

FILED  
Court of Appeals  
Division II  
State of Washington  
8/23/2019 4:52 PM

NO. 53432-1-II

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

---

STATE OF WASHINGTON,  
Appellant,

v.

MATTHEW JOSEPH PERRON,  
Respondent.

---

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

---

THE HONORABLE DAVID L. MISTACHKIN, JUDGE

---

APPELLANT'S OPENING BRIEF

---

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

**T A B L E S**

TABLE OF CONTENTS

**I. INTRODUCTION..... 1**

**II. ASSIGNMENTS OF ERROR ..... 1**

**III. STATEMENT OF THE CASE ..... 4**

**IV. SUMMARY OF ARGUMENT ..... 6**

**V. ARGUMENT ..... 7**

**1. The Findings of Fact are not supported by substantial evidence..... 7**

**Standard of review..... 8**

**Substantive evidence does not support the findings of fact concerning the second caller. .... 8**

**Finding of Fact 2.14 makes no findings. .... 11**

**The trial court improperly took judicial notice of what the judge believed the police dispatcher would have done..... 11**

**Without the challenged findings of fact, the conclusions of law are unsupported. .... 12**

**2. The trial court’s conclusion of law that the officer lacked reasonable suspicion to stop the Defendant’s car was wrong. 13**

**Standard of Review..... 14**

**Reasonable Suspicion is a low standard. .... 14**

**The court disregarded many factors that contributed to Officer Peterson’s reasonable suspicion..... 16**

**Officer Peterson could lawfully stop the vehicle for the parking violation..... 18**

**There is no evidence the Officer knew there were additional 911 calls. .... 19**

**Police are not required to disprove alternate theories before they have reasonable suspicion. .... 21**

**The trial court’s reasoning is faulty because in such a situation, the police could not lawfully stop a vehicle that matched any description. .... 23**

**3. The trial court erred by suppressing a cell phone that the Defendant showed no privacy interest in..... 24**

**4. The Order suppressing evidence should be vacated and the matter remanded for a new hearing..... 26**

**5. The Order dismissing Counts 4 and 5 should be reinstated. .. 26**

**VI. CONCLUSION ..... 26**

TABLE OF AUTHORITIES

**Washington Cases**

*Alexander Myers & Co., Inc. v. Hopke*, 88 Wn.2d 449, 565 P.2d 80 (1977) ..... 11

*City of Seattle v. Peterson*, 39 Wn.App. 524, 693 P.2d 757 (1985) ..... 20

*City of Seattle v. Yeager*, 67 Wn.App 41, 834 P.2d 73 (1992) ..... 17

*Fusato v. Washington Interscholastic Activities Ass'n*, 93 Wn.App. 762, 970 P.2d 774 (1999)..... 9

*In re Connick*, 144 Wn.2d 442, 28 P.3d 729 (2001), *as amended* (Aug. 6, 2001) ..... 9

*Nord v. Eastside Ass'n Ltd.*, 34 Wn. App. 796, 664 P.2d 4 (1983)..... 12

*Rice v. Offshore Sys., Inc.*, 167 Wn.App. 77, 272 P.3d 865 (2012)..... 10

*State v. Carneh*, 153 Wn.2d 274, 103 P.3d 743 (2004) ..... 14

*State v. Fuentes*, 183 Wn.2d 149, 352 P.3d 152 (2015) ..... 20

*State v. Hawkins*, 7 Wn.App. 688, 689, 502 P.2d 464 (1972.) ..... 18, 19

*State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994)..... 8

*State v. Howerton*, 187 Wn. App. 357, 348 P.3d 781, 785 (2015) ..... 8

*State v. Johnson*, 40 Wn.App 371, 699 P.2d 221 (1985)..... 10

*State v. Jordan*, 126 Wn. App. 70, 107 P.3d 130 (2005) ..... 25

*State v. Lee*, 147 Wn. App. 912, 199 P.3d 445 (2008) ..... 17

*State v. Marcum*, 149 Wn. App. 894, 205 P.3d 969 (2009)..... 21, 24

*State v. Payne*, 45 Wn. App. 528, 726 P.2d 997 (1986) ..... 9

*State v. Shuffelen*, 150 Wn.App. 244, 208 P.3d 1167 (2009) ..... 14, 25

*State v. Snapp*, 174 Wn.2d 177, 275 P.3d 289 (2012) ..... 14, 17

*State v. Thornton*, 41 Wn.App. 506, 705 P.2d 271 (1985) ..... 16

*State v. Z.U.E.*, 183 Wn.2d 610, 352 P.3d 796 (2015)..... 15, 16

**Federal Cases**

*Adams v. Williams*, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972)  
..... 22, 24

