

FILED

NOV 03 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
3

NO: 29166-9-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Appellant

vs.

ANDREW G. TRUTTER, Respondent

and

JOSHUA D. SMOLINSKI, Respondent

BRIEF OF RESPONDENT ANDREW G. TRUTTER

Thomas L. Ledgerwood
Attorney for Respondent Andrew G. Trutter
WSBA# 9564
922 Sixth Street
Clarkston, WA 99403

FILED

NOV 03 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO: 29166-9-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Appellant

vs.

ANDREW G. TRUTTER, Respondent

and

JOSHUA D. SMOLINSKI, Respondent

BRIEF OF RESPONDENT ANDREW G. TRUTTER

Thomas L. Ledgerwood
Attorney for Respondent Andrew G. Trutter
WSBA# 9564
922 Sixth Street
Clarkston, WA 99403

TABLE OF CONTENTS

Table of Contents i

Table of Authorities ii

I. Introduction 1

II. Statement of the Case 2

III. Argument 6

 A. The Trial Court's Findings Were Supported by the Record.
 6

 B. The Trial Court applied the Correct legal Standard in it's
 Findings of Fact and Conclusions of Law 12

 C. The Trial Court Correctly Ruled That Officers Did Not
 Have a Reasonable Suspicion to Conduct a Traffic Stop
 of the Defendant's Vehicle. 17

V. Conclusion 30

TABLE OF AUTHORITIES

TABLE OF CASES

<i>Aguilar v. Texas</i> , 378 U.S. 108, 84 Sup. Ct. 1509, 12 L. Ed. 2nd 723 (1964)	14, 16
<i>Delware v. Prouse</i> , 44 U.S. 648, 653, 99 S.Ct. 1391, 59 L. Ed.2nd 660 (1979)	13
<i>Seattle v. Mesiani</i> , 110 Wn. 2d, 540, 460, 755 P.2d 775 (1988).	13
<i>Spinelli v. United States</i> , 393 U.S. 410, 89 Sup. Ct. 584, 21 Lawyers Ed. 637 (1969)	14, 16
<i>State v. Almanza-Guzman</i> , 94 Wn. App. 563, 567-568, 972 P.2d 468 (1999)	20
<i>State v. Biegel</i> 57 Wn. App. 192, 787 P.2d 577, <i>review denied</i> , 115 Wn.2d 1004, 795 P.2d 1156 (1990)	24, 25, 26
<i>State v. Boland</i> , 115 Wn.2d 571, 582 to 583, 800 p.2d 1112 (1990). ...	17
<i>State v. Doughty</i> , 148 Wn. App. 585, 201 P.3d 342 (2009)	26, 27
<i>State v. Glover</i> , 116 Wn.2d 509, 514, 806 P.2d 760 (1991) ...	15, 23, 24
<i>State v. Gunwall</i> , 106 Wn.2d at 63 to 64.	12
<i>State v. Halstien</i> , 122 Wn.2d 109, 128, 857 P.2d 270 (1993)	7
<i>State v. Hardamon</i> , 29 Wn.2d 182, 189. 186 P.2d 634 (1947)	10
<i>State v. Hendrickson</i> , 129 Wn.2d 61, 69 917 P.2d 563 (1996)	12
<i>State v. Hill</i> , 123 Wn. 2d 641, 870 P.2d 313 (1994)	7
<i>State v. Houser</i> , 95 Wn.2d 143, 149, 622 P.2d 1218 (1980)	12

<i>State v. Kennedy</i> , 107 Wn.2d 1, 6, 726 P.2d 445 (1985)	10, 11, 16, 21, 22, 23
<i>State v. Ladson</i> , 138 Wn. 2d 343, 979 P.2d 833 (1999)	12
<i>State v. Lesnick</i> , 84 Wn. 2d 940, 944, 530 P.2d 243 (1975).	11
<i>State v. Mercer</i> , 45 Wn. App. 769, 727 P.2d 676 (1986)	18, 19
<i>State v. Richardson</i> , 64 Wn. App. 693, 825 P.2d 754 (1992)	27, 28
<i>State v. Samsel</i> , 39 Wn. App. 564, 570-571, 694 P.2d 670 (1985).....	29
<i>State v. Sieler</i> , 95 Wn.2d 43, 46, 621 P.2d 1272 (1980)	11
<i>State v. Stroud</i> , 106 Wn.2d 144, 148, 720 P.2d 436 (1986)	12
<i>State v. Villarreal</i> , 97 Wn. App. 636, 640, 984 P.2d 1064 (1999)	14
<i>State v. White</i> , 97 Wn.2d 92, 110 to 112, 640 P.2d 1061 (1982) ...	17, 29
<i>State v. White</i> , 76 Wn. App. 801, 888 P.2d 169 (1995)	28, 29
<i>Stuhlmiller v. Stuhlmiller</i> , 140 Wash. 175, 179, 248 Pac 393 (1926) ..	10
<i>Terry v. Ohio</i> , 392 U.S 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)	13, 14, 15, 16, 17, 24
<i>Whren</i> , 517 U.S. at 809 to 810	13

OTHER AUTHORITIES

3 <i>W. LaFave</i> at 65.	21
<i>Washington State Constitution Article I, Section 7</i>	12, 17
<i>Evidence Rule 201</i>	9, 10
<i>Evidence Rule 201 (b)(1)</i>	10

I. INTRODUCTION

Prosecution for possession of a controlled substance with intent to deliver. Substances were found in the defendant's vehicle after it was stopped by officers who eventually obtained a search warrant for the vehicle.

