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Court of Appeals
Division III
State of Washington
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No. 35932-8-II

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

STATE OF WASHINGTON, Respondent

v.

ERIC BUCK, Appellant

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY
THE HONORABLE JUDGE ANNETTE S. PLESE

REPLY BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

Mr. Buck rests on the assignments of error found in the opening brief of the appellant.

ISSUE RELATED TO ASSIGNMENTS OF ERROR

Mr. Buck rests on the issues related to assignments of error provided in the opening brief of the appellant.

II. STATEMENT OF FACTS AND ARGUMENT

Mr. Buck relies on the statement of facts presented in the appellant's opening brief, adds some corrections to the State's recitation of facts and reply to argument.

1. The State's Response brief, on page 6 argues:

The appellant complains that the initial stop of the defendant, under *Terry*, was unlawful. He does not complain that the events occurring immediately following the initial stop-involving the false identification and arrest, would be unlawful, if the stop was lawful under *Terry* at its inception.

The initial stop was unlawful. If the initial stop is unlawful, the results of the unlawful stop are inadmissible as fruits of the poisonous tree. *Wong Sun v. United States*, 371 U.S. 471, 83, S.Ct. 407, 9 L.Ed.2d 441 (1963).

2. The State's Response brief, on page 8 cites:

“Additionally, the defendant’s attempted flight from the area, after being there for almost two hours, occurred only after the police cruiser showed up.”

The record stands in direct contrast to the emphasized alleged fact. The testifying police officer stated he did *not* know if the motorhome left the parking lot in the intervening time between 10:30 p.m. and midnight. 1/19/17 RP 22-23. The trial court did not make a finding that the motorhome had been parked in the Rosauer’s parking lot the entire time. Absent a finding on a factual issue, the reviewing Court must indulge the presumption that the party with the burden of proof failed to sustain their burden on that issue. *State v. Armenta*, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997). This Court should not consider the State’s argument on that fact as the record does not support it.

3. The State’s Response Brief cites at p. 8:

Facts “which appear innocuous to the average person may appear incriminating to a police officer in light of past experience.” *Samsel*, 39 Wn.App. at 570.

The justification for an investigatory stop must be based on specific and articulable facts, which taken together with rational inferences from those facts, reasonably warrants the intrusion. The State must establish this exception to a warrant by clear and

convincing evidence. *State v. Garvin*, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009). The standard for articulable suspicion is a substantial possibility criminal conduct has occurred or is about to occur. A lawful stop demands a well-founded suspicion the defendant has engaged in criminal conduct. *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986); *State v. Doughty*, 170 Wn.2d 57, 239 P.3d 573 (2010). An intrusion on anything less than a well-founded suspicion is unreasonable.

Our Supreme Court has held:

The *Terry*-stop threshold was created to stop police from this very brand of interference with people's everyday lives. The Supreme Court embraced the *Terry* rule to stop police from acting on mere hunches.

Doughty, 170 Wn.2d at 63.

The State has not addressed the reasoning and rulings raised in appellant's brief from *Weyand*, *Fuentes*, and *Doughty*, which explicitly require more than just a suspicion to effectuate a lawful stop. In citing to *State v. Thierry*, 60 Wn.App. 445, 803 P.2d 844 (1991), the State relies on the officer "knowledge of Goodwill theft, and he was not required to ignore his observations" to establish there was a reasonable and articulable suspicion of criminal activity. (Br. Of Resp. at 9). However, the *Thierry* Court

held that that the circumstances observed by the officer at the time of the stop “must be *more consistent with criminal than innocent conduct.*” *Id.* at 448.

The Court found the *Thierry* stop lawful because officers working a high crime area saw teenagers driving slowly past a bus station in downtown Tacoma. The weather was cold, but the windows of the car were open, and the music from the radio was very loud. The teens were both slumped in their car seats. Officers believed the behavior fit the police profile of drive-by shootings and approached the car. One officer saw a wooden bat in the car near the driver, and another officer saw a docked semiautomatic pistol between the front armrests.

The Court reasoned that officers may do far more if the suspect *endangers life or personal safety than if it does not.* *Thierry*, 60 Wn.App. at 448. “The facts in existence immediately prior to the stop did not comport with innocent activity.” *Id.*

Here, the facts in existence before the stop were far more consistent with innocent conduct than criminal conduct. The officer agreed that people could drop off items at the Goodwill trailer at any time. He knew it was not illegal to leave items outside of the container after hours. 1/19/17 RP 21. The officer did not know if

the truck he saw at 10:30 p.m. left the area and returned later, going to the clothing drop off shed the second time, rather than the furniture drop off. 1/19/17 RP 22-23. The officer did not know if the grocery store was open or closed at the times he saw Mr. Buck's vehicle. 1/19/17 RP 21. He never saw Mr. Buck outside of the vehicle.

The trial court's denial of the defense motion to suppress evidence derived as the result of Mr. Buck's unlawful seizure requires vacation of the conviction.

III. CONCLUSION

Based on the foregoing facts and authorities, Mr. Buck respectfully asks this Court to reverse his conviction.

Respectfully submitted this 25th day of January 2019.

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CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury under the laws of the State of Washington, that on January 25, 2019, I mailed to the following US Postal Service first class mail, the postage prepaid, or electronically served, by prior agreement between the parties, a true and correct copy of the Appellant's Opening Brief to the following: Spokane County Prosecuting Attorney at SCPAAppeals@spokanecounty.org and to Eric Buck 782028, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA. 98520.



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January 25, 2019 - 11:49 AM

Transmittal Information

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