*Hoffa v. United States*, 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966)  
..... 18

*United States v. Arvizu*, 534 U.S. 266, 122 S.Ct. 744, 151 L.Ed.2d 740  
(2002)..... 21

*United States v. Hensley*, 469 U.S. 221, 105 S.Ct. 675, 83 L.Ed.2d 604  
(1985)..... 15

**Rules**

CrR 3.6..... 24

ER 201 ..... 9, 20

**Constitutional Provisions**

Wa. Const. art. 1, § 7 ..... 25

## **I. INTRODUCTION**

Following a CrR 3.6 motion, the Grays Harbor Superior Court ruled a police officer did not have reasonable suspicion to stop a car identified as having fled the scene of a shooting. The trial court then ordered suppression of certain evidence, including narcotics and a cell phone found in the hand of a man hiding in the trunk of the car. This resulted in the dismissal of two of five felony counts against the Defendant.

Subsequent to the hearing, the trial court held that, pursuant to RAP 2.2(d), there was no reason for delay of appeal of the decision. This appeal timely follows.

## **II. ASSIGNMENTS OF ERROR**

- 1.** The trial court erred by entering Finding of Fact 2.2 because it is in part not supported by substantial evidence.
- 2.** The trial court erred by making Finding of Fact 2.3 because it is irrelevant and not supported by substantial evidence.
- 3.** The trial court erred by making Finding of Fact 2.4 because it is irrelevant and not supported by substantial evidence.

4. The trial court erred by making Finding of Fact 2.14 because it makes no findings, but merely repeats inconclusive testimony.
5. The trial court erred making findings of fact 2.2, 2.3, 2.4 and 2.14 based upon a hearsay document that was never admitted, or stipulated to, but merely attached to a motion.
6. The trial court erred by taking judicial notice of what the judge assumed a police dispatcher would do, and making findings upon that improper judicial notice.
7. The trial court erred by holding a police officer “waived” his authority to stop a vehicle for an infraction because the officer did not immediately stop the vehicle.
8. The trial court erred by ruling the police officer lacked reasonable suspicion to stop the Defendant’s vehicle to investigate whether the occupants were involved in a shooting because the officer had articulable facts to believe the vehicle had fled the scene of the shooting (Conclusions of Law 3.2, 3.3, 3.4 & 3.5.)
9. The trial court erred by suppressing a cell phone found in the hand of a person in the trunk of the Defendant’s car without making a determination that the Defendant had a privacy interest in that phone.

10. The trial court erred in ordering the suppression of evidence because the officer had reasonable suspicion to stop the Defendant's vehicle.
11. The trial court erred by dismissing two felony counts of possessing controlled substances based upon its erroneous suppression of the evidence.

**Issues Pertaining to Assignments of Error**

1. Does a trial court err when it makes findings of fact based upon a hearsay document attached to a Motion, where that document was never identified, stipulated to, or admitted into evidence? (Assignments of error 1, 2, 3, 4 & 5.)
2. Does a trial court err when it makes findings of fact based on judicial notice of what the judge believes a police dispatcher would do? (Assignments of error 1, 2 and 3.)
3. Does a trial court err by basing a conclusion of law upon a finding of fact that finds no fact? (Assignment of error 4.)
4. Does a trial court err when it rules that an arguably inconsistent description of the color of a car causes an officer's reasonable suspicion to evaporate? (Assignment of error 8.)

5. Does the trial court err where, as here, it suppresses evidence without a showing by the defense that the Defendant had a privacy interest in that evidence? (Assignment of error 9.)
6. Does a trial court err when it orders evidence suppressed, and dismisses associated criminal counts, when there was reasonable suspicion for the stop? (Assignments of error 7 & 8.)

### **III. STATEMENT OF THE CASE**

On January 27, 2019, Officer David Peterson of the Hoquiam Police Department heard that two people had been shot in Aberdeen at approximately 4:00 a.m. RP at 64.<sup>1</sup> Officer Peterson received this report from dispatch, who had received a call to 911. RP at 64 – 65. Officer Peterson did not hear the 911 call. RP at 65.

Officer Peterson understood that multiple suspects had left the scene of the shooting in a small gray car. RP at 65. The scene of the shooting was close to the Aberdeen/Hoquiam city line. RP at 65. In response, Officer Peterson got into his patrol car and headed towards

---

<sup>1</sup> Several defense motions were heard at this hearing, and the Report of Proceedings contains all of them. The matters pertaining to the instant appeal begin at page 64.

