

No. 29166-9-III
(Consolidated with 29167-7-III)
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON, Appellant,

vs.

ANDREW G. TRUTTER, Respondent.

and

JOSHUA D. SMOLINSKI, Respondent.

APPEAL FROM THE ASOTIN COUNTY SUPERIOR COURT
Honorable William D. Acey, Judge

BRIEF OF RESPONDENT JOSHUA D. SMOLINSKI

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A. COUNTER-STATEMENT OF THE ISSUES

1. Were the portions of the trial court's findings that are challenged by the state supported by substantial evidence in the record?
2. Did the trial court correctly grant the joint defense motion to suppress the evidence where it applied the correct legal standard?
3. Did the trial court correctly grant the joint defense motion to suppress the evidence where the informant's tip did not contain enough objective facts to justify an investigatory stop and the officers did not have a reasonable articulable suspicion to conduct a traffic stop of the co-defendant's vehicle?

B. STATEMENT OF THE CASE

Mr. Smolinski joins in and incorporates as if set forth fully herein the statement of the case set forth in Mr. Trutter's Brief of Respondent at pages 2-6. RAP 10.1(g). Mr. Smolinski was a passenger in Trotter's Dodge Durango. CP 75, 131. The charges against Mr. Smolinski are based upon a search of the Durango. CP 4-6. Additional facts as necessary will be referred to in the argument section below.

C. ARGUMENT

1. The portions of the trial court's findings that are challenged by the state are supported by substantial evidence in the record.

The trial court's findings of fact on a motion to suppress evidence are reviewed for substantial evidence. State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). "Evidence is substantial when it is enough 'to persuade a fair-minded person of the truth of the stated premise.' ". Id., citing State v. Reid, 98 Wn. App. 152, 156, 988 P.2d 1038 (1999). The trial court's conclusions of law on a motion to suppress evidence are reviewed *de novo*. State v. Carneh, 153 Wn.2d 274, 281, 103 P.3d 743 (2004). When reviewing a trial court's decision following a motion to suppress, any unchallenged findings of fact are treated as verities on appeal. State v. Gaines, 154 Wn.2d 711, 716, 116 P.3d 993 (2005); State v. Stevenson, 132 Wn.2d 668, 697, 940 P.2d 1239 (1997).

Finding of Fact ¶ 3.2. The state first challenges the below-italicized portion of Finding of Fact ¶ 3.2, which provides in full:

The confidential informant told officers that Tanner was dealing and/or using drugs, including heroin, methamphetamine and 'pills'. No specifics were given by the confidential informant as to location, method or manner used by Tanner to buy, sell or use drugs. *No specifics were given by the confidential informant as to how recently such activity of Tanner had taken place.* Officers identified 'Tanner' as Tanner Hardin.

CP 156, ¶ 3.2; Brief of Appellant, p. 14–15. In support, the state cites the testimony of Detective Wolverton to the effect that the detective had spoken with the confidential informant (“CI”) earlier on the day of the surveillance and the CI indicated that Tanner was sounding like he was trying to get money together to re-supply himself with heroin. Brief of Appellant, p. 15. The state claims this testimony means “Tanner’s activities were ongoing and active on the day in question.” Id.

The detective’s statement does not support the state’s position. In fact, what the CI had told the officers was that he—and Tanner—were trafficking in stolen property in exchange for illegal narcotics. RP 41–42. The CI gave no specifics as to any current activities the CI and/or Tanner were involved in, i.e. the activity of exchanging stolen property for narcotics. Although he and Tanner were apparently partners in drug/stolen property operations (RP 90), the CI gave no information about any current stolen property that was to be exchanged for narcotics.

For purposes of the present surveillance, the CI simply gave no specifics, which is consistent with the trial court’s finding of fact. The CI knew only that Tanner wanted to get money to resupply himself with heroin. RP 91. The CI’s lack of detailed knowledge is understandable,

considering he had been in jail, and then was in a rehab center at the time that he gave information to officers. RP 102.

Detective Wolverton also testified that in the past the CI had given extensive detailed information about his and Tanner's joint drug ventures, such as how stolen property was being exchanged for narcotics, where the narcotics were coming from, where the narcotics were going to, and including in-depth descriptions of multiple cities, locations and the vehicles that were involved. RP 89-90.

