

No. 32219-0-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

FILED

Jul 21, 2014

Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

ADRIAN PIMENTAL, JR.,

Defendant/Appellant.

BRIEF OF APPELLANT

DAVID N. GASCH
WSBA No. 18270
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
Attorney for Appellant

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR.....5

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR.....5

C. STATEMENT OF THE CASE.....6

D. ARGUMENT.....7

The officer’s detention and investigation of Mr. Pimental was illegal because the officer did not have a reasonable suspicion arising from specific and articulable facts that Mr. Pimental was involved in any criminal activity.....7

E. CONCLUSION.....14

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Alabama v. White</i> , 496 U.S. 325, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990).....	11
<i>Delaware v. Prouse</i> , 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979).....	9
<i>Dunaway v. New York</i> , 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979) (White, J., concurring).....	8

<i>Gerstein v. Pugh</i> , 420 U.S. 103, 95 S.Ct. 854,43 L.Ed.2d 54 (1975).....	8
<i>Illinois v. Gates</i> , 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983).....	10
<i>Illinois v. Wardlow</i> , 528 U.S. 119, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000).....	10
<i>Mapp v. Ohio</i> , 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081, 84 A.L.R.2d 933 (1961).....	8
<i>Terry v. Ohio</i> , 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).....	9, 11
<i>Wong Sun v. United States</i> , 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).....	14
<i>State v. Apodaca</i> , 67 Wn. App. 736, 839 P.2d 352 (1992).....	7
<i>State v. Armenta</i> , 134 Wn.2d 1, 948 P.2d 1280 (1997).....	9, 12
<i>State v. Broadnax</i> , 98 Wn.2d 289, 654 P.2d 96 (1982).....	8
<i>State v. Doughty</i> , 170 Wash. 2d 57, 239 P.3d 573, 575 (2010).....	11
<i>State v. Duncan</i> , 146 Wn.2d 166, 43 P.3d 513 (2002).....	9, 13
<i>State v. Ellwood</i> , 52 Wash.App. 70, 757 P.2d 547 (1988).....	11
<i>State v. Garcia</i> , 125 Wash.2d 239, 883 P.2d 1369 (1994).....	12
<i>State v. Henry</i> , 80 Wn. App. 544, 910 P.2d 1290 (1995).....	9
<i>State v. Horrace</i> , 144 Wash. 2d 386, 28 P.3d 753 (2001).....	13
<i>State v. Kennedy</i> , 107 Wn.2d 1, 726 P.2d 445 (1986).....	9, 10, 13
<i>State v. Lee</i> , 147 Wn. App. 912, 199 P.3d 445 (2008).....	10, 11
<i>State v. Martinez</i> , 135 Wash. App. 174, 143 P.3d 855 (2006).....	13

<i>State v. Mendez</i> , 137 Wn.2d 208, 970 P.2d 722 (1999).....	8
<i>State v. Mennegar</i> , 114 Wn.2d 304, 787 P.2d 1347 (1990).....	7
<i>State v. Rowe</i> , 63 Wn. App. 750, 822 P.2d 290 (1991).....	10
<i>State v. Samsel</i> , 39 Wn.App. 564, 694 P.2d 670 (1985).....	10, 12
<i>State v. Takesgun</i> , 89 Wn.App. 608, 949 P.2d 845 (1998).....	9
<i>State v. Thompson</i> , 93 Wash.2d 838, 613 P.2d 525 (1980).....	12
<i>State v. Thornton</i> , 41 Wn.App. 506, 705 P.2d 271 (1985).....	10
<i>State v. White</i> , 97 Wn.2d 92, 640 P.2d 1061 (1982).....	12
<i>State v. Williams</i> , 102 Wn.2d 733, 739, 689 P.2d 1065 (1984).....	9

CONSTITUTIONAL PROVISIONS

U.S. Const., Fourth Amendment.....	8, 9
U.S. Const., Fourteenth Amendment.....	8
Wash. Const., art. 1, § 7.....	9

A. ASSIGNMENTS OF ERROR

1. The trial court erred in finding the police had a reason to believe criminal activity had occurred. Finding of Fact No. 7, CP 3.