Aberdeen. RP at 65. His plan was to look for the suspects in the small gray car, in case they fled to Hoquiam. RP at 66.

Officer Peterson found a vehicle matching the description given by dispatch in about the 3000 block of Cherry Street, parked on the wrong side of the road, headlights on. RP at 66. Traffic is generally light in that area, as it is a residential neighborhood of a small town. RP at 67. Officer Peterson began to approach the vehicle. RP at 67.

The small gray car turned south, sped up, then turned back north to return to the street it had been on when Officer Peterson first found it, going in the same direction. RP at 69. Officer Peterson found this route odd. RP at 69.

Officer Peterson followed it to get a better look, and saw it was a small gray passenger car with two occupants, which matched the only description of the shooting suspects he had from dispatch. RP at 68.

When the vehicle pulled over in the 2200 block of Cherry Street, Officer Peterson initiated a traffic stop. RP at 70.

On cross examination the defense attorney apparently attempted to impeach Officer Peterson with alleged inconsistencies in his report and information appended to his report. RP at 71-73. The defense attorney claimed that Officer Peterson neglected to include in his report that the

suspect vehicle was parked the wrong direction, but when he pointed out that he had, the line of questioning was discontinued. RP at 73. Officer Peterson did testify that the location of the shooting was less than a mile from where he ultimately stopped the vehicle. RP at 74.

#### **IV. SUMMARY OF ARGUMENT**

Officer Peterson had reasonable suspicion to stop the car based on the description of the car, that it contained multiple subjects, the location and the odd driving. Those facts justified a *Terry* stop of the Defendant's car.

The trial court's finding to the contrary is erroneous because the second 911 caller did not eliminate Officer Peterson's reasonable suspicion. Additionally, the factual findings that the court made to support its erroneous ruling were improperly made based upon a document that was never admitted into evidence and the court's improper taking of judicial notice about what the judge believed a police dispatcher would do.

Further, the trial court ruled that several facts that contributed to Officer Peterson's suspicion were irrelevant, even though prior cases establish that these are facts an officer may take into consideration, such as driving and proximity to the scene of the crime. The trial court also

erroneously ruled that Officer Peterson “waived” his authority to stop the car for the parking violation because Officer Peterson did not immediately seize the vehicle upon witnessing the violation.

The trial court then suppressed selected evidence from the stop, including a cell phone apparently belonging to a man hiding in the trunk of the Defendant’s car. But the court never inquired if the Defendant had any privacy interest in the phone of that person. That suppression resulted in the dismissal of two of the five felony counts against the Defendant.

The trial court’s findings and conclusions cannot be sustained given the procedural and legal errors made at the suppression hearing. The State asks this Court to reverse the trial court’s rulings and remand the matter back for a new hearing.

## **V. ARGUMENT**

### **1. The Findings of Fact are not supported by substantial evidence.**

Findings of Fact 2.3, 2.4 and 2.10 are not supported by substantial evidence. Those findings are based upon the trial court’s improper consideration of a document attached to a pleading, the judge’s personal belief of what a police dispatcher would have done, and possibly impeachment evidence.

**Standard of review.**

An appellate court reviews a trial court's order following a motion to suppress evidence to determine if substantial evidence supports the trial court's factual findings. *State v. Howerton*, 187 Wn. App. 357, 364, 348 P.3d 781, 785 (2015) (citing *State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994).) “A trial court's erroneous determination of facts, unsupported by substantial evidence, will not be binding on appeal.” *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313, 316 (1994) (citing *Nord v. Eastside Ass'n Ltd.*, 34 Wn.App. 796, 798, 664 P.2d 4, *review denied*, 100 Wn.2d 1014 (1983).)

**Substantive evidence does not support the findings of fact concerning the second caller.**

Officer Peterson’s testimony was that shortly after 4:00 AM he heard that there was a small grey car fleeing the scene of a shooting and that there were multiple suspects. Officer Peterson testified this was the only information he possessed at the time of the stop. Officer Peterson’s testimony was the only evidence presented. No exhibits were admitted or even offered. Despite this, the trial court made detailed findings regarding a second caller who reported a black car with a loud muffler

The source of the findings, according to the Findings of Fact and Conclusions of Law, was the police report of Officer Peterson, which was

attached to the Defendant's motion and labeled "Exhibit A." *See* CP at 63. This document was never identified, authenticated or admitted at the hearing. The trial court apparently just took judicial notice of this document, without it being admitted or a stipulation from the parties.

