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Division III
State of Washington
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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

BRIEF OF RESPONDENT

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I. ISSUES PRESENTED

1. Was the trial court's finding that the deputy sheriff had a reasonable suspicion to perform a *Terry*¹ stop supported by the evidence and the logical inferences from the evidence?
2. Does 50 months of incarceration plus 12 months of community custody equal a sum over the 60-month maximum authorized by law?
3. Should DNA fee be stricken pursuant to *State v. Ramirez*, ___ Wn.2d ___, 426 P.3d 714 (2018), where defendant has 16 prior felony convictions and it is reasonable to conclude that he has previously had a DNA test performed?

II. STATEMENT OF THE CASE²

On October 31, 2016, at 10:30 p.m., Spokane Sheriff Deputy Miller was driving southbound on Division Street from the area of Spokane known as the "Y"; responding to a call for assistance. CP 16 at Finding of Fact 2.2; CP 15-18.³ As he passed the Rosauers located at 9414 N. Division Street,

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

² Only reference to the January 19, 2017 hearing transcript by Court Reporter Crystal Hicks, consisting of 44 pages, is used, and therefore will be simply referred to as "RP."

³ The trial court entered findings of fact and conclusions of law regarding the *Terry* stop of the defendant. These are located at CP 15-18. For ease of reference, the number assigned to the factual finding is used in the factual

he could see a unique “Dolphin Motorhome” in the parking lot directly in front of a Goodwill donation trailer drop off location. CP 16 at FF 2.3. After finishing his call at approximately 12:30 a.m., Deputy Miller returned to the Goodwill/Rosauers location and observed the same motorhome at a slightly different part of the parking lot, adjacent to the Goodwill trailer, but “this time, perhaps near another, as he testified, a shed that may belong to another charitable organization that takes donations at a drop box.” RP 36; CP 16 at FF 2.4 There were only one or two other vehicles in the closed Rosauers grocery store parking lot at that time. CP 16 at FF 2.5

Deputy Miller was aware there was a sign on the trailer stating the Goodwill donation trailer was closed and unstaffed after 6:00 p.m. *Id.* at FF 2.6. Based on his training and experience, Deputy Miller was aware this location had been subject to previous thefts which almost always occurred after it was closed. *Id.* at FF 2.7, 2.8. He was also aware that the owners,

summary. These findings are supported by the testimony taken at the CrR 3.6 hearing held on January 19, 2017. *See* RP 1-44. The defendant has not taken exception to any of these factual findings, but has taken exception to the conclusions of law entered by the trial court regarding the legality of the *Terry* stop. Brief of Def. at 1. Therefore, these factual findings are verities on appeal. *State v. O’Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003) (challenged findings entered after a suppression hearing that are supported by substantial evidence are binding, and, when the findings are unchallenged, they are verities on appeal). For ease of reference, the number assigned to the factual finding is used in the factual summary. For example, Finding of Fact 2.1 is cited as FF 2.1.

Goodwill Industries, wished to prosecute thefts from these charitable donation locations. *Id.* at FF 2.9.

Deputy Miller parked directly in front of the motorhome as it attempted to drive off. *Id.* at FF 2.10. There was no dispute that the occupants of the vehicle were not free to leave and if they tried they would have been pursued by Deputy Miller. *Id.* at FF 2.11. Deputy Miller contacted the driver of the vehicle, who was later identified as the defendant. *Id.* at FF 2.12

When asked for identification, the defendant, Mr. Buck, provided a driver's license and informed Deputy Miller that it was valid. *Id.* at FF 2.13. Deputy Miller observed that the photo on the license did not look like Mr. Buck. *Id.* at FF 2.14. Deputy Miller found it unusual that Mr. Buck was unable to provide the address on "his" driver's license or provide the correct social security number for the person listed on the license. CP 17 at FF 2.15. Deputy Miller ran a check of the driver's license and determined that it was a valid driver's license belonging to another person. *Id.* at FF 2.16. Mr. Buck admitted that the license he had displayed was not his license and that he had lied about his identity to avoid going to jail for an outstanding warrant. *Id.* at FF 2.17. Deputy Miller also determined that the license plate on the motorhome belonged to a different car and that the plate had been reported stolen. *Id.* at FF 2.18. Probable cause existed at this point to arrest

Mr. Buck for presenting false identification and possession of stolen property for the license plate. *Id.* at FF 2.19.

