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AUG 27, 2012

Court of Appeals
Division III
State of Washington

NO. 307018-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Appellant

v.

RANDY SIMIANO, Respondent

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 10-1-00939-0

BRIEF OF APPELLANT

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INTRODUCTION

The State charged the defendant with one count of Possession of a Controlled Substance. The case proceeded to a CrR 3.6 hearing in which the essential facts of the case were undisputed and the defense challenged the stop of the defendant's vehicle as being unlawful. The trial court concluded that the stop was unlawful and entered an order that resulted in the suppression of evidence and dismissal of the case.

ASSIGNMENTS OF ERROR

The trial court erred in concluding that the stop of the defendant's car was unlawful and suppressing evidence found as a result of the stop.

Issues Pertaining to Assignment of Error:

1. WHAT IS THE STANDARD OF REVIEW FOR A TRIAL COURT'S CONCLUSIONS OF LAW AFTER A CrR 3.6 HEARING?
2. DID THE EVIDENCE PROVIDE SUFFICIENT REASONABLE SUSPICION OF THE DEFENDANT'S CRIMINAL ACTIVITY SUFFICIENT TO ALLOW A TERRY STOP OF THE DEFENDANT'S VEHICLE?

STATEMENT OF THE CASE

The Statement of the Case is derived from the trial court's findings of facts which are uncontested. (CP 48-54).

1. In the late evening of September 7th or the early morning of September 8, 2010, just after midnight, Kennewick Police Detectives Dorame and Schwartz observed a light colored four door GMC Jimmy (WA Lic. ABN5165) pull into the east parking lot of the Econolodge.
2. They observed a young Hispanic male in his 20's and a young Hispanic female exit the vehicle and meet up with a man recognized to be Walter Meckle.
3. Detective Dorame and Schwartz recognized Mr. Meckle from a prior contact in which they arrested him for possession of Methamphetamine on July 30, 2010.
4. Detective Dorame and Schwartz observed them walk into room #250 and stay for approximately 2 minutes before the Hispanic male and female then exited the room and drove away in the GMC Jimmy.
5. Detective Dorame had previously observed another male, recognized from prior narcotics contacts as Jason Vicens, enter the same room #250 just a few minutes prior to the GMC Jimmy arriving at the location.
6. Detective Dorame noted that based on his training and experience with narcotics investigations, he recognized

the quick stop at the hotel to be consistent with drug transactions.

7. At the time of the observations, the individuals observed entering and exiting the GMC Jimmy were never positively identified.

8. Due to another priority investigation, Detective Dorame and Schwartz were unable to follow up on their observations until the evening of September 8, 2010.

9. At approximately 2100 hours, Detectives Dorame and Schwartz were in the area of the Fred Meyer store on 10th avenue in Kennewick when they observed a light colored four door GMC Jimmy driving in the Fred Meyer parking lot.

10. They confirmed that the vehicle was the same vehicle they had previously observed at the Econolodge in the late evening or early morning of the 7th-8th.

11. Detective Schwartz noted that based on his training and experience as a Criminal Apprehension Team Detective and his involvement in numerous controlled narcotics buys, he knows that narcotics dealers use parking lots and vehicles to conduct sales of narcotics.

12. Detective Schwartz noted that narcotics dealers set up meeting locations with a purchaser and will pull up to each other in parking lots where one person will make contact at the window or enter the vehicle to make an exchange that usually last a few minutes.

13. Upon seeing the GMC Jimmy, Detective Dorame and Schwartz observed it park next to a small silver Toyota

Camry 4 door sedan that was occupied by at least two people in the north part of the parking lot.

14. Detectives Dorame and Schwartz observed a young Hispanic male contact the driver of the GMC Jimmy at the driver's door.

15. Detective Schwartz observed the male appear to speak with the driver for approximately 1 minute before entering the back seat and closing the door.

16. Detective Schwartz observed that the male was in the back seat for approximately 1 minute before he exited the vehicle and again contacted the driver at the driver's window for another 30 seconds.

17. Detective Schwartz observed the male walk back to the silver Toyota Camry 4 door sedan and enter the front passenger seat.

18. Detectives Dorame and Schwartz then observed both vehicles drive away from the location.

19. Detective Dorame and Schwartz then followed the Toyota Camry and stopped the vehicle in the area of 7th Avenue and Vancouver Street.

20. Detective Dorame contacted the driver of the vehicle and identified her as Brandy Ramos.

21. Brandy Ramos was detained for Driving While License suspended, her boyfriend was detained and placed in the rear of the police vehicle for an investigative detention.

22. Post Miranda, Ramos explained that she and her boyfriend, Sergio Mendoza, had just met Sergio's cousin, Randy Simiano in the parking lot of the Fred Meyer.