"A court's taking judicial notice of a matter raises a question of law reviewed *de novo*." *Fusato v. Washington Interscholastic Activities Ass'n*, 93 Wn.App. 762, 771–72, 970 P.2d 774, 779 (1999) (citing *Krein v. Smith*, 60 Wn.App. 809, 811, 807 P.2d 906, *review denied*, 117 Wn.2d 1002, 815 P.2d 266 (1991).) Without a record of the facts supporting a trial court's taking of judicial notice, an appellate court must conclude that such taking was error. *State v. Payne*, 45 Wn. App. 528, 531, 726 P.2d 997, 999 (1986). "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." ER 201.

All parties are required to follow the statutes and rules relating to authentication of documents. *In re Connick*, 144 Wn.2d 442, 458, 28 P.3d 729, 737 (2001), *as amended* (Aug. 6, 2001). A proponent of the evidence

must make a *prima facie* showing that the evidence is authentic. *Rice v. Offshore Sys., Inc.*, 167 Wn.App. 77, 86, 272 P.3d 865, 870 (2012).

In the instant case, it was clearly the Defendant who was offering the document. But it was never properly put before the trial court to be considered as substantive evidence.

The State anticipates that the defense may argue that Officer Peterson testified to these facts during cross examination. The “CAD log” was raised during an apparent attempt at impeachment during Officer Peterson’s cross-examination, but Officer Peterson never testified to the contents, only agreed that he saw what the defense attorney was reading from. *See* RP at 71-72. Impeachment evidence is not proof of the substantive facts encompassed in such evidence. *State v. Johnson*, 40 Wn.App 371, 377, 699 P.2d 221 (1985) (citing *In re Noble*, 15 Wn.App. 51, 547 P.2d 880 (1976) and *State v. Flielman*, 35 Wn.2d 243, 212 P.2d 794 (1949).) It was error for the trial court to make findings from what is, at best, impeachment evidence.

Because it was improper to take judicial notice of a document simply attached to a written motion and make findings based on that document, this Court should remand this matter back to the trial court with

instructions to make findings only upon evidence that is properly admitted, and to hold a new hearing.

**Finding of Fact 2.14 makes no findings.**

The trial court made a finding that “The officer testified he did not remember dispatch reporting the second tip (black vehicle with very loud muffler), but dispatch could have reported this to him. He claimed he did not look at the “CAD log” while following the car.” CP at 64 (Finding of Fact 2.14.)

This “finding of fact” actually makes no determination whatsoever.<sup>2</sup> It only reports what Officer Peterson testified about, without making the necessary holding: whether Officer Peterson knew there was a second caller. The “finding” is a nullity, and this Court should not consider it as finding any facts.

**The trial court improperly took judicial notice of what the judge believed the police dispatcher would have done.**

The Court opined that it believed that dispatch would have necessarily given Officer Peterson information about a second caller when Officer Peterson notified dispatch that he was behind the small grey car. VRP at 83-84. There is no evidence in the record to suggest this; rather,

---

<sup>2</sup> Appellate courts are not bound by a trial court’s erroneous designations. *Alexander Myers & Co., Inc. v. Hopke*, 88 Wn.2d 449, 459-60, 565 P.2d 80 (1977).

this appears to be a fact on which the court was willing to take judicial notice of. However, this was a fact that the State specifically disputed. RP at 84.

In this case, the trial court believed, without any evidence, what the dispatcher would have told Officer Peterson. The trial court used this belief to find that Officer Peterson “possibly” knew that there was a second 911 caller who said there was a black car, and therefore Officer Peterson did not have reasonable suspicion that the small grey car was involved in the shooting. This despite Officer Peterson stating that he only knew about a small grey car. This was error, and this Court should reverse the trial court’s ruling and remand for a new hearing.

**Without the challenged findings of fact, the conclusions of law are unsupported.**

Appellate courts look to a trial judge's oral decision “to ascertain the legal and factual bases upon which the trial court predicated its findings.” *Nord v. Eastside Ass'n Ltd.*, 34 Wn. App. 796, 798, 664 P.2d 4, 5 (1983). The trial court ruled that the “conflicting information definitely received by dispatch and possibly by the officer” was a major factor in the court’s decision that Officer Peterson did not have reasonable suspicion. RP at 85. However, the information that the court was referring to was the second 911 caller. As addressed above, those findings are not supported

by substantial evidence. Those findings are based upon improper judicial notice.