The defendant was later convicted on one count of second degree identity theft, a class C felony. CP 145-59 (judgment and sentence). With an offender score of 16, the defendant had a standard range of 43-57 months. CP 148. He was sentenced to 50 months custody, and community custody of 12 months. CP 151. Defendant timely appealed. CP 160.

III. ARGUMENT

A. THE TRIAL COURT'S FINDING THAT THE INVESTIGATIVE STOP OF MR. BUCK WAS VALID UNDER THE *TERRY v. OHIO* EXCEPTION TO THE WARRANT REQUIREMENT WAS SUPPORTED BY THE RECORD.

Mr. Buck appeals from the trial court's finding that his initial detention at the Goodwill charity drop box was lawful pursuant to *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). As explained below, the factual findings made by the trial court are supported by the record, and these findings support the trial court's conclusion that the initial detention of Mr. Buck was lawful under *Terry*.

Standard of Review

Both the federal and Washington constitutions bar warrantless searches unless they fall within one of several narrow exceptions. U.S. CONST. AMEND. IV; CONST. ART. 1, § 7; *State v. Doughty*, 170 Wn.2d 57, 61, 239 P.3d 573 (2010). A *Terry* investigatory stop is one

exception to the warrant requirement. *Terry*, 392 U.S. at 21. A *Terry* stop allows officers to seize a person briefly if specific articulable facts give rise to a reasonable suspicion that the person stopped is or has been involved in criminal activity. *State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 760 (1991). An appellate court determines the appropriateness of a *Terry* stop based on the “totality of the circumstances.” *State v. Snapp*, 174 Wn.2d 177, 198, 275 P.3d 289 (2012). The focus is on what the officer knew at the time of the stop. *State v. Lee*, 147 Wn. App. 912, 917, 199 P.3d 445 (2008). A court must base its evaluation of reasonable suspicion on “commonsense judgments and inferences about human behavior.” *Illinois v. Wardlow*, 528 U.S. 119, 125, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000).

The appellate court reviews a trial court’s denial of a motion to suppress by determining whether substantial evidence supports the challenged findings of fact and whether these findings support the trial court’s conclusions of law. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999). Substantial evidence is enough evidence to persuade a fair-minded person of the truth of the finding. *State v. Vickers*, 148 Wn.2d 91, 116, 59 P.3d 58 (2002). Whether a warrantless stop is constitutional presents a question of law the appellate court reviews de novo. *State v. Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008). The

appellate court treats unchallenged findings as true for purposes of the appeal. *State v. Ross*, 106 Wn. App. 876, 880, 26 P.3d 298 (2001).

Here, Deputy Miller drove by the parking lot located on Division Street at 10:30 p.m. and took note that the defendant's vehicle was parked within 10 feet of a Goodwill donation box that previously had been subjected to thefts. RP 10. Calls regarding thefts from these locations and requests for officers to respond usually occurred between 8:00 p.m. and the early morning hours. RP 10. Deputy Miller returned to this area approximately one and a half hours later and observed that this unique Dolphin Motorhome was still at the location, although it had been moved slightly towards a different charity donation drop located in the same parking area. RP 12.

As Deputy Miller drove into the parking lot and approached the Dolphin Motorhome, it was not moving, but as he pulled closer, the vehicle started to move forward as if attempting to leave. RP 12. Deputy Miller stopped the vehicle and asked the driver for identification. The defendant, Mr. Buck, provided a driver's license and informed Deputy Miller that it was valid. CP 16 at FF 2.13. Deputy Miller observed that the photo on the license did not resemble Mr. Buck.

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.

