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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

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

- A. The Trial Court Erred When It Denied Mr. Buck's Motion To Suppress And Dismiss. CP 18.
- B. The Trial Court Erred When It Entered Conclusion of Law 3.5. CP 18.
- C. The Trial Court Erred When It Entered Conclusion of Law 3.6. CP 18
- D. The Trial Court Erred When It Entered Conclusion of Law 3.7. CP 18.
- E. The Trial Court Erred When It Imposed A Sentence Outside The Statutory Maximum.
- F. The Trial Court Exceeded Its Authority When It Imposed The DNA Fee Prohibited By Statute.

ISSUE RELATED TO ASSIGNMENTS OF ERROR

- A. A police officer drove by a supermarket parking lot and saw a Dolphinhome parked by a goodwill donation drop-off. Two hours later he drove by and the vehicle was parked in another area of the parking lot by a different donation drop off. The officer knew the donation drop off

was closed and knew there had been thefts from them in the past. Based on these facts, does he have a reasonable suspicion that the individuals in the truck are engaging in criminal activity?

- B. The SRA authorizes a 60-month sentence or less for a Class C Felony. Where the trial court imposes a 50-month term of incarceration and a 12-month term of community custody, must the matter be remanded for resentencing within the standard range?
- C. Must the legal financial obligations be stricken from Mr. Buck's judgment and sentence as they are prohibited by statute?

II. STATEMENT OF FACTS

Eric Buck and a companion were parked within ten feet of a Goodwill donation trailer in the Rosauer's parking lot at 10:30 p.m. 1/19/17 RP 7, 10. Two hours later they were parked at a clothing donation shed in the same parking lot. 1/19/17 RP 11-12. Based on his observation of the vehicle near the drop offs, a police officer suspected they were engaged in criminal activity. 1/19/17 RP 15. He pulled in front of their vehicle to prevent them from leaving.

1/19/17 RP 13,22. He questioned Mr. Buck, who gave him someone else's identification. 1/19/17 RP 17. The officer learned Mr. Buck's name and arrested him on an outstanding DOC warrant. 1/19/17 RP 19.

Mr. Buck was charged with identity theft in the second degree. He was also charged with possession of stolen property in the third degree. CP 23-24.

Noting that the police officer was aware the donation center had had thefts in the past and was unmonitored at that time of the night, the court concluded the officer reasonably believed Mr. Buck was involved in criminal activity and ruled that evidence derived from the seizure was admissible. 1/19/17 RP 40; CP 15-18.

The jury found Mr. Buck not guilty of possession of stolen property in the third degree. The court imposed a 50-month sentence and a 12-month community custody term on the class C felony of identity theft second degree. The court also imposed a DNA database fee of \$100. CP 145-159. Mr. Buck appeals his conviction. CP 160-183.

Further pertinent facts will be addressed in the argument section of this brief.

III. ARGUMENT

A. Seizure Of An Individual, Absent Particularized Suspicion He Is Engaged In Criminal Activity, Is Unlawful And The Fruits Of the Seizure Must Be Suppressed.

1. Standard of Review

When an appellate court reviews the denial of a motion to suppress, it reviews the trial court's conclusions of law de novo and the findings of fact used to support those conclusions for substantial evidence. *State v. Fuentes*, 183 Wn.2d 149, 157, 352 P.3d 152 (2015). The constitutionality of a warrantless stop is a question of law reviewed de novo. *State v. Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008).

2. Article I § 7, of the State Constitution Guarantees Require Reasonable Suspicion Of Criminal Activity Based On Specific And Articulate Facts Known To The Officer At The Inception Of An Unwarranted Seizure.

Article I, § 7 of the Washington State Constitution guarantees that "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Under Washington law, generally, warrantless searches and seizures are

unconstitutional. *Gatewood*, 163 Wn.2d at 539. Warrantless seizures are per se unreasonable, and the State bears the burden of showing the warrantless disturbance falls within one of the "few jealously and carefully drawn exceptions" to the rule. *Fuentes*, 183 Wn.2d at 157-58.