Because the trial court predicated its conclusions of law based upon findings of fact that are not supported by substantial evidence, this Court should reverse the trial court's ruling and remand for a new hearing that comports with proper evidentiary rules.

**2. The trial court's conclusion of law that the officer lacked reasonable suspicion to stop the Defendant's car was wrong.**

Officer Peterson had reasonable suspicion to stop the Defendant's car because he had articulable facts that connected it to a shooting that had just occurred. The trial court's holding to the contrary is error because it puts too high a bar for reasonable suspicion, and disregards multiple facts Officer Peterson properly took into account before making the stop. The trial court also erred by holding that Officer Peterson "waived" his authority to make a stop based upon illegal parking.

The trial court's ruling that Officer Peterson's reasonable suspicion somehow evaporated because a second 911 call was error because 1) the findings concerning the second call are not supported by substantial evidence; 2) the trial court never found that Officer Peterson actually knew about a second call; and 3) the information did not indicate that the small, gray car Officer Peterson had found was not involved.

Finally, the trial court's holding that the second call eliminated Officer Peterson's reasonable suspicion should be overturned, as it is bad policy and would hamper the police's ability to respond to emergencies.

**Standard of Review.**

Legal conclusions of the trial court pertaining to suppression of evidence are reviewed *de novo*. *State v. Carneh*, 153 Wn.2d 274, 281, 103 P.3d 743 (2004) (citing *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).) Any conclusions of law must be supported by surviving findings of fact. *State v. Shuffelen*, 150 Wn.App. 244, 252, 208 P.3d 1167 (2009) (citing *State v. Vickers*, 148 Wn.2d 91, 59 P.3d 58 (2002).)

**Reasonable Suspicion is a low standard.**

The level of suspicion reasonable suspicion requires is considerably less than a preponderance of the evidence and less that required for probable cause. *Navarette v. California*, 572 U.S. 393, 397, 134 S.Ct. 1683, 1687, 188 L.Ed.2d 680 (2014) (citing *United States v. Sokolow*, 490 U.S. 1, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989).) A law enforcement officer may make a valid investigatory detention if he can point to "specific and articulable facts, which taken together with rational inferences from those facts, reasonably warrants the intrusion." *State v. Snapp*, 174 Wn.2d 177, 197, 275 P.3d 289 (2012) (quoting *Terry v. Ohio*.)

A reviewing court considers the nature of the crime, the officer's experience, and whether an officer's own observations corroborate information from an informant. *Id.* An anonymous tip alone may demonstrate sufficient reliability under the appropriate circumstances. *Navarette* at 397 (citing *Alabama v. White*, 496 U.S. 325, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990).)

The police may stop an automobile to investigate a reasonable suspicion that its occupants are involved in criminal activity. *United States v. Hensley*, 469 U.S. 221, 226, 105 S.Ct. 675, 679, 83 L.Ed.2d 604 (1985) (citing *United States v. Brignoni-Ponce*, 422 U.S. 873, 881, 95 S.Ct. 2574, 2580, 45 L.Ed.2d 607 (1975).) This is because the governmental interest in investigating a crime, when there are specific and articulable facts that support reasonable suspicion, outweigh the privacy interest of the driver and passengers. *Id.* (citing *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979).) The suspected crime need not be in process; the police may conduct a *Terry* stop to investigate a completed felony. *Id.* at 229.

In a challenge to the validity of a *Terry* stop the article I, section 7 analysis generally tracks the Fourth Amendment analysis. *State v. Z.U.E.*, 183 Wn.2d 610, 616, 352 P.3d 796 (2015). Serious crimes and potential

dangers afford a police officer greater leeway in a quick response. *Id.* at 623.

**The court disregarded many factors that contributed to Officer Peterson's reasonable suspicion.**

In this case, the Court specifically found that it did not doubt the veracity of the "informant" who called 911. RP at 86. Rather, the trial court found that the description of a small gray car was insufficient to justify the stop because it was "one piece of information... alone." RP at 86. This ignores several circumstances that contributed to Officer Peterson's reasonable suspicion, many of which have been long-recognized by courts as being legitimate factors to consider.

Firstly, Officer Peterson did not stop the car based upon its description alone. Officer Peterson testified that he followed the car to get a better look at it, and confirmed that it contained multiple occupants. RP at 68. This was consistent with what Officer Peterson knew, that there were multiple suspects fleeing the shooting scene. RP at 65.