2. The trial court erred in concluding that *State v. Horace*, 144 Wn.2d 386 (2001) is controlling; that officers may briefly detain individuals for safety reasons when there exists no reason to otherwise investigate said individuals. Conclusion of Law No. 3, CP 4.

3. The trial court erred in denying Mr. Pimental's motion to suppress.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Was the officer's detention and investigation of Mr. Pimental illegal because the officer did not have a reasonable suspicion arising from specific and articulable facts that Mr. Pimental was involved in any criminal activity?

C. STATEMENT OF THE CASE

Officer Efren Morfin and Officer Dulce Diaz were driving their patrol car at 6:30 p.m. on 12/11/13, in an area in Yakima known for Sureno gang members. There had been no criminal activity reported in the area that evening. RP 9, 29. The officers noticed a car with several occupants legally parked in a parking space in front of an apartment

complex. RP 9, 16. Officer Morfin testified this was not normal behavior since it was cold outside. He also testified he had previously contacted people breaking into cars and residences in that area. RP 9.

Officer Morfin activated his red and blue flashing lights on the rear of his unmarked patrol car as well as his spotlight and radioed for backup. RP 9-10, 19. The spotlight illuminated one person standing outside the car who immediately ran into a nearby apartment. Another person got out of the front passenger's seat and also ran into the apartment holding something in front of him. CP 3, RP 10. Two other people, one of who was Mr. Pimental, remained sitting in the back seat. Officer Morfin testified both men were reaching down for something on the floor. RP 10. Officer Diaz testified they were looking back and forth and appeared nervous. RP 27.

After the first two individuals ran into the apartment, Officer Diaz got out of the patrol car and stood by the apartment door. Officer Morfin also got out of the patrol car, drew his gun, approached the right rear car door, and ordered Mr. Pimental and the other occupant to put their hands on the back of the headrest in front of them. Officer Morfin did not recognize either individual. RP 12, CP 3. By now other officers had arrived. Officer Morfin noticed a handgun wedged behind a child's car

seat next to where Mr. Pimental and the other man were sitting as they were removed from the car and arrested. RP 13-14.

Mr. Pimental moved to suppress the evidence as an unlawful search and seizure. CP 35-42. The Court denied the motion finding the officers' actions were permissible as a proper *Terry* stop. CP 4. This appeal followed. CP 7.

D. ARGUMENT

The officer's detention and investigation of Mr. Pimental was illegal because the officer did not have a reasonable suspicion arising from specific and articulable facts that Mr. Pimental was involved in any criminal activity.

Standard of Review. In reviewing a trial court's findings of fact following a suppression hearing, the reviewing court makes an independent review of all the evidence. *State v. Apodaca*, 67 Wn. App. 736, 739, 839 P.2d 352 (1992), (citing *State v. Mennegar*, 114 Wn.2d 304, 310, 787 P.2d 1347 (1990)). Findings of fact on a motion to suppress are reviewed under the substantial evidence standard. Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. Conclusions of law in an order pertaining to suppression of

evidence are reviewed *de novo*. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

Substantive Argument. The Fourth Amendment, made applicable to the states by way of the Fourteenth Amendment, guarantees the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. *Mapp v. Ohio*, 367 U.S. 643, 647, 81 S.Ct. 1684, 1687, 6 L.Ed.2d 1081, 84 A.L.R.2d 933 (1961). Its "key principle," or "ultimate standard," is one of "reasonableness." *Dunaway v. New York*, 442 U.S. 200, 219, 99 S.Ct. 2248, 2260, 60 L.Ed.2d 824 (1979) (White, J., concurring). This key principle has many specific applications. Of those involving the detention of persons, undoubtedly the most fundamental is that it is reasonable for an officer to detain a person indefinitely, e.g., for appearance in court or prosecution, only if the officer has probable cause to believe the person has committed a crime. *Gerstein v. Pugh*, 420 U.S. 103, 114, 95 S.Ct. 854, 863, 43 L.Ed.2d 54 (1975); *State v. Broadnax*, 98 Wn.2d 289, 293, 654 P.2d 96 (1982).