Officers had general information from a confidential informant that the CI and "Tanner" were engaged in exchanging stolen property for narcotics. The CI gave information about vehicles and cities involved, but nothing of that related to the defendant. Officers followed Tanner's vehicle to the Albertsons parking lot where the defendant's vehicle was observed to approach and park next to it. The defendant got into Tanner's vehicle. Nothing was seen exchanged.

Defendant's vehicle was followed to where it pulled off on a side street a block or so off of the main street. The driver was sitting with his feet out, doing something in the car when a man walking up the street stopped and spoke to the defendant and then walked on. Again, nothing was seen exchanged.

The car was stopped on the belief of the officers that a crime had occurred. The trial Court found that there was not an articulable suspicion of criminal activity and suppressed the evidence.

II. STATEMENT OF THE CASE

On February 11, 2010 drug task force officers undertook a surveillance of a residence on Rainier Street in the Clarkston Heights, the residence of a John "Tanner" Hardin. RP 43. The surveillance was based on information received from a confidential informant, which information was that Tanner was involved in illegal narcotics sales and/or use in the Lewiston-Clarkston Valley. RP 41.

The informant had given information in the past that had been corroborated. RP 41. The specific information given by the informant in the past was that the informant and Tanner were trafficking in stolen property in exchange for illegal narcotics. RP 42. The informant had indicated that he was working with Mr. Hardin as a partner in the drug operation. RP 90. The CI described in detail how stolen property was being exchanged for narcotics and stated where the narcotics were coming from and where they were going to. RP 90. The CI gave detailed information about cities and locations and also information regarding vehicles involved. RP 90. None of the information that the CI provided was about defendant Andrew Trutter, defendant Joshua Smolinski or the Durango vehicle owned by Mr. Trutter. RP 64.

The confidential informant, who had been in jail, was in a rehabilitation facility at the time he gave current information to an officer. RP 102. The recent information from the confidential informant to the officer was that Tanner was sounding like he was trying to get money together to resupply himself with heroin. RP 91. There was no information about a white Durango or Mr. Trutter. As officers watched the Rainier Street address, a male arrived in a vehicle, knocked on the doors and was eventually let in. RP 91. Tanner and that male left around 8:30 p.m. in Tanner's pickup and drove a direct route down to the Albertsons parking lot in Clarkston. RP 92.

At the Albertsons parking lot, Tanner parked out in the lot, away from the Albertsons business, close to the northeast corner of a Pizza Hut. RP 47. Officers set up positions to observe Tanner's vehicle. RP 47. As they watched, a white Dodge Durango entered the parking lot and pulled into a parking space, driver side door to driver side door to Tanner's vehicle. RP 48. At that point, Mr. Trutter exited the white Dodge Durango and got into the rear seat of Tanner's quad-cab pickup. RP 48, RP 93. The lights on the Tanner vehicle stayed on and additionally the dome light inside Tanner's vehicle was on. RP 93. Officers were unable to hear the conversation taking place in Tanner's vehicle. RP 66. Officer Boyd acknowledged that it was not

unusual for persons to get into a vehicle and exchange conversation. RP 66. While Mr. Trutter could be seen leaning forward to talk to Tanner, nothing was seen exchanged between Trutter and Tanner. RP 100.

A male, not Trutter or Tanner, exited Tanner's pickup from the front passenger side and ran across the parking lot where he was observed to get into a third vehicle in the parking lot. RP 49. The dome light was on in that other vehicle and a male driver and female passenger could be seen. RP 50. The male driver handed something back to the person who had come from Tanner's vehicle. RP 50. The third vehicle then approached the location of Tanner's vehicle and the Durango and stopped. The passenger got out of the third car and got back into Tanner's Dodge pickup into the passenger seat. RP 50. Although the dome light was on in Tanner's vehicle, nothing was observed handed to or from Tanner Hardin or to or from the driver of the Durango, Mr. Trutter. RP 100.

Mr. Trutter then exited the Dodge pickup and got back into the white Durango. RP 50. Tanner's vehicle was followed back to the Rainier Street address and was not stopped. RP 51. The third vehicle, a small SUV, was not followed because of lack of manpower. RP 51. Officer Boyd followed the white Durango. RP 51.

