

**FILED**

NOV 18, 2013

Court of Appeals  
Division III  
State of Washington

NO. 316084-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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THE STATE OF WASHINGTON, Respondent

v.

JOHN WILLIAM WALLACE, JR., Appellant

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APPEAL FROM THE SUPERIOR COURT  
FOR BENTON COUNTY

NO. 12-1-01261-3

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BRIEF OF RESPONDENT

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## **I. COUNTER STATEMENT OF THE CASE**

On October 19, 2012, at approximately 4:17 p.m., Benton County Sheriff's Deputy Jean-Paul Benitez was dispatched to 216203 E. Perkins Road for a welfare check of a possibly suicidal person. (CP 24). Linda Wallace-Lincoln had reported she had third-party information that her son, John William Wallace, Jr., was possibly overdosing on drugs in a trailer in a back field of that property. (CP 24). Ms. Wallace-Lincoln indicated this information came from her other son's acquaintance, who was receiving text messages from Wallace saying he was overdosing. (CP 24). Ms. Wallace-Lincoln reported that she owned the property at that address and that it had been condemned, was uninhabitable, and nobody was supposed to be staying in any building on the property. (CP 24).

Upon arrival, Deputy Benitez made contact with Wallace while he was stepping out of a trailer. (CP 24). Wallace was extremely "high" and showed symptoms of being under the influence of an unknown stimulant. (CP 24). He was flailing his limbs and head in an uncontrollable fashion and had blood on his hands. (CP 24). Deputy Benitez detained Wallace for safety reasons and requested assistance from medical personnel. (CP 24). When medics arrived, Deputy Benitez noticed a window on the trailer had been smashed, and asked the defendant what happened. (CP 24). Wallace replied that he was asleep when an unknown side pain upset

him, causing him to jump up and punch out the window. (CP 24). Medics treated Wallace's hand and advised there was nothing else they could do for him unless he agreed to voluntarily be transported to the hospital. (CP 24). Wallace refused to go to the hospital. (CP 24). Deputy Benitez asked Wallace if he was trying to hurt himself. (CP 24). Wallace denied he wanted to harm himself, and stated he wanted to go to bed. (CP 24).

Deputy Benitez made contact with Ms. Wallace-Lincoln on the phone. (CP 24). She reported she owned the property, had trespassed Wallace from the property, and further reported it was condemned by the County. (CP 24). She stated Wallace was homeless, because she had kicked him out of her residence because of his drug use. (CP 24). Ms. Lincoln-Wallace reported she had screwed the doors to the trailer shut. She also stated she believed Wallace would be at the trailer, because he repeatedly ignored her trespass directive and on occasion hides out on the property. (CP 24). She stated she wanted to pursue malicious mischief charges against Wallace. (CP 24). Deputy Benitez re-contacted Wallace and advised him that his mother said he wasn't supposed to be on the property. (CP 24). Wallace stated he was homeless and he had nowhere else to go. When advised his mother wanted to pursue malicious mischief charges against him, Wallace replied the trailer was unsecured and he did

not force his way in. He further stated it was technically his property. (CP 24). Ms. Lincoln-Wallace reiterated the trailer belonged to her. (CP 24).

Deputy Benitez conducted further investigation and found blood around the broken window and on the outside of the trailer door. (CP 24). Based upon the damage to the trailer and the defendant's admission he broke the window with his hand, Deputy Benitez placed Wallace under arrest for malicious mischief. (CP 24). A search incident to arrest produced a small baggie containing a white crystalline substance, which field tested positive for methamphetamine. (CP 24).

## II. ARGUMENT

1. **Issue One: Deputy Benitez had probable cause that the defendant committed Criminal Trespass and Malicious Mischief, and the subsequent search incident to arrest was lawful.**

Probable cause existed for both Criminal Trespass and Malicious Mischief. Only the latter charge was articulated as the basis for the arrest by Deputy Benitez; however, both should be considered when determining whether probable cause existed. "An arrest supported by probable cause is not made unlawful by an officer's subjective reliance on, or verbal announcement of, an offense different from the one for which probable

cause exists.” *State v. Rose*, 175 Wn.2d 10, 19, 282 P.3d 1087 (2012); *State v. Huff*, 64 Wn. App. 641, 646, 826 P.2d 698 (1992).

“Probable cause exists when an officer has reasonable grounds to believe a suspect has committed or is committing a crime based on circumstances sufficiently strong to warrant that conclusion.” *State v. Gonzales*, 46 Wn. App. 388, 395, 731 P.2d 1101 (1986). This determination rests “on the totality of facts and circumstances within the officer's knowledge at the time of the arrest.” *State v. Fricks*, 91 Wn.2d 391, 398, 588 P.2d 1328 (1979). Probable cause does not require the officer to have evidence sufficient to establish guilt beyond a reasonable doubt. *State v. Bellows*, 72 Wn.2d 264, 266, 432 P.2d 654 (1967). Moreover, the court's probable cause determination should be grounded on a practical, nontechnical review of the total facts of the case under consideration. *State v. Gillenwater*, 96 Wn. App. 667, 671, 980 P.2d 318 (1999), review denied, 140 Wn.2d 1004, 999 P.2d 1262 (2000).