Another, narrower application is that even in the absence of probable cause, it is reasonable for an officer to detain a person briefly, for investigation, if the officer harbors a reasonable suspicion, arising from

specific and articulable facts, that criminal activity is afoot. *Terry v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868, 1879, 20 L.Ed.2d 889 (1968); *State v. Kennedy*, 107 Wn.2d 1, 5-6, 726 P.2d 445 (1986). A police officer's act of stopping a vehicle and detaining its occupants constitutes a seizure. *State v. Takesgun*, 89 Wn. App. 608, 610, 949 P.2d 845 (1998) (citing *Delaware v. Prouse*, 440 U.S. 648, 653, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979)). To be lawful, it must have been justified at its inception and reasonable in scope. *State v. Henry*, 80 Wn.A pp. 544, 549-50, 910 P.2d 1290 (1995).

A warrantless, investigatory stop must be reasonable under the Fourth Amendment and article I, section 7 of the Washington State Constitution. *State v. Duncan*, 146 Wn.2d 166, 171, 43 P.3d 513 (2002). The State must prove an investigatory stop's reasonableness. *Id.* An investigatory stop is reasonable if the arresting officer can attest to specific and objective facts that provide a reasonable suspicion that the person stopped has committed or is about to commit a crime. *State v. Armenta*, 134 Wn.2d 1, 10, 948 P.2d 1280 (1997). An investigatory stop occurs at the moment when, given the incident's circumstances, a reasonable person would not feel free to leave. *Armenta*, 134 Wn.2d at 10, 948 P.2d 1280; *State v. Williams*, 102 Wn.2d 733, 739, 689 P.2d 1065 (1984).

It is generally recognized that crime prevention and crime detection are legitimate purposes for investigative stops or detentions. *Kennedy*, 107 Wn.2d at 5-6, 726 P.2d 445. However, there must be sufficient articulable facts supporting a reasonable suspicion of criminal activity to justify a temporary investigative stop. See *State v. Thornton*, 41 Wn. App. 506, 705 P.2d 271 (1985); *State v. Samsel*, 39 Wn. App. 564, 694 P.2d 670 (1985).

"The reasonableness of the officer's suspicion is determined by the totality of the circumstances known to the officer at the inception of the stop." *State v. Lee*, 147 Wn. App. 912, 917, 199 P.3d 445 (2008) (citing *State v. Rowe*, 63 Wn. App. 750, 753, 822 P.2d 290 (1991)); see *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). Moreover, "the determination of reasonable suspicion must be based on common sense judgments and inferences about human behavior." *Lee*, 147 Wn. App. at 917, 199 P.3d 445 (citing *Illinois v. Wardlow*, 528 U.S. 119, 125, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000)).

Reasonable suspicion, like probable cause, is dependant upon both the content of information possessed by police and its degree of reliability. *Id.* Both factors--quantity and quality--are considered in the "totality of the circumstances--the whole picture," that must be taken into account

when evaluating whether there is reasonable suspicion. *Id.* (quoting *Alabama v. White*, 496 U.S. 325, 330, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990)).

Herein, the content of information possessed by Officer Morfin when he got out of his patrol car and conducted an investigative detention did not support a reasonable suspicion of criminal activity by Mr. Pimental and the other person in the back seat. Officer Morfin admitted he was not investigating any crime—only what he felt was a suspicious circumstance. RP 9-10. Nothing in the record suggests Mr. Pimental was engaged in any criminal activity when Officer Morfin and Officer Diaz arrived at the scene. The trial court’s finding that the police had a reason to believe criminal activity had occurred is incorrect. Finding of Fact No. 7, CP 3.

