “on the nod,” Detective Perkinson had a reasonable suspicion that the Defendant was in possession of heroin, or possible in actual physical control of a vehicle while under the influence of a drug. His request for identification and who owned the car was a reasonable investigatory “*Terry stop*.” The motion to suppress was properly denied.

The color photograph was irrelevant.

The Defendant argues that the color photograph proves that she was not the person that Detective Perkinson was looking for, and therefore the court abused its discretion in denying her request to reopen the suppression issue.

The Defendant misapprehends the court’s reasoning for denying the request. It was not relevant whether the court believed that the woman in the photograph resembled the Defendant. What mattered was if Detective Perkinson, in observing the Defendant slumped over in her car, believed she *could have been* the woman in the photograph. Second-

guessing Detective Perkinson from the vantage point of the courtroom would not have disproven what Detective Perkinson believed at the time.

The trial court addressed this very issue with the Defendant's trial council, explaining, "...a judge may have found that that photograph was not of Ms. Stoken, and I am saying that doesn't matter." 3/7/2017 RP at 22.

Further, it was more than the Defendant's appearance. As the trial court pointed out, the clothing Detective Perkinson saw (a pink jacket and a black jacket) also matched the photograph, as well as the vehicle the Defendant was found in. 3/7/2017 RP at 21.

Finally, the Defendant claims that the trial court abused its discretion by denying the motion to reopen the CrR 3.6 issue because "counsel's inability to present the color photograph at the initial suppression hearing was due solely to the State's failure to provide the photograph in a timely manner." Brief of Appellant at 20. But what this assertion ignores is that the Defendant was represented by a different attorney at the CrR 3.6 hearing, which the Defendant concedes. *See* Brief of Appellant at 17. In fact, the attorney who represented the Defendant at trial was her *third* attorney. 11/13/2017 RP at 5. The record is silent as to whether the Defendant's prior attorney had possession of a color

photograph and simply chose not to use it at the hearing because, like the trial court, he realized that whether the Defendant looked like the woman in the photograph in a courtroom was not germane to the issue of whether Detective Perkinson thought the person slumped over the steering wheel in a car *could* be the woman he was looking for.

Because the color version of the photograph did not call into question whether Detective Perkinson thought the Defendant might have been who he was looking for, the court's ruling that it was irrelevant was correct. For that reason, this court should decline to overturn the Defendant's conviction.

2. The court did not abuse its discretion in taking the nature of the Defendant's offense into consideration when refusing to grant a Drug Offender Sentencing Alternative.

The Defendant also challenges the trial court's denial of a prison-based Drug Offender Sentencing Alternative, hereinafter "DOSA." The Defendant argues that, because the sentencing judge took the nature of her offense into account at sentencing, he must have categorically denied her request without proper consideration. The Defendant takes the court's comment out of context, and misunderstands the law. The court's decision was proper.

Denial of a grant of a DOSA is not reviewable.

As the Defendant concedes, “A sentence within the standard sentence range... shall not be appealed.” RCW 9.94A.585(1). Therefore, she claims that the judge failed to even consider the DOSA sentence based on nonadjudicated facts. The Defendant misses the point; that she was a drug dealer (the stated reason for the denial) was an adjudicative fact proved at trial.

This case is distinguishable from *Grayson*.

The Defendant’s argument is that the trial court in this case made the same error as the trial court in the case of *State v. Grayson*, 154 Wn.2d 333, 111 P.3d 1183 (2005). This appears to be based on a misunderstanding of the ruling in *Grayson*, as that case is substantively different.

In *Grayson*, the defendant requested a DOSA sentence. *Grayson* at 336. The judge refused the request, apparently not mentioning the facts of the case, but instead stating that, “...the State no longer has money available to treat people who go through a DOSA program...” *Id.* at 336-37.

In its decision, the Supreme Court drew a distinction between adjudicative facts and legislative facts. “Adjudicative facts are usually

those facts that are in issue in a particular case.” *Grayson* at 340 (quoting *Korematsu v. United States*, 584 F.Supp. 1406, 1414 (N.D.Cal.1984).) But “[l]egislative facts are ‘established truths, facts or pronouncements that do not change from case to case but [are applied] universally, while adjudicative facts are those developed in a particular case.’ ... [H]istorical facts, commercial practices and social standards are frequently noticed in the form of legislative facts.” *Id.* (quoting *Korematsu*, alterations in original.)

The Supreme Court went on to note that, under the Sentencing Reform Act, sentencing courts “...should consider only adjudicative evidence that the parties in an adversarial context have “the opportunity to scrutinize, test, contradict, discredit, and correct.” *Id.* (citing George D. Marlow, *From Black Robes to White Lab Coats: The Ethical Implications of a Judge's Sua Sponte, Ex Parte Acquisition of Social and Other Scientific Evidence During the Decision-Making Process*, 72 St. John's L.Rev. 291, 319 (1998).)

What the Defendant fails to address here is that the fact that the Defendant was engaged in selling heroin for profit was an adjudicative fact. It was elicited from the evidence at trial. Therefore, it was proper for the court to consider.

The Defendant argues that the court's comment amounts to a refusal to consider a DOSA for "an entire class of offenders, i.e heroin sellers." Brief of Appellant at 23. This is not the case. The Court said that it had never before granted a DOSA to a person who *profits* from the sale of heroin, and had decided not to in this case either. Other persons who could potentially be convicted of delivering, or possessing with intent to deliver, heroin include those who only sell to support their own habits, and those who share the drug with their friends. The court's comment did not encompass these people. The court was addressing only those who profit from the sale of a dangerous and illegal narcotic.

Expanding the *Grayson* decision in the manner suggested by the Defendant would be a dangerous precedent. Sentencing judges might be afraid to expound upon their decisions from the bench, concerned that their words might be later interpreted, from a cold record, as a categorical denial of the request to consider the Defendant's request, no matter how unreasonable.

The court did not categorically refuse to grant the DOSA.

The Defendant asserts that the judge did not consider her request for the sentencing alternative she requested. However, she ignores the fact that the very judge who denied her request for a DOSA ordered that she be

evaluated for a DOSA. CP at _____. The evaluation was completed and was in the court file at the time of sentencing. CP at _____.

Were it true that the court never even considered a DOSA sentence, the court would not have ordered the evaluation. The record indicates, rather, that the court decided against granting the DOSA for reasons which included the nature of the Defendant's offense.

CONCLUSION

The motion to suppress in this case was properly denied. The case proceeded to trial, and based on the facts at trial, the court declined to grant the Defendant a DOSA. Therefore, her conviction should be upheld. The State does not object to modifying the Defendant's legal financial obligations to conform with the current state of the law.

DATED this _____ day of May, 2019.

Respectfully Submitted,

BY: 

JASON F. WALKER
Chief Criminal Deputy
WSBA # 44358

JFW /

GRAYS HARBOR PROSECUTING ATTORNEY

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