Criminal Trespass requires a person knowingly enter or remain unlawfully in a building (first degree) or premises (second degree) of another. RCW 9A.52.070 and 9A.52.080. Malicious Mischief in the Third Degree requires proof that the defendant knowingly and maliciously caused damage to the property of another. RCW 9A.48.090.

Probable cause existed for both offenses. Ms. Wallace-Lincoln advised Deputy Benitez that she owned the trailer, that Wallace did not have permission to be there, and that she had specifically trespassed him from the property. (CP 24). Wallace claimed he owned the trailer. (CP 24). Deputy Benitez, based on the totality of the circumstances, weighed the veracity of the competing claims. Deputy Benitez was aware at the time that the doors had been bolted shut. He was aware of Wallace's claim that he broke the window from the inside of the trailer. However, the physical evidence suggested this was not true. Wallace's hand was bloody, and blood was found near the window and outside of the trailer. This suggests that the window was broken from the outside in order to gain entry into the trailer. Wallace's false account of what occurred certainly did not aid Wallace in his assertion he was the owner.

Additionally, when initially confronted with the assertion he was not allowed to be there, Wallace replied he was homeless and had nowhere to go. (CP 24). It was not until he was advised his mother wished to pursue criminal charges that Wallace claimed the trailer was his. (CP 24).

Based on the foregoing, it would be reasonable for Deputy Benitez to believe Wallace was not the true owner. Many arrests require law enforcement to make a credibility determination when faced with

conflicting information. That is exactly what Deputy Benitez did here. Based upon the totality of the circumstances, Deputy Benitez believed Ms. Wallace-Lincoln's assertion that she owned the trailer. Deputy Benitez did not need proof, beyond a reasonable doubt, that Wallace maliciously broke the window and that he was not the owner. Probable cause does not require the officer to have evidence sufficient to establish guilt beyond a reasonable doubt. *Bellows*, 72 Wn.2d at 266. Accordingly, there were sufficient grounds for Wallace's arrest and subsequent search, and the trial court's ruling permitting the introduction of fruits of the search was not in error.

**2. Issue Two: Deputy Benitez's contact with Wallace was lawful under both the Community Caretaking exception and also as a valid *Terry*<sup>1</sup> detention for suspicion of Criminal Trespass and Malicious Mischief.**

When Deputy Benitez arrived on the location, he had information there may be a possible suicide at the property, the property had been condemned, and that nobody was supposed to be at the property. (CP 24).

It has long been held that warrantless searches are per se unreasonable under the Fourth Amendment of the United States Constitution. *State v. Kinzy*, 141 Wn.2d 373, 384, 5 P.3d 668 (2000). However, there are exceptions to this warrant requirement. *Id.* The State

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<sup>1</sup> *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

bears the burden of showing a warrantless search falls within one of these exceptions. *Id.*

The community caretaking function, which is divorced from the criminal investigation, is one such exception to the warrant requirement. *Id.* at 385. This exception allows for the limited invasion of constitutionally protected privacy rights when it is necessary for police officers to render aid or assistance or when making routine checks on health and safety. *Id.* at 386. Such invasion is allowed only if (1) the police officer subjectively believed that someone likely needed assistance for health or safety concerns; (2) a reasonable person in the same situation would similarly believe that there was need for assistance; and (3) there was a reasonable basis to associate the need for assistance with the place being searched. *Id.* at 386. “Whether an encounter made for noncriminal non-investigatory purposes is reasonable depends on a balancing of the individual's interest in freedom from police interference against the public's interest in having the police perform a ‘community caretaking function.’” *Kalmas v. Wagner*, 133 Wn.2d 210, 216, 943 P.2d 1369 (1997).

Deputy Benitez was clear in his report that his primary purpose for going to the location was for a “welfare check of a possible suicidal subject.” (CP 24). “[W]hen ‘an officer believes in good faith that

someone's health or safety may be endangered ... public policy does not demand that the officer delay any attempt to determine if assistance is needed and offer assistance while a warrant is obtained.”” *State v. Moore*, 129 Wn. App. 870, 880, 881, 120 P.3d 635 (2005). (quoting *State v. Gocken*, 71 Wn. App. 267, 276, 857 P.2d 1074 (1993)).

The report was made by Wallace’s mother. (CP 24). She reported an acquaintance of her other son reported he was receiving text messages from Wallace stating he was overdosing. (CP 24). Based upon this information, a reasonable person would believe that there was a need for assistance. The location of the contact was also proper, as it was the location given by Wallace’s mother, who was aware that Wallace frequently hid out in the location and was homeless. (CP 24). Upon contact, Wallace appeared to be under the influence of an unknown intoxicant, and was flailing his arms and head uncontrollably. In addition, he had a visible injury to his hand. The good faith nature and subjective belief of Deputy Benitez’s detention is evident by the fact that he called for medical assistance. (CP 24). Wallace appears to concede that the detention of Wallace was proper up until the time he was seen by medics and declined further medical attention. (App. Brief at 12-13).

