

**FILED**

OCT 15, 2012

Court of Appeals  
Division III  
State of Washington

NO. 30701-8-III

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

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STATE OF WASHINGTON,

Appellant,

v.

RANDY SIMIANO,

Respondent,

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR BENTON COUNTY

The Honorable Craig J. Matheson, Judge

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BRIEF OF RESPONDENT

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A. RESPONDENT'S STATEMENT OF THE CASE

After the Benton County Prosecutor's Office charged Randy Simiano with one count of possessing a controlled substance (methamphetamine), Simiano moved to suppress the evidence against him, arguing it was the product of an unlawful warrantless seizure. CP 1-2, 11-39. The Honorable Craig Matheson agreed and granted the motion. RP 48-49.

The facts are not in dispute. During the late evening of September 7 or early morning of September 8, 2010, Kennewick Police Detectives Keith Schwartz and John Dorame observed a GMC Jimmy pull into the parking lot of an Econolodge Motel. CP 48. An unidentified young Hispanic male and young Hispanic female exited the Jimmy and spoke with Walter Meckle, an individual who had previously been arrested for possession of methamphetamine.<sup>1</sup> CP 49.

The unidentified Hispanic male and female entered room #250, along with Meckle. CP 49. Prior to the GMC Jimmy's arrival, detectives also had seen Jason Vicens enter room #250. Detectives

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<sup>1</sup> The record does not reveal whether Meckle ultimately was convicted of any crime.

knew Vicens from "prior narcotics contacts."<sup>2</sup> CP 49. The Hispanic male and female stayed in the motel room for 2 minutes, exited, and drove away. Detectives have never identified the young couple. CP 49.

At approximately 9:00 p.m. the following night (the evening of September 8), Detectives Schwartz and Dorame were parked near a Fred Meyer store when they spotted the same GMC Jimmy arrive in the store parking lot. CP 49-50. The Jimmy, driven by Randy Simiano,<sup>3</sup> pulled along side a parked Toyota Camry. Inside the Camry were two people – Brandy Ramos (who was driving the car) and Sergio Mendoza (the passenger). Mendoza and Simiano are cousins. CP 50-51.

Detectives watched as Mendoza spoke to his cousin at the driver's window of the Jimmy for about a minute. Mendoza then got in the back of the newly purchased Jimmy, was inside for another minute, and returned to the driver's window, where he spoke to his cousin for about another 30 seconds before getting back in the

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<sup>2</sup> There is no indication whether Vicens has any convictions, either.

<sup>3</sup> Simiano had just purchased the car that very day. He paid the seller \$1,000 but still needed to come up with an additional \$1,500. CP 31.

Camry. CP 50. Both vehicles then left the parking lot headed in separate directions. CP 51.

Detectives followed the Camry and stopped the vehicle. CP 51. Ramos was detained for driving with a suspended license. She told police that Mendoza was her boyfriend and that he had just met with his cousin in the Fred Meyer lot because Simiano had asked to borrow some money, which Mendoza gave him. CP 51. She denied that Mendoza had purchased narcotics from Simiano, but did share that she knew Simiano was allegedly a methamphetamine dealer at some point in his past. CP 51. She also told detectives that Simiano had recently purchased the GMC Jimmy. CP 51. Detective Schwartz recognized Simiano's name from "a past narcotics investigation." CP 51.

Meanwhile, Mendoza – who was in the backseat of a police vehicle – admitted that he had marijuana in his pocket. Marijuana was also found on the floorboard of the police car. CP 52. Mendoza indicated he had the marijuana before he met with Simiano. CP 52. He was arrested for possessing the marijuana and transported to the Benton County Jail. Once there, Mendoza disclosed that he had additional marijuana in his sock. Again, he denied purchasing it from his cousin. CP 52.

Detectives decided to search for the GMC Jimmy, locating it at approximately 12:30 a.m. on the morning of September 9 parked in front of Coyote Bob's Casino. CP 52. At about 1:50 a.m., they saw Simiano enter the truck and drive away. CP 52-53. They stopped the vehicle and detained Simiano in a patrol car until they could apply for and obtain a telephonic warrant to search the vehicle. Detectives executed the warrant at about 2:18 a.m. and found suspected methamphetamine hidden in a compartment within a water bottle. CP 53.

In finding the warrantless stop unlawful, Judge Matheson entered the following conclusions:

1. The observations made by Kennewick Police Detectives Schwartz and Dorame were a set of innocuous facts over a prolonged period of time (two and a half hours) and are insufficient to provide a basis to stop the defendant for an investigative detention under a reasonable suspicion standard.
2. Meetings at hotels and in parking lots happen all the time and they do not string together in this case. Because there was no reasonable suspicion of criminal conduct by the defendant, the stop of the defendant's [vehicle] was unlawful.
3. Nobody connected Randy Simiano to any drug transaction therefore it was wrong to detain him.
4. Too much time had passed between the

observed event in the parking lot and the Terry stop. There is no lawful [T]erry stop here, if the officers believed a crime had been committed they had 2 ½ hours to obtain a warrant. It was improper for the police to wait for the defendant to return to the automobile and wait for him to drive it away in order to conduct an investigat[ive] detention under the pretext of a Terry stop.