The Durango left the Albertsons parking lot and went west on Bridge Street. RP 55. It then turned off of Bridge Street on Burns Street and went a block or so, pulling into a parking spot closest to Burns Street at a park. RP 69 The officer parked on the side of the road on Burns and watched the Durango. RP 56. As the officer observed the Durango, the driver's door came open and his feet came out and set on the door jam or kickboard RP 56,. RP 69-70. The officer acknowledged that the position would be consistent with the driver fixing a dome light or dome light cover. RP 70.

As the officer watched, a tall male walking southbound on Burns Street walked passed the parked officer from behind him. RP 58. As the male walked up Burns Street, he approached the driver side door of the Durango and stood there for a moment or two. RP 59. No one got out of the Durango RP 59. Nothing was observed handed in or out of the Durango. RP 71. The person who had stopped continued walking up Burns Street and was not followed. RP 71. No drug transaction was observed at the Burns location. RP 72.

After a short time, the driver of the Durango completed what he was doing and the Durango backed out of the parking spot and went westbound on Maple Street and back to Bridge Street. RP 60. Officer Boyd contacted

Officer Denny on police radio and advised Officer Denny to make a stop of the Durango, which did occur. RP 61.

Officers eventually submitted a Search Warrant Affidavit and obtained a Warrant to search the defendant's vehicle. CP 71-78. At a Suppression Hearing held on May 11, 2010, the Court entered its Findings, Conclusions and Order on Motion to Suppress Evidence. CP 145-148. The Court concluded that although the confidential informant had been established as credible by drug task force officers, there was insufficient information produced by the confidential informant to establish, together with the observations of the officers, a reasonable suspicion to stop and detain the defendant. CP 148. All evidence obtained following the stop of the Durango was suppressed. CP 148. The state acknowledged inability to go forward with prosecution without the suppressed evidence and the charges against the defendant were dismissed. CP 149-150. This appeal followed.

III. ARGUMENT

A. THE TRIAL COURT'S FINDINGS WERE SUPPORTED BY THE RECORD.

The state acknowledges that Findings of Fact in a Suppression Motion are reviewed for substantial evidence. In *State v. Hill*, 123 Wn. 2d 641, 870 P.2d 313 (1994), the Court held at 644:

"Generally, findings are viewed as verities, provided there is substantial evidence to support the findings. *State v. Halstien*, 122 Wn.2d 109, 128, 857 P.2d 270 (1993). 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. *Halstien*, at 129."

The state challenges the Court's Finding No. 3.2 that the confidential informant had not given specifics as to location, method or manner used by Tanner to buy, sell or use drugs. The Finding did recite that no specifics were given by the confidential informant as to location, method or manner used by Tanner to buy, sell or use drugs. The Finding also recited that no specifics were given by the confidential informant as to how recently such activity of Tanner had taken place.

The state then cites the testimony of Detective Wolverton, who, at RP 91, had stated that he had spoken with the CI earlier that same day and the CI indicated that Tanner Hardin was sounding like he was trying to get money together to resupply himself with heroin.

While the officer did make that statement, that does not support the state's position that there was a time frame regarding Tanner's activities on the day in question. In fact, what the informant had told the officers was that he, the informant, and Tanner, were trafficking in stolen property in exchange for illegal narcotics. RP 41-42. No specifics at all were given by the confidential informant as to any current activities the informant and/or Tanner Hardin were involved in, ie exchanging stolen property for narcotics. Although the two were partners in the drug/stolen property operation, (RP 90), the CI had no current information about any stolen property that was to be exchanged for narcotics. This was particularly significant since Officer Wolverton testified that the CI had previously given detailed information regarding how stolen property was being exchanged for narcotics, where the narcotics were coming to and where the narcotics were going to. RP 90. The CI had previously given in-depth information, including cities and locations and had provided information regarding vehicles involved. RP 90.

In this case, the CI knew only that Tanner Hardin wanted to get money to resupply himself with heroin. RP 91. There were no specifics at all, consistent with the Court's Finding. The lack of specific information on the part of the informant is understandable, considering he had been in jail and

was in a rehab center at the time that he gave information to officers. RP 102. While the informant had previously given information about the stolen property, the narcotics and the vehicles involved, he had no information about a white Durango, Mr. Trutter or anyone from Pullman, Washington or Moscow, Idaho, where Mr. Trutter and Mr. Smolinski had come from. RP 101. The Court's Finding of lack of specifics was not clearly erroneous.

The state also took issue with paragraph 3.5 of the Court's Findings that parking out away from the businesses, away from other cars, can be consistent with drug transactions, but may also be consistent with non-drug activity, such as avoiding have a car damaged or dinged. CP 146. The state alleges there was no testimony regarding such non-drug activity and the Finding is not supported by the evidence. Officer Boyd acknowledged that someone getting out of a car and getting into another car and talking to the people happens all day long in that parking lot. RP 63. Detective Boyd also acknowledged that persons stopping to talk to each other in a parking lot could be social contacts. RP 66.