Here, in stark contrast to the earlier detailed information, the CI provided no specifics about drug activities and gave no time frame. The CI had never indicated Tanner conducted drug activities in the Albertson's parking lot, and did not say that Tanner had drugs (or stolen property) with him on this particular day. RP 65. Nor did he mention a white Durango or other vehicle, or refer to Mr. Trutter or any other possible contacts, or suggest drugs were to come from or end up at specific locations such as Pullman, Washington or Moscow, Idaho (where Mr. Trutter and Mr. Smolinski had come from). RP 13-14, 101. There was substantial evidence to support the Court's finding of lack of specifics, and the finding should be upheld.

Finding of Fact ¶ 3.5. The state next challenges the below-italicized portion of Finding of Fact ¶ 3.5, which provides in full:

Detective Boyd has been involved in at least a dozen controlled purchases which occurred in the parking lot of Albertson's. No time frame was given as to dates observed. Parking out away from the businesses, away from other cars, can, according to Detective Boyd, be consistent with drug transactions. However, such parking location may also be consistent with non-drug activity, *such as avoiding a car being damaged or dinged*.

CP 156, ¶ 3.5; Brief of Appellant, p. 15–17. At the presentation hearing, the state did not have a problem with the finding that “such parking location may be consistent with non-drug activity.” RP 140. The state did object to including the phrase “such as avoiding a car being damaged or dinged” on the basis it was not supported by any testimony. RP 140–41.

On appeal, the state has apparently changed its mind. It now argues that the entire finding—“However, such parking location may also be consistent with non-drug activity, such as avoiding a car being damaged or dinged”—is not supported by any testimony and cannot be supported by “common experience”. Brief of Appellant, p. 16.

Here, contrary to the state's argument, the state itself presented evidence that non-drug activities involving cars routinely occur in the Albertson's parking lot that was under surveillance. Officer Boyd agreed that someone getting out of a car and getting into another car and talking

to the people happens all day long in that lot. RP 63. He also agreed that persons pulling cars up in the lot and stopping to talk to each other could be social contacts. RP 66.

In his oral ruling, the trial court observed that Tanner had driven from his Rainier Street address and parked in the Albertsons lot in “that same place any other person would park that doesn’t want their car dinged. How many parking lot dings do you get [in] an Albertson’s parking lot if you park anywhere next to a rig on either side of you? Where they park on ... the far end of the spaces away from other parked vehicles, away from the businesses, it’s just as consistent with ... drug activity as it is with somebody who doesn’t want their car ... or truck getting dinged up. So, that all by itself doesn’t mean anything.” RP 116–17.

In rejecting the state’s exception to the finding, the trial court noted that “common experience” reveals that some people park out away from businesses to avoid having their car dinged. RP 140–41. Evidence Rule 201 applies only to judicial notice of adjudicative facts, i.e. “facts that are relevant to the case, and that help explain who did what, when, where, how, and with what motive and intent, ... the sort of fact that is normally determined by the jury.” ER 201; Tegland, 5 Wash. Prac., Evidence Law and Practice, § 201.2 (5th Ed.). The state having already presented

evidence that parking out in a lot is equally consistent with non-drug activity; the trial court then interjected an example of such non-drug-related activity – to avoid car dings or other damage. The state provides no authority to support its argument that the giving of an example based on common knowledge was somehow improper.

If, on the other hand, the example given by the trial court is not technically an “adjudicative fact”, then ER 201 does not apply. Tegland, *supra*. But even if judicial notice was not proper, in a bench trial, the judge is expected to bring his or her own “opinions, insights, common sense, and everyday life experiences” into the fact-finding process. State v. Carlson, 61 Wn. App. 865, 878, 812 P.2d 536 (1991). The court’s finding simply provided a common sense example of how parking out in a lot could be motivated by purely innocent reasons. This particular innocent reason is merely a subset of the larger finding—that the parking location in this case could also be consistent with non-drug activity. This finding is supported by the state’s own witnesses. As discussed further below, the court ultimately concluded that the totality of the circumstances—including the location of the cars in the parking lot—did not give rise to a substantial possibility that criminal conduct has occurred

or was about to occur. State v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1985). The court's finding is not clearly erroneous.

Finding of Fact ¶ 3.6. The state next challenges Finding of Fact ¶ 3.6, which provides:

The evidence fails to establish the Albertson's parking lot was a high crime area or known as a high drug crime area.

CP 152, ¶ 3.6; Brief of Appellant, p. 17. The state argues that this finding "ignores the testimony of Detective Darin Boyd that he had personally been involved in approximately a dozen controlled purchases of drugs in that parking lot in the three years he had been assigned to the Quad Cities Drug Task Force." Id.