CP 53.

The State has conceded that it cannot proceed with the prosecution in light of Judge Matheson's ruling. See RP 54; Brief of Appellant, at 1.

B. ARGUMENT

JUDGE MATHESON PROPERLY FOUND THE WARRANTLESS STOP UNLAWFUL.

Under the Fourth Amendment to the United States Constitution and article 1, § 7 of the Washington Constitution, a warrantless search or seizure is per se unreasonable unless the State demonstrates – by clear and convincing evidence – the search or seizure falls within one of the "jealously and carefully drawn exceptions" to the warrant requirement. State v. Garvin, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009); State v. Hendrickson, 129 Wn.2d 61, 70, 917 P.2d 563 (1996) (quoting Arkansas v. Sanders, 442 U.S. 753, 759, 99 S. Ct. 2586, 61 L. Ed. 2d 235 (1979)). A traffic stop is a

seizure, no matter how brief. State v. Ladson, 138 Wn.2d 343, 350, 979 P.2d 833 (1999).

One of the narrow exceptions to the warrant requirement is the "Terry investigatory stop," discussed in detail in Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). During a Terry stop, an "officer may briefly detain and question a person reasonably suspected of criminal activity." State v. Watkins, 76 Wn. App. 726, 729, 887 P.2d 492 (1995) (quoting State v. Rice, 59 Wn. App. 23, 26, 795 P.2d 739 (1990)). To justify a Terry stop, an officer must be able to point to "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant th[e] intrusion." State v. Williams, 102 Wn.2d 733, 739, 689 P.2d 1065 (1984) (quoting Terry, 392 U.S. at 21). Specific and articulable facts means evidence demonstrating "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).

Judge Matheson properly found an absence of reasonable suspicion justifying detectives' decision to stop Simiano in his GMC Jimmy. The State failed to demonstrate a substantial possibility that Simiano had engaged in criminal conduct.

The State could not even demonstrate that Simiano was the young Hispanic male at the Econolodge on the evening of September 7 or early morning of September 8. At best, they observed someone driving the Jimmy make contact with two individuals (Meckle and Vicens) who had been associated with drug use in the past, although not necessarily ever convicted of a drug crime. Detectives saw no drugs and no transaction of any type. 2RP 15-16. Even if detectives had been able to identify the individual as Simiano, “[m]erely associating with a person suspected of criminal activity does not strip away the protections of the fourth amendment to the United States Constitution.” State v. Broadnax, 98 Wn.2d 289, 296, 654 P.2d 96 (1982), overruled on other grounds, Minnesota v. Dickerson, 508 U.S. 366, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993); accord State v. Thompson, 93 Wn.2d 838, 841, 613 P.2d 525 (1980).

Events the following evening – at the Fred Meyer parking lot – added almost nothing in the way of useful information. Detectives saw Simiano interacting with his own cousin. Family members living in the same small town often interact. This is hardly novel. Nor is it surprising Simiano would want his cousin to see his brand new vehicle. Circumstances equally consistent with

innocence as with guilt will not give rise to a reasonable suspicion. State v. Hobart, 94 Wn.2d 437, 444, 617 P.2d 429 (1980). Importantly, once again detectives did not see any drugs and did not see any transaction. RP 7-8, 30-31. While Mendoza was later found to have some marijuana, he denied receiving it from Simiano. Indeed, what little information detectives had on Simiano from Ramos – that he was *alleged* to have previously dealt *methamphetamine* – hardly established that he was currently in the business of selling marijuana.<sup>4</sup>

The State compares the circumstances here to those in State v. Doughty, 170 Wn.2d 57, 239 P.3d 573 (2010). This is an apt comparison. Doughty was seen at 3:20 a.m. visiting a residence identified by police as a “drug house.” Neighbors had frequently complained about “short stay” traffic at the home, which officers knew was consistent with drug dealing. *Id.* at 60. Doughty stayed at the house only two minutes before leaving in his vehicle. Police stopped him for suspicion of drug activity, arrested him after discovering he had a suspended license, and found

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<sup>4</sup> There is no indication detectives found any marijuana in Simiano’s vehicle when they illegally pulled him over the next morning.

methamphetamine in searches incident to his arrest. *Id.* at 60.

The Supreme Court concluded there was not reasonable suspicion to stop Doughty. The Court noted that proximity to others suspected of criminal activity is insufficient, by itself, to justify a stop. *Doughty*, 170 Wn.2d at 62. Police merely saw Doughty approach and leave a suspected drug house in the wee hours of the morning without any evidence of what occurred inside that house. *Id.* at 64. At most, police had a hunch that Doughty was engaged in illegal conduct, which was insufficient to justify the warrantless seizure. *Id.* at 63.