The Court's comment that some people park out away from businesses to avoid having their car dinged was something the Court called "common experience". RP 141. Evidence Rule 201 does allow a court to take

judicial notice of generally known facts, whether requested or not. Rule 201 (b) (1) allows the court to take judicial notice of facts generally known within the territorial jurisdiction of the trial court. Illustrative cases mentioned in the comments to Rule 201, as to that first category include:

"(a) That fruit trees in this state have a dormant period in the winter months. *Stuhlmiller v. Stuhlmiller*, 140 Wash. 175, 179, 248 Pac. 393 (1926).

(b) That the City of Seattle is in King County. *State v. Hardamon*, 29 Wn.2d 182, 189, 186 P.2d 634 (1947)."

That some persons park out in the lots to avoid car dings is equally noticeable. The state argues that Mr. Trutter, on arrival, would not have pulled driver's door to driver's door if trying to avoid door dings. That ignores the fact that it was Mr. Tanner Hardin that the court was referring to as having parked out in the lot. Trutter only pulled up next to Hardin because that is where Hardin was already parked.

The state argues that actions equally consistent with criminal or non-criminal activity may justify a Terry stop, citing *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1985). However, the *Kennedy* court, in the same paragraph, states that the totality of the circumstances must give rise to a substantial possibility that criminal conduct has occurred or is about to occur.

Kennedy, supra at 6. The mere possibility, based on the informant tip that Tanner Harden might be discussing exchange of stolen property for drugs is not sufficient. There must be a well-founded suspicion that the person is connected to potential or actual criminal activity. *State v. Sieler*, 95 Wn.2d 43, 46, 621 P.2d 1272 (1980); *State v. Lesnick*, 84 Wn. 2d 940, 944, 530 P.2d 243 (1975).

The state also tries to extend the testimony of Detective Boyd beyond what he said. Detective Boyd stated that he had personally been involved in approximately a dozen controlled purchases of drugs in the Albertsons parking lot. RP 53. However, a review of the transcript at page 53 does not show during what time frame Officer Boyd made those observations. He stated he had been employed with the Clarkston Police Department for five years and had been in the QUAD Cities Task Force for three years of those five. RP 36. He also stated he was with the Garfield County Sheriff's Office for six years. RP 36 There was no evidence as to how many of the alleged dozen transactions took place during his 11 years of police service in those two counties.

B. THE TRIAL COURT APPLIED THE CORRECT LEGAL STANDARD IN IT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The state does not dispute that the stop of a motor vehicle is unlawful without a reasonable suspicion of criminal activity. *In State v. Ladson*, 138 Wn. 2d 343, 979 P.2d 833 (1999), the Washington Supreme Court held that pretextual traffic stops, made for the purpose of conducting a warrantless investigation of a matter unrelated to driving, violated Article 1, Section 7 of the Washington Constitution. At 348, the *Ladson* court held:

"It is already well established that Article 1, Section 7 of the State Constitution has broader application than does the Fourth Amendment of the United States Constitution. See *e. g. Hendrickson*, 129 Wn.2d at 69 to 70 n.1; *State v. Stroud*, 106 Wn.2d 144, 148, 720 P.2d 436 (1986); *Gunwall*, 106 Wn.2d at 63 to 64."

The court in *Ladson* analyzed warrantless stops of automobiles for the purpose of investigation. At 349 the court in *Ladson* held:

"As a general rule, warrantless searches and seizures are *per se* unreasonable" *Hendrickson*, 129 Wn. 2d at 70 (quoting *State v. Houser*, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980)). They are, however, subject to "a few jealously and carefully drawn" exceptions... which provide for those cases where the societal cost of obtaining a warrant...outweigh

the reasons for a prior recourse to a neutral magistrate."

Whether pretextual or not, a traffic stop is a "seizure" for the purpose of constitutional analysis, no matter how brief. *Delware v. Prouse*, 44 U.S. 648, 653, 99 S.Ct. 1391, 59 L. Ed.2nd 660 (1979); *Whren*, 517 U.S. at 809 to 810; *Mesiani*, 110 Wn. 2d, at 460.

An ordinary traffic stop has been analogized by federal courts to investigative detention subject to the criteria of reasonableness set forth in *Terry v. Ohio*, 392 U.S 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Under the Fourth Amendment to the United States Constitution, such investigative detention is permissible only if (1) "the officer's action was justified at it's inception," and (2) "it was reasonably related in scope to the circumstances which justified the interference in the first place". *Terry*, 392 U.S. at 20.

In the present case, the stop and detention of the Dodge Durango was based "on reasonable suspicion that a crime had just occurred". Probable Cause Affidavit of Darin Boyd, CP 2. The officer does not say what crime is alleged to have occurred. Presumably, officers contend that since a confidential informant stated that the owner of the vehicle parked on Rainier Street was engaged in drug use and/or drug dealing, was selling stolen property to supply drugs and was trying to resupply himself, that a drug

transaction must have taken place at the public parking lot. While there is no evidence that the driver of the "target" vehicle had any drugs or any stolen property with him or that any drug transaction or stolen property transaction took place, officers followed the Durango after the Durango driver had sat in the target vehicle for a few moments. The Durango was followed to the Burns and Maple area when it parked across from a park and a tall man approached. There is no evidence that any transaction occurred between the driver of the Durango and the tall man. The tall man was only observed to be at the driver's side of the Durango.