Assuming the detention for community caretaking ended after the defendant declined further medical care, continued detention was

appropriate as a *Terry* detention. Under an exception to the warrant rule, a police officer can conduct a *Terry* investigative stop. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The *Terry* stop exception allows officers to briefly seize a person if specific and articulable facts, in light of the officer's training and experience, give rise to a reasonable suspicion that the person is involved in criminal activity. *State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 760 (1991) (quoting *Terry v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)).

In evaluating the lawfulness of the *Terry* stop, this Court inquires whether the temporary seizure was justified at its inception, and whether the stop was reasonably related in scope to the circumstances which justified the initial interference. *State v. Williams*, 102 Wn.2d 733, 739, 689 P.2d 1065 (1984). A *Terry* stop must be reasonable under the circumstances. *State v. Doughty*, 170 Wn.2d 57, 62, 239 P.3d 573 (2010). The reasonableness of the officer's actions is viewed in light of the facts the officer knew at the time of the stop. *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). A court may consider factors such as the officer's training and experience, the location of the stop, and the conduct of the person detained. *State v. Pressley*, 64 Wn. App. 591, 596, 825 P.2d 749 (1992). To determine whether the scope of the stop was excessively intrusive, relevant factors include “the purpose of the stop, the amount of

physical intrusion upon the suspect's liberty, and the length of time the suspect is detained.” *Williams*, 102 Wn.2d at 740.

Officers may frisk and handcuff a person during a *Terry* stop if the officer has a reasonable fear of danger, such as a reasonable belief that the person is armed. *State v. Mitchell*, 80 Wn. App. 143, 145, 906 P.2d 1013 (1995).

Deputy Benitez was advised by Wallace’s mother that she owned the property and had told Wallace he was trespassed from the property. Deputy Benitez was aware that the window of the trailer had been broken. These are specific and articulable facts that give rise to a reasonable suspicion that Wallace was involved in criminal activity. After Wallace declined medical care, Deputy Benitez continued the detention for a short period of time to investigate. The brief detention was limited to the time it took for Deputy Benitez to speak with Ms. Wallace-Lincoln and the defendant, and to visually inspect the trailer. Wallace’s detention was brief and was not intrusive.

**3. Issue Three: Remand for resentencing is appropriate.**

The State concedes that Wallace may not have sufficiently acknowledged his offender score at sentencing. The record indicates the parties had an agreement relative to sentencing. The prosecutor advised the court that the standard range was six months to eighteen months. (RP

04/18/13, 86). Counsel for Wallace acknowledged this, stating Wallace falls within a range that could mean either local time or prison, and he was asking the court to sentence him to a year and a day. The prosecutor stated, “Our agreement, your honor, with Counsel in that contingency was that we recommend a year and a day. And we stand by that recommendation.” (RP 04/18/13, 87). In her reply, counsel again asked the court to follow the recommendation of a year and a day. (RP 04/18/13, 87).

The court found that based upon an offender score of five, the standard range was six months to eighteen months, and followed the parties’ recommendation. (RP 04/18/13, 88). At no time did Wallace dispute his offender score. Understanding that the failure to object is not sufficient to establish Wallace’s criminal history, the State agrees that the matter should be remanded for resentencing.

Wallace argues he should be sentenced with an offender score of zero. The State disagrees. On remand, the State should be able to present evidence of Wallace’s past convictions. “When a defendant raises a specific objection at sentencing and the State fails to respond with evidence of the defendant’s prior convictions, then the State is held to the record as it existed at the sentencing hearing.” *State v. Mendoza*, 165 Wn.2d 913, 930, 205 P.3d 113 (2009). “But where, as here, there is no

objection at sentencing and the State consequently has not had an opportunity to put on its evidence, it is appropriate to allow additional evidence at sentencing.” *Id.* Moreover, this remedy is consistent with RCW 9.94A.530(2), which provides, “On remand for resentencing ... the parties shall have the opportunity to present and the court to consider all relevant evidence regarding criminal history, including criminal history not previously presented.” *State v. Hunley*, 161 Wn. App. 919, 929-30, 253 P.3d 448 (2011), as amended (June 2, 2011), *Review Granted*, 172 Wn.2d 1014, 262 P.3d 63 (2011) and *Affirmed by* 175 Wn.2d 901, 287 P.3d 584 (2012).

### **III. CONCLUSION**

Deputy Benitez’s contact with the defendant was lawful, and he had probable cause that the defendant committed Criminal Trespass and Malicious Mischief. Therefore, the subsequent search incident to arrest was lawful. The defendant’s conviction of Unlawful Possession of a Controlled Substance should be affirmed.

However, since Wallace may not have sufficiently acknowledged his offender score at sentencing, the State recommends the case be remanded for resentencing.

**RESPECTFULLY SUBMITTED** this 18th day of November

2013.

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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:

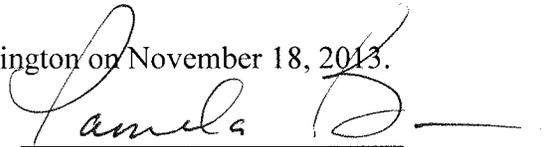
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