This argument disregards an earlier finding by the trial court that "no time frame was given as to [the] dates [of the dozen controlled purchases] observed [by Detective Boyd]. Finding of Fact ¶ 3.5 at CP 152. The court's finding clearly rejects what the state now argues on appeal. The state did not challenge this finding and the unchallenged finding of fact must be treated as a verity on appeal. Gaines, 154 Wn.2d at 716; Stevenson, 132 Wn.2d at 697.

Further, the court's finding is supported by the record. Detective Boyd testified he had been employed with the Clarkston Police Department for five years (three years of which he has been assigned to the

Quad Cities Drug Task Force) and was previously employed as a deputy with the Garfield County Sheriff's Office for six years. RP 36, 53.

Contrary to the state's assertion, the detective did not testify that his involvement in controlled buys took place "in the three years he had been assigned to the Quad Cities Drug Task Force." The state presented no evidence as to how recently the alleged dozen transactions took place during the detective's 11 years of police service in those two neighboring counties.

The state argues that the detective's dozen controlled buys—made at some unspecified time in the span of 11 years—"supports the reasonable inference that the parking lot is frequently used by those involved in drug sales for conducting business." Brief of Appellant, p. 17. The trial court had already found that the state had not established a time frame for the controlled buys apparently conducted in the past. The court properly rejected this untenable argument, and further noted that there was nothing in the affidavit for search warrant claiming that the Albertson's parking lot in Clarkston, Washington was a high crime or high drug transaction area. RP 116. The court's factual finding that there was insufficient evidence to establish that the Albertson's parking lot was a high crime area or known as a high drug crime area is not clearly erroneous.

In summary, there was substantial evidence in the record to support all of the challenged findings of fact, and the trial court's ruling on the motion to suppress evidence should be upheld.

2. The trial court correctly granted the joint defense motion to suppress the evidence where it applied the correct legal standard.

Mr. Smolinski joins in and incorporates as if set forth fully herein the argument on this issue set forth in Mr. Trutter's Brief of Respondent at pages 12–17. RAP 10.1(g).

3. The trial court correctly grant the joint defense motion to suppress the evidence where the informant's tip did not contain enough objective facts to justify an investigatory stop and the officers did not have a reasonable articulable suspicion to conduct a traffic stop of the co-defendant's vehicle.

The Fourth Amendment, made applicable to the states by way of the Fourteenth Amendment, guarantees the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. Mapp v. Ohio, 367 U.S. 643, 647, 81 S.Ct. 1684, 1687, 6 L.Ed.2d 1081, 84 A.L.R.2d 933 (1961). Searches and seizures must be supported by probable cause whether or not formal arrest or search by way of warrant has been made. Dunaway v. New York, 442 U.S. 200, 208, 99

S.Ct. 2248, 2254, 60 L.Ed.2d 824 (1979). Under article I, § 7 of the Washington Constitution, warrantless seizures are per se unreasonable and the state bears the burden of demonstrating that the warrantless stop falls within one of the narrow exceptions to the general rule. State v. Williams, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). Exceptions authorizing seizure on less than probable cause are narrowly drawn and carefully circumscribed. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); State v. White, 97 Wn.2d 92, 640 P.2d 1061 (1982).

One such exception is a brief stop to investigate suspicious activity. Terry, supra; State v. Hudson, 124 Wn.2d 107, 112, 874 P.2d 160 (1994); State v. Kennedy, 107 Wn.2d at 6. Although lacking probable cause to arrest or search, police may briefly detain and question a person if they have a well-founded suspicion that the person is connected to actual or potential criminal activity. State v. Seiler, 95 Wn.2d 43, 46, 621 P.2d 1272 (1980), *citing* Brown v. Texas, 443 U.S. 47, 51, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979); Terry, 392 U.S. at 21; State v. Glover, 116 Wn.2d 509, 513-14, 806 P.2d 760 (1991).

A seizure must be lawful at its inception. State v. Martinez, 135 Wn. App. 174, 181, 143 P.3d 855 (2006). Crime detection and prevention are legitimate purposes of investigative stops or detentions, and the

reasonableness of an officer's actions in making a *Terry* stop will be evaluated in light of the facts known to him at the time. State v. Kennedy, 107 Wn.2d at 5–6 (citations omitted). However, the test is whether a police officer can point to specific, articulable facts which indicate a "substantial possibility that criminal conduct has occurred or is about to occur." Kennedy, 107 Wn.2d at 6, 726 P.2d 445.