Additionally, the small, gray car was close to the shooting scene. Close physical and temporal proximity to a crime scene is a factor that can justify an investigative detention. *State v. Thornton*, 41 Wn.App. 506, 510-12, 705 P.2d 271 (1985). The trial court here made no mention of the fact that Officer Peterson found the car after driving towards the shooting,

even though the testimony was that, even after Officer Peterson followed the car for several blocks, the final point at which he stopped the car was only minutes away from the shooting scene. RP at 74.

The trial court also erred in holding that the Defendant's driving did not contribute to Officer Peterson's suspicion. RP at 85. Whether an officer had reasonable suspicion that a crime had been committed is based on commonsense judgments and inferences about human behavior. *State v. Lee*, 147 Wn. App. 912, 917, 199 P.3d 445 (2008) (citing *Illinois v. Wardlow*, 528 U.S. 119, 125, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000).) A driver's behavior, such as erratic driving or attempts to evade have long been recognized as legitimate factors to take into account when establishing reasonable suspicion. *City of Seattle v. Yeager*, 67 Wn.App 41, 49, 834 P.2d 73 (1992) (citing *United States v. Brignoni-Ponce*, 422 U.S. 873, 885, 95 S. Ct. 2574, 2582, 45 L. Ed. 2d 607 (1975).)

Additionally, Officer Peterson testified that he had been patrolling that area for ten years, and that any traffic at all at 4:00 AM in that residential area was somewhat unusual. An officer's experience is a factor to consider when reviewing whether the officer had reasonable suspicion. *Snapp* at 197.

Because Officer Peterson had articulable facts that justified a brief detention in the form of a traffic stop, but the trial court improperly dismissed several facts that should have been considered, this Court should reverse the trial court's holding and remand the matter for further consideration.

**Officer Peterson could lawfully stop the vehicle for the parking violation.**

The trial court held that the officer "waived" his ability to stop the Defendant's car for illegal parking when Officer Peterson chose not to initiate the traffic stop immediately upon seeing the car parked illegally. RP at 83. Such a holding is error, as there is no right to be seized. *See e.g. Hoffa v. United States*, 385 U.S. 293, 310, 87 S.Ct. 408, 417, 17 L.Ed.2d 374 (1966).

In *State v. Hawkins* two Seattle police officers observed the defendant remove a parking citation from a parked car and place it upon his own car. *Hawkins*, 7 Wn.App. 688, 689, 502 P.2d 464 (1972.) The officer waited forty minutes, until the defendant returned before approaching him and arresting him. *Id.*

The trial court ruled the arrest illegal, but the State appealed and Division 1 of this Court reversed, holding that the officers were continuing to investigate and, "[t]he fact that 40 minutes elapsed before an arrest was

actually effected does not make that which the officers' initially observed any less a misdemeanor committed in the officers' presence.” *Id.* at 690.

The Defendant did not have a right to be seized as soon as he parked illegally. Here, Officer Peterson properly waited to conduct his stop to observe the vehicle. He also had officer safety concerns; as he testified, it was night, there were multiple subjects and he was alone, and if these were the individuals he was seeking, it was reasonable to believe they were armed and capable of using a firearm.

Because it was error for the court to hold that the officer “waived” his right to stop the car based on the illegal parking, this Court should hold that an officer need not stop a vehicle for a violation immediately upon witnessing it, and remand this case to the trial court for further proceedings.

**There is no evidence the Officer knew there were additional 911 calls.**

There is also no evidence that Officer Peterson knew of the second 911 caller, except the trial court’s belief that dispatch would have necessarily told Officer Peterson about another caller.<sup>3</sup>

---

<sup>3</sup> The trial court said, “So he calls into dispatch, calls it out, updates dispatch saying that he's following the car, but yet the car -- or yet the dispatch doesn't give him the information that dispatch clearly had about the subsequent second informant: black car, loud muffler. That makes no sense to me. I find that -- that stretches the imagination to believe that dispatch would not have updated him with that information when he called

Reasonable suspicion is based upon the facts *known to the officer at the time of the stop*, and reviewing courts should only consider those facts known to the officer, in the totality of the circumstances. *State v. Fuentes*, 183 Wn.2d 149, 158, 352 P.3d 152 (2015) (citing *State v. Gatewood*, 163 Wn.2d 534, 182 P.3d 426 (2008) and *State v. Glover*, 116 Wn.2d 509, 806 P.2d 760 (1991).)

There was no testimony about the dispatcher's procedures or duties. The trial court apparently decided to take judicial notice of what his belief was that a dispatcher would have done. Neither side even requested the court do so; the trial court simply came up with this theory *sua sponte*.