23. Ramos stated that Sergio had provided Simiano some money because Simiano had asked to borrow some money.

24. She denied having any knowledge that Sergio had purchased narcotics from Randy Simiano but she did acknowledge knowing that Randy Simiano had been alleged to have been a Methamphetamine dealer in the past.

25. Ramos stated that Simiano is about 23 years old and had just recently purchased the GMC Jimmy that he had been seen driving.

26. Detective Schwartz contacted Sergio separate from Brandy, placed him in handcuffs, seated him in the back of the police vehicle and advised him of Miranda warnings.

27. Sergio advised that he had been at a friend's house with his girlfriend prior to being stopped.

28. Detective Schwartz then contacted Detective Dorame to verify Ramos and Sergio's stories.

29. Detective Schwartz recognized Randy Simiano's name a past narcotics investigation.

30. Detective Dorame contacted Sergio who was still seated in the backseat of the vehicle.

31. Sergio advised Dorame that he had some marijuana in his pocket, but claimed that he had it in his possession before he met Simiano.

32. The back seat of the vehicle was searched where Sergio had been sitting and suspected marijuana was observed smashed into the floorboard of the police vehicle.

33. Sergio was placed under arrest for possession of marijuana less than 40

grams and transported to the Benton County jail.

34. Upon entering the jail, Sergio stated that he had some marijuana in his shoe.

35. He was searched and inside Sergio's sock, Detective Schwartz located a clear zip-lock sandwich bag with a couple of buds of marijuana.

36. Sergio denied purchasing the marijuana from Simiano.

37. Detective Dorame and Schwartz began to search for Simiano and located the GMC Jimmy parked in front of Coyote Bob's Casino at approximately 0030 hours on September 9, 2010.

38. Surveillance was placed on the vehicle and at approximately 0150 hours, they observed a male matching the physical description of Simiano enter the vehicle and drive the vehicle away from the location.

39. They stopped the vehicle and detained him in the back seat of a patrol vehicle while they applied for a telephonic search warrant for the vehicle.

40. At approximately 0218 hours, Detectives executed the search warrant on the defendant's vehicle.

41. During the search, a baggy of suspected methamphetamine was discovered in a hidden compartment within a Dasani water bottle.

(CP 48-53).

ARGUMENT

1. STANDARD OF REVIEW

An appellate court reviews a trial court's findings of fact in a motion to suppress for substantial evidence. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999). Unchallenged findings of fact are verities on appeal. *State v. Acrey*, 148 Wn.2d 738, 745, 64 P.3d 594 (2003). A trial court's conclusions of law are reviewed de novo. *Id.* The court's conclusions of law must be supported by its findings of fact. *State v. Dodson*, 110 Wn. App. 112, 123, 39 P.3d 324 (2002). Further, the question of whether an investigatory stop, or warrantless seizure, is constitutional is a question of law reviewed de novo. *State v. Bailey*, 154 Wn. App. 295, 299, 224 P.3d 852 (2010), review denied, 169 Wn.2d 1004, 236 P.3d 205 (2010); see also *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Here, the State does not challenge any findings of fact, therefore, they

are verities on appeal. The trial court's conclusions of law are reviewed de novo.

2. THE TRIAL COURT ERRED IN CONCLUDING THAT LAW ENFORCEMENT DID NOT HAVE A REASONABLE SUSPICION OF CRIMINAL ACTIVITY SUFFICIENT TO ALLOW A TERRY STOP OF THE DEFENDANT'S VEHICLE.

At the trial court level the defendant argued that there was not a reasonable and articulable suspicion that criminal activity had occurred or was about to take place. (RP 02/15/12, 38-39). The defendant argued that each observation made by law enforcement was insignificant and did not relate to the defendant. This argument ignored the facts of the case as a whole and the totality of circumstances surrounding the case. The State argued, and now argues that the facts and circumstance when viewed together give rise to reasonable suspicion regarding the defendant's criminal activity and allowed law enforcement to make a legal *Terry* stop of his vehicle.

Generally, warrantless searches and seizures are per se unreasonable under both the Fourth Amendment to the United States Constitution and Article I § 7 of the Washington State Constitution. *State v. Ross*, 141 Wn.2d 304, 4 P.3d 130 (2000); *State v. Neeley*, 113 Wn. App. 100, 52 P.3d 539 (2002). Consent and certain exigent circumstances may justify a warrantless search and seizure. *State v. Day*, 161 Wn.2d 889, 894, 168 P.3d 1265 (2007); see also *State v. Hendrickson*, 129 Wn.2d 61, 71, 917 P.2d 563 (1996).

Another exception to the prohibition on warrantless seizures is a law enforcement officer's investigatory stop of a vehicle if he or she has a reasonable suspicion to believe that criminal activity has occurred. *State v. Little*, 116 Wn.2d 488, 497-98, 806 P.2d 749 (1991). A Terry stop must be reasonable. *State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986). When reviewing the merits of an investigatory stop, a

court must evaluate the totality of circumstances presented to the investigating officer. *State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 760 (1991).