Although less intrusive than an arrest, a *Terry* stop must nevertheless be reasonable. Kennedy, 107 Wn.2d at 4. To justify a seizure on less than probable cause, the officers' suspicion must be based on specific, objective facts indicating that a *particular* person has or is about to commit a crime. Terry, 392 U.S. at 21; Martinez, 135 Wn. App. at 181-82; State v. Duncan, 146 Wn.2d 166, 172, 43 P.3d 513 (2002); Kennedy, 107 Wn.2d at 6. An informant's tip cannot constitutionally provide police with such a suspicion unless it possesses sufficient "indicia of reliability." Seiler, *supra*, citing Adams v. Williams, 407 U.S. 143, 147, 92 S.Ct. 1921, 1923, 32 L.Ed.2d 612 (1972) and State v. Lesnick, 84 Wn.2d 940, 943, 530 P.2d 243 (1975).

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." Sieler, 95 Wn.2d at 47, *citing* Lesnick, 84 Wn.2d at 944 (*quoting* from State v. Lesnick, 10 Wn. App. 281, 285, 518 P.2d 199 (1973)).

Herein, the information the state claims *should* support the investigative stop of Mr. Trutter's car falls far short of the standard set in Kennedy.¹ The Kennedy decision relied on detailed information provided by a reliable informant, specifically alleging that the *defendant* was engaged in criminal activity, and the corroboration of that information as supplied by the officers' observation of the defendant's activities.

In Kennedy, the defendant was seen leaving a house in the afternoon and getting into a maroon car. 107 Wn.2d at 3. The observing officer had received a tip from a reliable informant detailing that the defendant regularly bought marijuana at the house, went there only to buy drugs, and often drove a particular maroon car. Id. The officer had also received neighbor complaints about frequent foot traffic to the house. Id. After verifying that the maroon car he had seen was the particular car the defendant was said to drive, the officer stopped the car. Id. The

¹ The Kennedy Court adopted the analyses in Seiler, Lesnick and Adams v. Williams, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972). Kennedy, 107 Wn.2d at 5-9.

Washington Supreme Court held the information rendered an investigative stop reasonable. *Id.* at 8–9.

The *Kennedy* decision relies almost exclusively on the detailed nature of the reliable informant’s information.² The neighbors’ complaints and Kennedy’s actions were significant primarily because they substantially corroborated that information. In the present case, the reliable informant gave no detailed information as to the target suspect “Tanner” and no information whatsoever as to the white Durango or the co-defendants or any other circumstances involved herein.

The informant “told officers that Tanner was dealing and/or using drugs, including heroin, methamphetamine and ‘pills’.” Finding of Fact ¶ 3.2 at 153. Detective Wolverton testified the informant told him that “[Tanner] was sounding like he was trying to get money together, and was planning on ... resupplying himself with heroin.” RP 91. This tip, in

² In *Kennedy*, “we emphasized that police formed a reasonable and articulable suspicion to seize the defendant based on detailed information provided by a reliable informant. The informant told police that Kennedy ‘regularly purchased marijuana [at a suspected drug house], that Kennedy only went [there] to buy drugs, and that Kennedy usually drove either a [green truck or maroon car]’. [*Kennedy*, 107 Wn.2d] at 3, 726 P.2d 445. The officer observed Kennedy leave the location in the maroon car described by the informant. *Id.* As the officer signaled Kennedy to pull over, he saw Kennedy make a furtive movement to place something (later discovered to be marijuana) under his seat. *Id.* These grounds justified the investigative seizure and the officer’s vehicle search for a weapon.” *State v. Doughty*, 170 Wn.2d 57, 63–64, 239 P.3d 573 (2010).

conjunction with past information provided by the informant, may have provided the officers with an initial reason to investigate Tanner and even follow him to the Albertson's parking lot. See Lesnick, 84 Wn.2d at 944. Once there, however, there were no other informant "details" to corroborate.

Past information from the informant included extensive detailed information about his and Tanner's joint drug ventures, such as how stolen property was being exchanged for narcotics, where the narcotics were coming from, where the narcotics were going to, and including in-depth descriptions of multiple cities, locations and the vehicles that were involved. RP 89-90. However, the informant provided no such details on this occasion. A potential corroboration of exchanging stolen property for drugs fails miserably where the officers saw virtually nothing exchanged between individuals in the Albertsons parking lot. Finding of Fact ¶¶ 3.4, 3.7, 3.8, 3.9, 3.11 and 3.12 at CP 152-53.