The evidence available to Kennewick police was no more compelling than that in *Doughty*. Police had a hunch that Simiano might be involved in illegal transactions because the Jimmy (although not necessarily Simiano himself) was at the Econolodge for a brief period of time and in the company of two men police associated with narcotics. Police had no evidence, however, of what – if anything – occurred inside the Econolodge. Approximately 21 hours later, Kennewick police saw Simiano briefly interact with his own cousin at Fred Meyer. As before, however, they never saw drugs or any transaction. Yet they chose to arrest Simiano, without a warrant, almost five hours later.

As Judge Matheson astutely observed, “This is just one speculation on another. These are innocuous facts. Meetings at hotels or meetings at parking lots happen all the time. And they don’t string together here in this case. There are no concrete facts. Nobody saw any drugs. Nobody connected this man to any drug transaction.” RP 48-49.

Properly anticipating an additional problem – the scope of the Terry stop in this case – the State argues police had probable cause to detain Simiano the almost 30 minutes it took to obtain and execute the telephonic search warrant. See CP 52-53 (defendant stopped shortly after 1:50 a.m. and warrant executed at 2:18 a.m.).

Under Terry, any investigative detention must be as brief as reasonably possible. Williams, 102 Wn.2d at 738. Courts analyze several factors in determining when a warrantless intrusion becomes so substantial that it can only be supported by a showing of probable cause: (1) the purpose of the stop, (2) the degree of physical intrusion upon liberty (and whether appropriate in light of the suspected crime and probable dangerousness of the suspect), and (3) the duration of the detention. State v. Wheeler, 108 Wn.2d 230, 235, 737 P.2d 1005 (1987); Williams, 102 Wn.2d at 740.

Simiano was held for 30 minutes in a police cruiser based merely on suspicion of a drug offense, without any indication he might be armed or dangerous, while detectives obtained a warrant. The State appears to concede the need for probable cause under these circumstances, as it argues that greater standard in seeking to justify this prolonged hold. See Brief of Respondent, at 13-14.

The State then posits:

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.

Brief of Respondent, at 15.

In other words, argues the State, because officers obtained a search warrant, they obviously had probable cause supporting their suspicions of criminal activity (and therefore supporting the prolonged detention). And since officers had probable cause, they undoubtedly had reasonable suspicion to stop the vehicle in the first place.

But there is a fatal flaw with the State's attempt to bolster the legality of the stop with the subsequent warrant. An unlawful seizure cannot be justified by the fruits of that seizure. State v. McKenna, 91 Wn. App. 554, 560, 958 P.2d 1017 (1998) (citing Smith v. Ohio, 494 U.S. 541, 543, 110 S. Ct. 1288, 108 L. Ed. 2d 464 (1990)). As Judge Matheson noted below, the warrant was not before him. RP 45 ("I'm not in any position to rule on the warrant. I haven't heard anything about it, what was in the affidavit or anything."). However, the police reports submitted for the court's consideration reveal that the warrant was based – not merely on what detectives knew prior to the warrantless stop – but also on what they considered to be significant new information gained after the stop.

Specifically, Detective Schwartz's report indicates, "While applying for the search warrant Detective Slocombe advised that when Simiano was being placed into another vehicle he was holding an operational digital scale that appeared to be an iPhone and that the scale had residue on it." CP 29. And Detective Dorame's report indicates, "I began to apply for a telephonic search warrant. In the process of applying for the search warrant, Det. Slocombe advised us that a digital scale had been located in Simiano's hand while he was detained." CP 33.

This information contradicts the State's belief, expressed to Judge Matheson at the hearing on the motion to suppress, that "no evidence used from the detention of the defendant was used in obtaining that search warrant." RP 44. Because it appears the warrant was based on evidence obtained after the illegal stop, and therefore only because of the illegal stop, the State has not demonstrated that the warrant's existence in any way establishes that Judge Matheson erred in finding the stop unlawful.

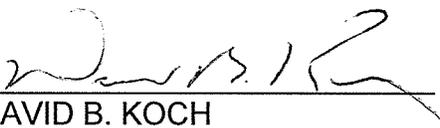
C. CONCLUSION

Judge Matheson properly found the warrantless seizure in this case was not supported by reasonable suspicion of criminal activity. This Court should affirm.

DATED this 15<sup>th</sup> day of October, 2012.

Respectfully submitted,

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State v. Randy Simiano

No. 30701-8-III

Certificate of Service by email

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 15<sup>th</sup> day of October, 2012, I caused a true and correct copy of the **Brief of Respondent** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

Benton County Prosecuting Attorney  
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Randy Simiano  
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Signed in Seattle, Washington this 15<sup>th</sup> day of October, 2012.

X   
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