One exception is the *Terry* investigative stop. *Id.* Under a *Terry* exception, an officer may briefly detain an individual for questioning if he has reasonable, articulable suspicion, based on specific, objective facts, that the person has committed or is about to commit a crime. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *State v. Doughty*, 170 Wn.2d 57, 65, 239 P.3d 573 (2010). The suspicion must be well-founded, individualized, particularized, and tie the detained individual to the suspected criminal activity. *Doughty*, 170 Wn.2d at 62-63.

In evaluating the reasonableness of the officer's suspicion, the appellate court looks at the totality of the circumstances known to the officer. *State v Glover*, 116 Wn.2d 509,514, 806 P.2d 760 (1991). This "includes the officer's training and experience, the location of the stop, the conduct of the person detained, the purpose of the stop, and the amount of physical intrusion on the suspect's liberty." *Fuentes*, 183 Wn.2d at 156. In evaluating the

totality of the circumstances to determine if a reasonable suspicion of criminal conduct exists, the Court examines each fact the officer related as contributing to that suspicion. *Id.* The officer's actions must be justified at their inception. *State v. Ladson*, 138 Wn.2d 343, 350, 979 P.2d 833 (1999).

In *Weyand*, the Supreme Court identified the question is whether "the specific facts that led to the stop would lead an objective person to form a reasonable suspicion that [defendant] was engaged in criminal activity." *State v. Weyand*, 188 Wn.2d 804, 812, 399 P.3d 530 (2017). The Court emphasized in "evaluating the facts known at the inception of the stop 'it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" *Id.* (internal citations omitted).

In *Weyand*, the officer saw a car parked on an address that had not been there 20 minutes earlier. *Weyand*, 188 Wn.2d at 807. He ran the license plate and it revealed nothing of consequence. He parked his car and saw Weyand and a friend leave the address. As the men walked quickly toward the car, they looked up and down the street. The driver looked around a second time before

getting into the car. Weyand got in the passenger seat. Based on these observations and the officer's knowledge of the extensive drug history of the home Weyand had exited, he conducted a *Terry* stop. *Id.* at 532.

The Supreme Court agreed with the Court of Appeals, that the late night, short stay at the known drug house did *not* justify a *Terry* stop. *Id.* at 811. However, the defendant's glances up and down the street did *not* provide reasonable suspicion of criminal activity. *Id.* The Court noted that although there was a known drug location, the officer did not observe any current activity that would lead a reasonable observer to believe that criminal activity was taking place or about to take place in the residence. The court found that the officer had not articulated any reasonable suspicion that Weyand was involved in criminal activity. *Id.* at 817.

In *Fuentes*, the Court examined the facts at the time of the seizure: (1) the officer knew the area had extremely high drug activity based on 911 calls and drug dealing investigations; (2) the officer knew the apartment the defendant exited belonged to a woman with numerous drug-related convictions including possession with intent to deliver; (3) the officer had express authority from the complex owner to trespass nonoccupants for

loitering; (4) the car defendant rode in did not belong to any tenants; (5) the driver of the car slumped down when the officer drove past him; (6) the driver and defendant had different stories for why they were in the area; (7) The defendant looked surprised when he saw the officer; (8) the defendant visibly shook and looked pale when the officer talked to him. *Fuentes*, 183 Wn.2d 149 at 155.

The Court concluded none of the circumstances amounted to reasonable suspicion that criminal activity was afoot. *Fuentes*, 183 Wn.2d at 157. Most significant to this case, the Court found the defendant's visit to the apartment of a suspected drug dealer *late at night in a high crime area, without more, did not justify a Terry stop. Id.* at 157.

Here, in its findings of fact and conclusions of law, the trial court outlined the facts the officer used to justify the *Terry* stop:

- (1) the officer knew the drop-off collection closed at 6 p.m. and that most thefts that occurred at that location happened at night and the victims intended to prosecute;
- (2) Based on the officer's training and experience, he found it suspicious that the same vehicle was found in the same

parking lot near the Goodwill trailer two hours after he initially observed it there.