Once they arrived at the parking lot, the officers therefore had no further "reliable informant details" to corroborate, and were on their own to form a reasonable articulable suspicion of criminal activity sufficient to support a *Terry* stop. Simply socializing with the target suspect, Tanner, does not meet the requirements of *Terry*. A person's "mere proximity to

other independently suspected of criminal activity does not justify [a] stop.” State v. Thompson, 93 Wn.2d 838, 841, 613 P.2d 525 (1980). In Detective Boyd’s experience, parking out in a parking lot away from businesses is consistent with drug transactions. However, the court found such a location could also be consistent with non-drug activity. Finding of Fact ¶ 3.5. Similarly, the evidence of individuals making contact in the Albertsons parking lot with no criminal activity observed and one of those vehicles later stopping by a public park and talking to a pedestrian with no criminal activity observed comports with innocent activity rather than criminal activity.

The degree of probability required for the police conclusion that a crime is in progress or has occurred is a “substantial possibility”. Kennedy, 107 Wn.2d at 6. Here, the officers’ experience coupled with what little they knew from the confidential informant was insufficient to create a well-founded suspicion of criminal activity. State v. White, 97 Wn.2d at 110–12.

Division One of the Court of Appeals described a case in which, it said, the facts were very close to the fine line between an articulable suspicion and an inchoate hunch. In State v. Pressley, the officer observed two individuals in a location well known for narcotics transactions in the

evening after dark. 64 Wn. App. 591, 593–96, 825 P.2d 749 (1992). One individual was pointing to an object or objects in her hand, at which the other individual was looking intently. Id. at 594. The officer had previously observed drug transactions involving similar activity. Id. He approached the individuals, whereupon one of them said “Oh Shit” and closed the hand containing the objects. Id. The individuals then walked away from each other. Id. The officer saw something sticking out of the first individual’s hand, and as he approached she put her hand in her pocket. Id.

Division One recognized that merely observing what could be a drug transaction in an area known for such activities would have been insufficient to justify a stop, since the behavior was “susceptible to a number of innocent explanations.” Id. at 597. The individuals’ words and conduct as the officer approached, however, were viewed as sufficiently consistent with “an incipient drug deal” to justify the stop. Id. Even so, the court observed, “While the officer’s basis for the stop hovers near the line between sufficient and insufficient grounds for a *Terry* stop, it did amount to more than simply an ‘inarticulable hunch’ “. Id.

Surely, if the activities described in Pressley hover near the line separating proper and improper *Terry* stops, then the decision in this case

represents a proper upholding of the requisite standard of “substantial probability” that a crime is in progress or has occurred.

.. [T]here was no money observed changing hands; ah, there was something passed to somebody in the backseat of this third car; yeah, there was some kind of human shell game going on maybe, but nobody knows what was underneath the shell between these three rigs. Ah, and granted it’s, you know, 8:30, 9 o’clock at night, it’s February 11, it’s dark. Ah, you know, sure, there’s lights in the parking lot at Albertsons, and there was a dome light on for a brief, ah, moment that, ah – ah, Detective Wolverton testified to.

But – and then the meeting with ... this guy at the park, but, again, nothing was seen exchanged. Ah, and without a little bit more, ah, there’s – there really wasn’t an articulable suspicion of criminal activity observed by the officers.

RP 117–18.

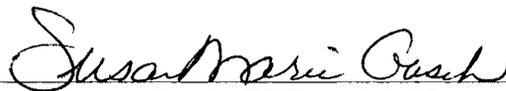
The trial court’s Findings were supported by the evidence, even considering the testimony of the officers and their experience. The court applied the correct legal standard of the need for a reasonable suspicion to conduct a traffic stop on a vehicle, and properly determined that reasonable suspicion was lacking.

Additionally, Mr. Smolinski joins in and incorporates as if set forth fully herein the argument on this issue set forth in Mr. Trutter’s Brief of Respondent at pages 17–30. RAP 10.1(g).

D. CONCLUSION

For the stated reasons, Mr. Smolinski requests that this Court affirm the trial court's order of suppression and dismissal.

Respectfully submitted on May 4, 2011.

A handwritten signature in cursive script, reading "Susan Marie Gasch", is written over a horizontal line.

Susan Marie Gasch, WSBA #16485
Attorney for Respondent Smolinski