Under those circumstances, the officers did not observe a violation of any criminal provision and there were no specific and articulable facts giving rise to a reasonable suspicion that the person stopped is, or is about to be, engaged in criminal activity. *State v. Villarreal*, 97 Wn. App. 636, 640, 984 P.2d 1064 (1999). *Terry v. Ohio*, supra at 22.

The state makes a partial summary of the judge's decision and takes his decision out of context. While the judge made general statements about the Aguilar-Spinelli test, the court ultimately found that the totality of the facts and circumstances known to the officer had not established a reasonable suspicion to justify the stop. The court's Conclusion No. 4.2 at CP 148 was

a Finding contrary to what the state argues. The court found specifically that there was insufficient information produced by a confidential informant to establish, together with the observations of the officer, a reasonable suspicion to stop and detain the defendant.

The trial court did say that the court looks at the totality of the circumstances known to the officer in deciding whether a stop meets the *Terry* criteria. When reviewing the merits of an investigatory stop, a court must evaluate the totality of the circumstances presented by the investigating officer. *State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 760 (1991). However, unlike the state's assertion, the court did not find that the totality of the facts and circumstances known to the officer established reasonable suspicion to justify the stop. Rather, the court analyzed what was known to the officer:

"there was no money observed changing hands; there was something passed to some body in the back seat of this third car; yeah there was some kind of human shell game going on maybe, but no one knows what was underneath the shell between these three rigs. Ah, and it's granted it's 8:30, 9:00 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 moment that ah-ah detective Wolverton testified too, but— and then the meeting —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 117-118 (Emphasis added).

General comments made in passing by the trial court are not error when the correct legal standard is used and the Findings of Fact are supported by the evidence. The court's reference to Aguilar-Spinelli is derived from *Aguilar v. Texas*, 378 U.S. 108, 84 Sup. Ct. 1509, 12 L.Ed. 2nd 723 (1964) and *Spinelli v. United States*, 393 U.S. 410, 89 Sup. Ct. 584, 21 L. Ed. 637 (1969) and was mentioned by the court in connection with the informant's veracity and basis of knowledge. In fact, the court found that the information from the informant was reliable. RP 115. However, his information, together with other knowledge of the officers, was insufficient to meet the reasonable suspicion of criminal activity standard of *Terry v. Ohio*, supra.

There is no question that the officers were stopping the vehicle solely to investigate perceived controlled substance activity. There was no reasonable suspicion that such activity was occurring and the stop was unconstitutional.

When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed. *State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986). Under

Article I, Section 7, suppression is constitutionally required. *State v. White*, 97 Wn.2d 92, 110 to 112, 640 P.2d 1061 (1982); *State v. Boland*, 115 Wn.2d 571, 582 to 583, 800 p.2d 1112 (1990).

C. THE TRIAL COURT CORRECTLY RULED THAT OFFICERS DID NOT HAVE A REASONABLE SUSPICION TO CONDUCT A TRAFFIC STOP OF THE DEFENDANT'S VEHICLE.

The state concedes that police need reasonable suspicion to stop and detain an individual. *Terry v. Ohio*, 392 U.S 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Under the Fourth Amendment to the United States Constitution, such investigative detention is permissible only if (1) "the officer's action was justified at it's inception," and (2) "it was reasonably related in scope to the circumstances which justified the interference in the first place". *Terry*, US at 20.

The state attempts to justify the stop of the Dodge Durango based on claimed reasonable suspicion that a crime had just occurred. The state alleges that it had information from a confidential informant that the person being followed, the target, was involved in using or dealing controlled substances. However, the state ignores that the evidence from the confidential informant was that he and the target individual, "Tanner" were engaged in stealing

property and trading the stolen property for drugs. The driver of the target vehicle making contact with first one and then another vehicle at the Albertson's parking lot with nothing at all being exchanged between individuals is not behavior consistent with the activities described by the confidential informant.

The cases cited by the state do not support a stop based on vague facts like the present case. In *State v. Mercer*, 45 Wn. App. 769, 727 P.2d 676 (1986), a state trooper observed a single car in a school parking lot at 3:30 a.m. with the dome light flashing on and off. As the trooper entered the parking lot in his patrol car, an individual exited the passenger side of the car and ran away. The other two persons in the car exited, but did not attempt to flee. The trooper asked the men for identification, asked what they were doing and why the third individual had run. They stated he fled because he wanted them to smoke marijuana. During this same time, the trooper noticed six chrome mag wheels of mixed sizes in the rear of the car and a water pipe on the ground within throwing distance of the passenger side of the car. *Mercer*, supra at 771.

Under those facts, the court did say at 774:

"The officer's experience will be taken into account in assessing whether a suspicion of

wrongdoing was justified under the circumstances."