Division 1 of this Court has held that a court could not take judicial notice that a particular model of traffic radar reliably and accurately measured speed. *City of Seattle v. Peterson*, 39 Wn.App. 524, 529, 693 P.2d 757 (1985). In that case, the defendant's conviction for speeding was reversed and remanded for a new trial. *Id.* at 530.

As discussed previously, ER 201 restricts what a court may take judicial notice of to facts that are generally known, or cannot reasonably be questioned. The procedures used by police dispatcher, like the

---

into dispatch to advise them that he was following the vehicle. That, to me, I can't -- I'm having -- struggling with that." RP at 83-84.

accuracy and reliability of a radar device, are neither of those things.

Because the only finding that even suggests Officer Peterson knew that a second caller had reported a black car comes from the court's improper judicial notice, the matter should be remanded for a new hearing.

**Police are not required to disprove alternate theories before they have reasonable suspicion.**

The trial court's erroneous ruling is largely based on the premise that the information from the first caller, that there was a small grey car, was somehow negated because a second caller said a black car with a loud muffler was fleeing the scene.<sup>4</sup>

“In allowing [investigative] detentions, *Terry* accepts the risk that officers may stop innocent people.” *State v. Marcum*, 149 Wn. App. 894, 908, 205 P.3d 969, 976 (2009) (citing *Illinois v. Wardlow*, 528 U.S. 119, 125, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000), alteration in original.) Reasonable suspicion need not rule out the possibility of innocent conduct. *United States v. Arvizu*, 534 U.S. 266, 277, 122 S.Ct. 744, 753, 151 L.Ed.2d 740 (2002) (citing *Illinois v. Wardlow*, 528 U.S. 119, 125, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000).) “The Fourth Amendment does not require a policeman who lacks the precise level of information necessary

---

<sup>4</sup> There was no evidence adduced concerning the muffler of the car Officer Peterson ultimately stopped.

for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape.” *Adams v. Williams*, 407 U.S. 143, 145, 92 S.Ct. 1921, 1923, 32 L.Ed.2d 612 (1972).

In this case, even if Officer Peterson had the information that a second caller had reported a black car, he did not find the black car. He found the *gray* car. It was his duty to locate the suspects that had fled the shooting, and that required him to stop the car that matched the description to determine whether it was involved or not.

This would be a different situation if the second caller’s information was exculpatory as regards to the gray car. For example, if the second caller had explained that the victims were in the gray car, and the suspects were in a black car, the analysis might be different. However, here, to any extent the second caller’s information can properly be considered, the information does not prove a gray car is not involved. The information is only *arguably* inconsistent. Obviously, at four in the morning, it would be dark out, and what one person might think is black, another might consider a gray tone. Or, the callers could have been reporting two different cars fleeing with two sets of suspects.

Because the second caller's information does not negate Officer Peterson's reasonable suspicion that the small gray car was connected to the shooting, this Court ought to reverse the trial court's holding.

**The trial court's reasoning is faulty because in such a situation, the police could not lawfully stop a vehicle that matched any description.**

Even assuming, *arguendo*, that Officer Peterson had knowledge of a second caller who reported a black car was fleeing the scene, and that evidence was properly admitted, the trial court's ruling that the (arguably) inconsistent description<sup>5</sup> nullified the officer's reasonable suspicion would set a bad precedent and hamper the abilities of the police to respond to emergencies.

According to the trial court's reasoning, had Officer Peterson located a black car, he would have lacked legal authority to stop it because the information available was still inconsistent; one caller said a gray car, another said a black car with a loud muffler. No matter which car the police located, they could not act. The police would then be in a position that they could not take action to apprehend persons apparently fleeing the scene of a shooting until the apparently inconsistent information is reconciled.

---

<sup>5</sup> The State attempted to point out the description was not so inconsistent, but the trial court cut off the prosecutor. RP at 79.

Situations with 911 callers are frequently, if not more often than not, exigent and emergent. As *Marcum* and *Williams, supra*, point out, the *Terry* stop allows officers to stop innocent people so that officers are not paralyzed when dealing with incomplete information. Inconsistent information does not change that analysis.

In this case, for example, it was never established at the CrR 3.6 hearing whether the second caller was referring to the *same* car, or a *second* car. Officer Peterson, on the lookout for armed shooters at 4:00 AM would have been in no better position to immediately make that determination. Had he also found a black car, he or his fellow officers would have needed to be able to stop that car as well.

Because the trial court's reasoning would paralyze the police when multiple callers to an emergency phone system report multiple suspects, or are inconsistent in any detail, this Court should overrule the trial court and remand for a new hearing.