Even though the area may have been known for Sureno gang members, and Officer Morfin may have previously contacted people breaking into cars and residences in that area, there had been no criminal activity reported in the area that evening. RP 9, 29. A person's presence in a high-crime area at a “late hour” does not, by itself, give rise to a reasonable suspicion to detain that person. *State v. Doughty*, 170 Wash. 2d 57, 62, 239 P.3d 573, 575 (2010), citing *State v. Ellwood*, 52 Wash.App. 70, 74, 757 P.2d 547 (1988) (citing *Terry*, 392 U.S. at 21–22,

88 S.Ct. 1868). The circumstances must suggest a substantial possibility that the particular person has committed a specific crime or is about to do so. *State v. Garcia*, 125 Wash.2d 239, 242, 883 P.2d 1369 (1994).

Similarly, a person's "mere proximity to others independently suspected of criminal activity does not justify the stop." *State v. Thompson*, 93 Wash.2d 838, 841, 613 P.2d 525 (1980).

Moreover, the test is an objective one as the trial court correctly found. Conclusion of Law No. 2, CP 4. Since there is no good faith exception to the exclusionary rule in Washington, the subjective beliefs of the officer are irrelevant. *State v. White*, 97 Wn.2d 92, 107 fn. 6, 640 P.2d 1061 (1982). Therefore, Officer Morfin's subjective belief that a car with several occupants legally parked in a parking space in front of an apartment complex in cold weather at 6:30 p.m. constituted suspicious circumstances was irrelevant. RP 9, 16.

His belief was also unreasonable under an objective standard, since innocuous facts do not justify a stop. *State v. Armenta*, 134 Wash.2d 1, 948 P.2d 1280 (1997). An officer may, however, rely on experience in evaluating arguably innocuous facts. *State v. Samsel*, 39 Wash.App. 564, 570–71, 694 P.2d 670 (1985). The question here is whether arguably innocuous facts plus the officer's experience amount to an articulable

suspicion or merely an inchoate hunch. Since there had been no report of any criminal activity that evening and no information, such as a description, tying the defendant to any crime, the facts are insufficient for a *Terry* stop. *State v. Martinez*, 135 Wash. App. 174, 180-82, 143 P.3d 855 (2006). Instead the officers needed a *particularized* suspicion, which means there must be some suspicion of a particular crime or a particular person, and some connection between the two. *Martinez*, 135 Wash. App. at 182, 143 P.3d 855, (citing *State v. Duncan*, 146 Wash.2d 166, 179, 43 P.3d 513 (2002); *Kennedy*, 107 Wash.2d at 6, 726 P.2d 445). General suspicions that Mr. Pimental may have been up to no good are not enough to warrant the stop here. *Id.*

The trial court's reliance on *State v. Horace* is also misplaced. *Horace* is easily distinguishable from the present case on its facts. Horace was the passenger in a vehicle that had been lawfully stopped for a traffic infraction. Unlike the present case, the furtive movement and reasonable suspicion that ultimately led to Horace being frisked occurred after the lawful stop. *State v. Horrace*, 144 Wash. 2d 386, 388-90, 28 P.3d 753 (2001). Therefore, the trial court erred in concluding that *Horace* is controlling in this case. Conclusion of Law No. 3, CP 4.

Since the initial detention and subsequent arrest was an unlawful seizure without probable cause, all evidence obtained by exploitation of that primary illegality must be excluded as “fruit of the poisonous tree.” Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). Therefore, the controlled substance discovered during the search incident to Mr. Pimental’s arrest must be suppressed under the exclusionary rule.

E. CONCLUSION

For the reasons stated, the conviction should be reversed.

Respectfully submitted July 21, 2014,

David N. Gasch
WSBA #18270
Attorney for Appellant

PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on July 21, 2014, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of the brief of appellant:

Adrian Pimental, Jr.
c/o Green Hill Training School
375 SW 11th Street
Chehalis WA 98532

E-mail: David.Trefry@co.yakima.wa.us
David B. Trefry
Yakima County Prosecutor's Office
P. O. Box 4846
Spokane WA 99220-0846

s/David N. Gasch, WSBA #18270
Gasch Law Office
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
FAX: None
gaschlaw@msn.com