The court went on to say:

"Although the circumstances must be more consistent with criminal than innocent conduct, reasonableness is measured not by exactitudes, but by probabilities." *Mercer*, supra at 774.

The *Mercer* court went on to hold at 775:

"When the facts here are considered as a whole, it was reasonable for Trooper Kimball to conclude Mr. Mercer and his companions were engaged in criminal activities; the facts in existence immediately prior to the stop do not comport with innocent activity." (Emphasis added).

The facts in *Mercer* involved a vehicle at 3:30 in the morning in a parking lot, an individual running away and plain view observations of mag wheels and a water pipe thrown on the ground. The facts in the present case involve only individuals making contact in an Albertson's parking lot with no criminal activity observed and one of those vehicles stopping by a public park and talking to a pedestrian. Those facts comport with innocent activity rather than criminal activity. To hold otherwise would be to allow officers to justify a stop of a vehicle every time someone they believe is engaged in drug activity makes contact with another car or another person.

The state concedes that innocuous facts alone, without more, are insufficient to provide a basis for reasonable suspicion of criminal activity. *State v. Almanza-Guzman*, 94 Wn. App. 563, 567-568, 972 P.2d 468 (1999). The court in *Almanza-Guzman* held that officers did not have reasonable suspicion of criminal activity to detain the defendant. There were even more compelling facts in that case than in the present case. In *Almanza-Guzman*, the defendant attended a gun show. He approached a table, looking to purchase a replacement magazine for his pistol. He retrieved the pistol from under his jacket to show the gun dealers. He was observed by off-duty United States Border Patrol Agents to do so. They observed that the pistol had not been disabled by a procedure required at the gun show's entrance. They also felt "based on their experience as border patrol agents" and their conversation with Mr. Guzman (most of which was conducted in Spanish) that Guzman was a Mexican national rather than a US citizen and concluded that he was an alien carrying a weapon without a license. *Almanza-Guzman*, supra at 565.

Merely being of Mexican ancestry and the fact that the primary language of Mr. Guzman was Spanish were insufficient to justify an investigative stop. The court also noted that Mr. Guzman was carrying the gun "at a gun show". *Almanza-Guzman*, supra at 567. In the present case, the driver of the target vehicle, "Tanner" (who was never stopped by police) was talking with occupants of two other vehicles at the Albertson's parking lot. Officers had no information of any drug or stolen property involvement by

the occupant of the Durango or the occupant of the third car prior to the contact in the Albertson's lot. That is particularly significant, because the confidential informant had previously given extensive, detailed information regarding how stolen property was being exchanged for narcotics, where the narcotics was coming from, where it was going to. The detailed information included cities and locations and information regarding vehicles involved. RP 90. The current CI tip contained no such details.

State v. Kennedy, 107 Wn.2d 1, 726 P.2d 445 (1986) is also not support for the state's position. *Kennedy* did hold at 6 that actions equally consistent with criminal or noncriminal activity may justify a stop. However, the full quote from page 6 is:

"Hence, the degree of probability required for the police conclusion is less in a stop situation than in an arrest. 3 W. LaFave at 65. LaFave suggests that the standard is a substantial probability that criminal conduct has occurred or is about to occur. We believe this to be the preferred definition. It maintains the ability of law enforcement to deter criminal conduct and yet reasonably safeguards "private affairs." When the activity is consistent with criminal activity, although also consistent with noncriminal activity, it may justify a brief detention." (Emphasis added)

The facts in *Kennedy* were that officers were investigating complaints about Rob Smith's house from neighbors that there was heavy pedestrian traffic in and out of the Smith's house and that individuals involved stayed

only for a few moments. The officer drove by and saw a maroon car with someone seated on the passenger side parked near the Smith house. The officer had received information from an informant that Michael Kennedy regularly purchased marijuana from Smith, that Kennedy only went to Smith's house to buy drugs, and that Kennedy usually drove either a light green pickup truck or a maroon Oldsmobile belonging to Sue Sison. The officer checked the license and found the car belonged to Sue Sison.

Although the officer saw nothing in Kennedy's hands or any suspicious activity, he believed Kennedy had purchased marijuana.

Those facts, where a particular person and particular vehicle were identified are far greater than the present case. In *Kennedy*, Rob Smith was believed to be selling drugs. However, while in *Kennedy*, there was identification of a particular individual and particular vehicle who had contact with the suspect, in this case there was no identification of Mr. Trutter or a Durango as a person who was involved in drug or stolen property transactions with the target individual. The officer in *Kennedy* derived the facts from which he based his conclusion of a drug buy on informant tips and his own experience. He had firsthand corroboration for two of the informant's facts. He saw Kennedy come out of the Smith house and enter a car described by

the informant. *Kennedy*, supra at 8. The information available to the officer was far greater than the present case that the target individual, who could be engaged in drug activity, met up with a person for whom officers had no knowledge about, despite having specific knowledge of persons and vehicles from the CI in the past.