**3. The trial court erred by suppressing a cell phone that the Defendant showed no privacy interest in.**

The trial court ruled that a cell phone found in the hand of a man located in the trunk of the Defendant's vehicle would be suppressed in this case without any evidence that the Defendant had a privacy interest in that phone. This was error.

Automatic standing only applies when a defendant is asserting his own rights were violated. *Shuffelen* at 255 (citing *State v. Williams*, 142 Wn.2d 17, 23, 11 P.3d 714 (2000).) It is the defendant's burden to establish a privacy right under article. 1, section 7 of the Washington constitution. *State v. Jorden*, 126 Wn. App. 70, 107 P.3d 130, review granted 155 Wn.2d 1011, 122 P.3d 913, reversed on other grounds 160 Wn.2d 121, 156 P.3d 893 (2005) ("The defendant has the burden of showing that his or her "private affairs" were disturbed by police in a way that implicates the State Constitution."); and see *State v. Jackson*, 82 Wn.App. 594, 601-02, 918 P.2d 945 (1996).

In the instant case the trial court failed to undertake any meaningful inquiry of whether the Defendant had any privacy interest in the phone seized. The parties agreed that the phone was in the hand of CJ Buhl when the car was stopped, and the phone placed in the trunk and retrieved later by the use of a search warrant. RP at 88. The trial court simply ordered the phone suppressed. RP at 89.

Because the Defendant cannot vicariously assert a privacy interest, the trial court erred by ordering the phone suppressed. This Court should reverse that decision and remand the matter to the trial court for further proceedings.

**4. The Order suppressing evidence should be vacated and the matter remanded for a new hearing.**

Because Officer Peterson had reasonable suspicion to stop the Defendant's car based upon the 911 call, this Court should vacate the Order and remand this matter back to the trial court for a new hearing.

**5. The Order dismissing Counts 4 and 5 should be reinstated.**

After the hearing, the State conceded that it could not proceed on Counts 4 and 5 without the evidence the trial court had ruled should be suppressed. The trial court then ordered those counts dismissed. RP at 90.

Because the trial court's dismissal of Counts 4 and 5 was based upon the afore-mentioned suppression of evidence, this Court should vacate the judgment and remand the matter back to the Grays Harbor Superior Court for a new hearing.

## **VI. CONCLUSION**

Reasonable suspicion is a low standard because it exists specifically so police officers can make brief seizures to determine if a person has committed a crime. Because some people will be seized who are not the person being sought, the detentions are brief, and officers need not simply walk away if they possess incomplete information.

In this case, Officer Peterson knew a small grey cay was fleeing the scene of a shooting, and he found such a car. That car was close to the scene, contained multiple suspects, consistent with his information, and drove evasively. He was entitled to stop it whether he knew there was a second caller reporting a black car or not.

The trial court took unlawful judicial notice of a set of facts the defense apparently wished to use to lower Officer Peterson's credibility to make a unique and erroneous ruling; that if multiple 911 callers give information that is inconsistent in any way, the police cannot act upon any of the information. No case holds as much.

Further, the trial court then suppressed evidence without any regard as to the Defendant's standing to challenge the seizure of such property, suppressed evidence, and dismissed felony criminal counts based on its erroneous ruling.

This Court should vacate the trial court's findings that are not supported, erroneous conclusions, order and judgment of dismissal, announce that the police may still make a *Terry* stop if they possess inconsistent, but not exculpatory information, and remand this matter for a new hearing.

DATED this 23rd day of August, 2019.

Respectfully Submitted,

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

JFW /

# GRAYS HARBOR PROSECUTING ATTORNEY

August 23, 2019 - 4:52 PM

## Transmittal Information

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 53432-1  
**Appellate Court Case Title:** State of Washington, Appellant v. Matthew J. Perron, Respondent  
**Superior Court Case Number:** 19-1-00065-4

### The following documents have been uploaded:

- 534321\_Briefs\_20190823165204D2915959\_8798.pdf  
This File Contains:  
Briefs - Appellants  
*The Original File Name was BRIEF OF APPELLANT - PERRON.pdf*

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

- kevin@olympicappeals.com
- sierra@olympicappeals.com

### Comments:

---

Sender Name: Jason Walker - Email: jwalker@co.grays-harbor.wa.us

Address:

102 W BROADWAY AVE RM 102

MONTESANO, WA, 98563-3621

Phone: 360-249-3951

**Note: The Filing Id is 20190823165204D2915959**