CP 17-18.

These facts do not amount to reasonable suspicion to support a *Terry* stop under *Fuentes* and *Weyand*. Here, 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 trailer 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.

The officer testified he did *not* see the items outside the Goodwill donation center were not "neatly stacked" until *after* he contacted Mr. Buck. 1/19/17 RP 24-25. He further agreed that he had no idea if the strewn about clothing had been left that way by the donors. 1/19/17 RP 26.

Most significantly, the officer *never* saw Mr. Buck or the passenger outside of the truck either time he drove by. 1/19/17 RP 22.

Simply put, the officer did not observe any activity that would lead a reasonable observer to believe that criminal activity was taking place or was about to take place near the Goodwill drop off. The single fact the officer relied on was that the truck was parked in the lot at night. Police cannot justify a suspicion of criminal conduct based on a person's location in an area where crimes have been committed in the past:

It is beyond dispute that many members of our society live, work, and spend their waking hours in high crime areas, a description that can be applied to parts of many of our cities. That does not automatically make those individuals proper subjects for criminal investigation. *State v. Larson*, 93 Wash.2d 638, 645, 611 P.2d 771 (1980).

Weyand, 188 Wn.2d at 817.

Mr. Buck respectfully asks this Court to find that being parked near a Goodwill drop off trailer at 10:30 p.m. and at midnight is not enough to create a reasonable suspicion of criminal activity justifying a *Terry* stop. The trial court's denial of the defense motion to suppress evidence derived as the result of Mr. Buck's unlawful seizure require reversal of his conviction.

B. The Trial Court Exceeded Its Authority When It Imposed A Sentence Outside Of the Statutory Maximum and The DNA Database Fee.

Questions involving a sentencing court's authority are reviewed de novo. *State v. Mann*, 146 Wn.App. 349, 357, 189 P.3d 843 (2008). A sentencing court does not have authority to sentence an offender beyond that authorized by the legislature. *In re Pers. Restraint of Fleming*, 129 Wn.2d 529, 533, 919 P.2d 66 (1996).

1. Confinement Term

The trial court may not impose a sentence of confinement and community custody that, when combined, exceeds the statutory maximum for the offense. *State v. Boyd*, 174 Wn.2d 470, 472, 275 P.3d 321 (2012). Remand for sentencing that complies with RCW 9.94A.701(09) is required when a total sentence of confinement and community exceed the statutory maximum allowed by law. *Boyd*, 174 Wn.2d at 473.

Identity theft in the second degree is a Class C felony. RCW 9.35.020(3). The statutory maximum term of imprisonment is not more than five years. RCW 9A.20.020(c). Here, the trial court imposed a 50-month sentence of imprisonment and an additional 12 months of community custody for a total of 62 months. CP 168-69. This sentence exceeds the statutory maximum for this offense by two months. This matter must be remanded for resentencing to comply with RCW 9.94A.701(9).

2. DNA DataBase Fee Must Be Stricken

The trial court imposed a \$100 DNA database fee as part of Mr. Buck's judgment and sentence. CP 152. This fee is no longer authorized by law under certain circumstances.

House Bill 1783 modified Washington's system of legal financial obligations. *State v. Ramirez*, 426 P.3d 714, 2018 WL 4499761 (September 20, 2018)¹. The DNA database fee is no longer mandatory if the offender's DNA has been collected because of a prior conviction. *Id.* at 721. RCW 43.43.7541. Mr. Buck's criminal history shows he has previous convictions in Washington

¹ Under *Ramirez*, an appellant whose case is not yet final when the amendments were enacted is entitled to the benefit of the statutory change. *Ramirez*, 426 P.3d at 723.

and therefore, his DNA is on file. CP 165-166. He respectfully asks this Court to strike the fee.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Buck respectfully asks this Court to reverse his conviction. In the alternative, he asks the Court to remand for resentencing and with instructions to strike the DNA fee.

Respectfully submitted this 22nd day of October 2018.



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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 October 22, 2018, 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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