The state argues that reasonable suspicion is a fairly low threshold and cites *State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 760 (1991). However, again in *Glover*, the facts were much more compelling than in the present case. In *Glover*, officers were patrolling an apartment complex with a history of a high incidence of gang and drug activity. The complex was surrounded by a fence topped with concertina wire and posted with no trespassing or loitering signs. There was an agreement between the management and the Seattle police for the police to stop individuals observed on the apartment grounds who were not recognized as residents. Mr. Glover was stopped because upon seeing the officers he turned and walked in the opposite direction, acting suspiciously. The officers were also familiar with the residents of Lakeshore Village and did not recognize Glover as being a resident. They stopped Glover to determine if he had a trespass admonishment card on file. *Glover* at 512.

Sufficient reasonable suspicion existed in *Glover* for officers to conduct a lawful *Terry* stop of Glover, because:

"Glover began to act suspiciously. Further, the officers testified they frequently patrolled the area, were familiar with the residents of Lakeshore Village, and that they did not recognize Glover as an apartment resident. In viewing the totality of the circumstances presented to the investigating officers, we hold that the police, based upon location, and the conduct of Glover, possessed sufficient reasonable suspicion to stop him to investigate him for criminal activity." *Glover* at 514.

In the present case, by contrast, Mr. Trutter did nothing more than get out of his vehicle and get into the vehicle of a person who a CI contended was involved in using controlled substances and exchanging stolen property for narcotics. Mr. Trutter's vehicle then stopped and was approached by an individual on the street with nothing seen exchanged. To hold that that conduct was "reasonable suspicion" of criminal activity would allow the stop of every vehicle that the target vehicle had contact with. That conduct does not arise to a "well-founded suspicion" of criminal activity. *Glover* at 513.

The state argues that the stop of Mr. Trutter's vehicle is analogous to drug house cases where officers observe an individual enter a suspected drug house and leave after a short stay. (Citing *State v. Biegel* 57 Wn. App. 192, 787 P.2d 577, *review denied*, 115 Wn.2d 1004, 795 P.2d 1156 (1990)).

However, the facts were again more compelling than in the present case. Officers in Yakima were patrolling an area called "the hole" in Southeast Yakima, a high crime area. Mr. Biegel got out of his car, conversed with one of several persons standing on the corner for about 30 seconds and then followed that person into the apartment building. The officer believed this was the normal mode of conduct for a drug transaction; however, he did not know this particular person was a drug dealer. The officer positioned himself so he could make immediate contact with Mr. Biegel once he exited the apartment building. His stated purpose was to identify him so that if Mr. Biegel appeared in that vicinity again, he might be subject to arrest under a Yakima ordinance prohibiting loitering for the purpose of engaging in drug related activity. *Biegel*, at 193 to 194.

The immediate contact by the officer of Mr. Biegel when he came out of the apartment to ask him if he lived or worked in the area was not unlawful. However, the evidence was suppressed because the officer, without Mr. Biegel's consent, removed his wallet from his trouser pocket when Mr. Biegel would not identify himself. He found a driver's license in the wallet, called the station and located an outstanding warrant. Mr. Biegel was arrested and a pat down search located cocaine. *Biegel* at 194.

The court found sufficient cause to speak to Mr. Biegel as he walked out, but not enough to cause to arrest him:

"This was the first time Mr. Biegel had been seen in the area. The officers did not know what occurred inside the apartment and did not see him involved in the purchase of drugs. They merely suspected he might have made a drug purchase. A well founded suspicion that criminal conduct has occurred supports a Terry stop...but does not create probable cause for an arrest. To hold otherwise would mean that every individual who entered or left that apartment building could be arrested and searched...". *Biegel* at 195.

In the present case, officers did not speak to Mr. Trutter as he exited a building. They actually stopped his vehicle. There was not sufficient reasonable suspicion that a drug transaction had occurred. To hold otherwise would be to allow the stop of every vehicle whose driver ever spoke to or got in the car with the owner of the target vehicle.

State v. Doughty, 148 Wn. App. 585, 201 P.3d 342 (2009), cited by the state in its brief at 23, also does not support the state's position. In *Doughty*, police were watching a particular house because informants identified it as a drug house. There were complaints of drug activities from neighbors. Mr. Doughty appeared at the home at 3:20 a.m. and was in the house for less than two minutes. Mr. Doughty's car was stopped and his license found to be suspended. He was arrested and his car searched incident

to arrest, which was permissible at the time. Drugs were found during the search. *Doughty* at 587.

The stop in the *Doughty* case was justified because of the early morning hour, the designation by the police as a drug house, the neighbor's complaints and Mr. Doughty's "actions". *Doughty* at 588. In the present case, by contrast, a confidential informant stated that the driver of the target vehicle was engaged in selling or using drugs and exchanging stolen property for narcotics. Mr. Hardin was trying to get money together to resupply himself with heroin, which would seem to mean that he would be trying to exchange stolen property for drugs. The contact in the Albertson's parking lot was not contact at a known drug house. No property was seen exchanged. The contact was not in the early morning hours. *Doughty* holds, at 589:

"We have required more than simple presence in a high crime area or physical proximity to the suspected drug dealer to justify a stop."