The State must show by clear and convincing evidence that the Terry stop was justified. *Id.* It is a well settled point of law that an individual may be detained for investigative purposes when an officer has "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968), *State v. Armenta*, 134 Wn.2d 1, 20, 948 P.2d 1280 (1997). There must be "a substantial possibility that criminal conduct has occurred or is about to occur." *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). Pursuant to *State v. Williams*, three factors are considered in determining whether a Terry stop is permissible or whether the higher standard of probable cause is required: (1) the purpose of the stop, (2) the

degree of physical intrusion upon the suspect's liberty, and (3) the length of time the suspect is detained. *State v. Williams*, 102 Wn.2d 733, 689 P.2d 1065 (1984).

In *State v. Doughty*, the Supreme Court held that a person's mere presence in a high-crime area at a late hour is insufficient to give rise to a reasonable suspicion to detain that person without more. *State v. Doughty*, 170 Wn.2d 57, 239 P.3d 573 (2010). The facts of the present case are similar to those in *Doughty*, but they provide more than mere presence. In the present case, the totality of the facts and circumstances known to the Detectives at the time they began looking for the defendant provided a substantial possibility that criminal conduct had occurred, and that the defendant was involved in that conduct. Detectives were initially drawn to the defendant's vehicle when they observed it at the Econolodge in the early morning hours of September 8, 2010. (CP 48). They observed the

occupants of the vehicle behave in a manner consistent with a drug transaction by making a quick stop at a hotel room that was occupied by a known narcotic user. (CP 49). Approximately 21 hours later, the same detectives observe the defendant's vehicle pull into a Fred Meyer parking lot and watch as it parks next to another vehicle. (CP 50). The detectives then observed a male approach the defendant's vehicle, and then observed what they believed to be a drug transaction. (CP 50-51). The second vehicle was then stopped leaving the parking lot and the passengers identified the defendant as the owner and driver of the suspect vehicle. (CP 51). The female driver acknowledged that she knew the defendant had been alleged to be a narcotics dealer in the past. (CP 51). The detectives then located marijuana in the possession of the male passenger. (CP 51). Additional marijuana was later discovered on the male passenger's person when he was booked into jail. (CP 52).

After clearing the jail, the Detectives began to search for the defendant's vehicle in relation to the narcotics investigation. (CP 51). After locating the vehicle, surveillance was placed on the vehicle and it was stopped when a male matching the defendant's description was observed driving it away from the surveillance location. (CP 52-53). The defendant was identified as the driver of the vehicle and was detained while law enforcement obtained a search warrant to search the vehicle. (CP 53).

It is clear from the evidence that the Detectives were justified in stopping the defendant's vehicle to further investigate his involvement in the suspected drug transaction, and the seizure of the defendant was appropriate and necessary in order to obtain a search warrant for the vehicle and occupants. The Washington Supreme Court has held that the police, if they have probable cause to search, may seize a residence for the time reasonably needed to

obtain a search warrant. *State v. Terrovona*, 105 Wn.2d 632, 645, 716 P.2d 295 (1986); *State v. Ng*, 104 Wn.2d 763, 770-71, 713 P.2d 63 (1985). This holding and rationale has also been extended to allow the seizure of vehicles. *State v. Flores-Moreno*, 72 Wn. App. 733, 740, 866 P.2d 648 (1994); *State v. Lund*, 70 Wn. App. 437, 448-49, 853 P.2d 1379 (1993); *State v. Huff*, 64 Wn. App. 641, 653, 826 P.2d 698 (1992).

Once probable cause to search the car and its contents was established, officers acquired authority to seize and deny access to it for a reasonable time while they sought a search warrant. *Flores-Moreno*, 72 Wn. App. at 741. In this case, the observations and subsequent investigation by law enforcement into the suspected drug transaction between the defendant and the occupants of the sedan in the Fred Meyer parking lot provided probable cause to obtain a search warrant for the contents of the GMC Jimmy. The detectives obtained a search warrant for the

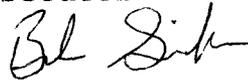
defendant's vehicle as a direct result of their observations. It is only logical that these same facts and circumstances known to law enforcement provided a sufficient reasonable suspicion of the defendant's criminal activity to stop the vehicle pursuant to a *Terry* stop.

CONCLUSION

For the foregoing reasons, the State respectfully requests this Honorable Court to reverse the order finding the stop unlawful and suppressing the evidence found, which resulted in the dismissal order of the Benton County Superior Court, and remand this case for proceedings consistent with the judgment.

RESPECTFULLY SUBMITTED this 27thth day of August 2012.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

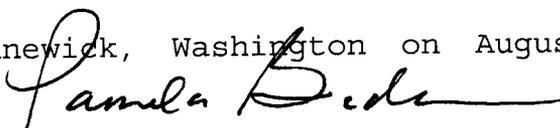
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