Doughty at 589 cites *State v. Richardson*, 64 Wn. App. 693, 825 P.2d 754 (1992), where the court held at 697:

"Nor does an individual's mere proximity to others independently suspected of criminal activity justify an investigative stop; the suspicion must be individualized."

In *Richardson* the officer knew only that Mr. Richardson was in a high crime area, late at night, walking near someone the officer suspected of

"running drugs". He had not heard any conversation between the men and had not seen any suspicious activity between them. Officer Guyer's detention of Mr. Richardson was an unreasonable seizure in violation of his constitutional rights and all evidence seized in the search was suppressed. *Richardson*, supra at 697. In the present case, Albertsons was not a high crime area and the contact was not late at night.

This is also not a "see/pop" operation as the state would try to justify it under cases like *State v. White*, 76 Wn. App. 801, 888 P.2d 169 (1995). In *White*, the officer was using binoculars from the top floor of a parking garage to look for drug activity on the street below. The officer saw White and another man, Murray, walking along the sidewalk. A man in a white sweat suit approached them. The man began walking with Murray while White walked three to five steps behind. Then the man in the sweat suit took money from his pocket and counted it. Murray reached into his shorts and dropped something on the ground. The man in the sweat suit stopped, picked up the object, looked at it, put it in his mouth for a moment and handed Murray money. They then separated and began walking in different directions. *White*, supra at 803.

At 804 the court held that based on the officer's training and experience, White's action throughout the entire contact between Murray and

the man in the white sweat suit was consistent with the actions of a look out or set up person in a drug transaction. *White* at 804. In the present case, by contrast, the officer observing the target vehicle, even with the dome light left on, did not see anything given by the driver of the target vehicle to Trutter and did not see Trutter give anything to the driver of the target vehicle. The two were merely observed to be in the same car together. Being in a vehicle together is not suspicious activity. Talking to a person who walks up to your car, where nothing is exchanged, is also not suspicious activity.

The state argues that the officer's experience would be taken into account in assessing whether a suspicion of wrong doing was justified under the circumstances. Citing *State v. Samsel*, 39 Wn. App. 564, 570-571, 694 P.2d 670 (1985). The officers did testify that drug transactions can take place in public parking lots and that persons who meet in parking lots for drug activities will park out in the lot and not enter the business premises.

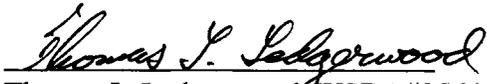
However, that experience, coupled with what they knew from the confidential informant was insufficient to create a well founded suspicion of criminal activity. *State v. White*, 97 Wn. 2d 92, 110-112, 640 P.2d 1061 (1982). All the officers had to add to their previous drug enforcement training and observations was the knowledge that Tanner Hardin was trying to get

money together to resupply himself with heroin. While previously the CI had given information about how stolen property was exchanged, where the narcotics were coming from and particular vehicles involved, none of that information was available in the present incident. Even considering the officer's training and experience, the stop of the Durango was not justified.

V. CONCLUSION

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 found such reasonable suspicion to be lacking. The trial court's Order Granting Suppression should be affirmed.

Respectively submitted this 2nd day of November, 2010.


Thomas L. Ledgerwood / WSBA#9564
Attorney for respondent

FILED
NOV 03 2010
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

COURT OF APPEALS OF THE STATE OF
WASHINGTON - DIVISION III

THE STATE OF WASHINGTON,

Appellant

Court of Appeals No. 29166-9-III

v.

DECLARATION OF SERVICE

JOSHUA D. SMOLINSKI

and

ANDREW G. TRUTTER

Respondent

THOMAS L. LEDGERWOOD, declares as follows:

That I am now and at all times mentioned a citizen of the United States, over the age of twenty-one years, not a party to or interested in the above-entitled action and competent to be a witness therein.

That on the 2nd day of November, 2010, I delivered a copy of the Brief of Respondent Andrew G. Trutter personally to

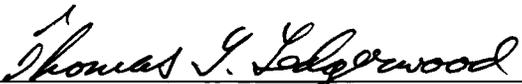
Curt L. Liedkie
Deputy Prosecuting Attorney
PO Box 220
Asotin, WA 99402

Thomas L. Ledgerwood
922 Sixth Street
Clarkston, WA 99403
(509) 758-1005

That on the 2nd day of November, 2010, I deposited into the U.S. mail, with sufficient postage attached, a true and correct copy of the Brief of Respondent Andrew G. Trutter to:

Susan M. Gasch
Gasch Law Office
PO Box 30339
Spokane, WA 99223-3005

I declare under penalty of perjury under the laws of the State of Washington the foregoing statement is true and correct.



Thomas L. Ledgerwood, WSBA# 9564
Attorney for Respondent Andrew G. Trutter