A review of the facts, and the rational inferences available from those facts, establishes that the officer had a reasonable suspicion of charity-theft from the drop boxes located in the lot. The deputy had, within his knowledge, an understanding that the Goodwill charitable drop box had been subject to thefts, that Goodwill wished to prosecute these thefts of donated items, and that these thefts usually occurred during the hours covering the defendant's midnight presence at the location when the location was unmanned. Indeed, the trial court noted that “[i]t seems somewhat nonsensical to suggest that someone would be stealing from the location while there is a Goodwill employee right there.” RP 37. Moreover, the location of the defendant's vehicle was away from the open parking and available parking locations near Rosauers, so it was unlikely the defendant was shopping there, especially, as the court indicated, it was “reasonable to assume, from the officer's training and experience, there probably wouldn't be people doing a lot of grocery shopping at Rosauers past midnight on Halloween night.” RP 37-38. Additionally, the defendant's attempted *flight*

from the area, after being there for almost two hours, occurred only after the police cruiser showed up.⁴

Considering these facts, it is also important to note that a police officer may rely on his experience to evaluate apparently innocuous facts. *State v. Moreno*, 173 Wn. App. 479, 492, 294 P.3d 812 (2013); *State v. Martinez*, 135 Wn. App. 174, 180, 143 P.3d 855 (2006); *State v. Samsel*, 39 Wn. App. 564, 570-71, 694 P.2d 670 (1985). 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. Police officers are not required to set aside that experience. *Id.* at 570-71. Where, as here, a person, late at night, stops at one drop box location and then moves towards a nearby second donation box location, it is rational to infer that such person is not “dropping off” charitable donations over a nearly two-hour period, and that a person would not have to go to two charity locations to do so. Indeed, being proximate to two charity containers would provide a better selection of items to purloin.

“[T]he determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior.”

⁴ Courts may also consider flight to determine whether an officer had reasonable suspicion of criminal activity. *State v. Little*, 116 Wn.2d 488, 496, 806 P.2d 749 (1991).

State v. Saggors, 182 Wn. App. 832, 840, 332 P.3d 1034 (2014) (quoting *Illinois v. Wardlow*, 528 U.S. at 125. Here, the purpose of the *Terry* stop was for the limited purposes of ascertaining the identity of the suspect and for the brief investigatory questioning regarding whether he was involved in theft, the two lawful ends of a *Terry* stop. *State v. Kennedy*, 107 Wn.2d 1, 16, 726 P.2d 445 (1986). In testing the validity of such stops, appellate courts consider factors such as the officer's training and experience, the location of the stop, the conduct of the person detained, the purpose of the stop, the amount of physical intrusion upon the suspect's liberty, and the length of time the suspect is detained. *State v. Acrey*, 148 Wn.2d 738, 747, 64 P.3d 594 (2003). Here, the officer had knowledge of previous thefts and observed behavior consistent with the profile of Goodwill theft, and he was not required to ignore his observations. *Cf. State v. Thierry*, 60 Wn. App. 445, 448, 803 P.2d 844 (1991).⁵ Here the amount of physical

⁵ Such knowledge and experience was key to upholding the investigatory stop in *Thierry*. There, officers watched two teenagers drive through a high-crime area located at a transit stop in downtown Tacoma one winter afternoon with the car windows rolled down and loud music playing. 60 Wn. App. at 446-47. The car drove through a parking lot containing open spaces without attempting to park and stopped at the entrance. *Id.* at 447. As the officers approached, they saw a wooden bat at the driver's feet and noticed the passenger making furtive hand motions. *Id.* After ordering the two to bring their hands into view, an officer saw a pistol between the front armrests. *Id.*

Division II of this court upheld the stop, stating that the officers had observed behavior consistent with the profile of drive-by shootings and

intrusion upon the suspect's liberty was slight and momentary; the *Terry* stop for the theft ended and a separate investigation began upon the defendant's display of obviously false identification.

The trial court did not err in denying defendant's motion to suppress because the trial court's unchallenged factual findings supported its conclusion of law that, under the totality of the circumstances, Deputy Miller had a reasonable articulable suspicion to conduct an investigatory stop to contact the defendant.

B. THE CASE MUST BE REMANDED TO CORRECT THE SENTENCE IMPOSED AS THE 62 MONTHS TOTAL INCARCERATION AND COMMUNITY CUSTODY EXCEEDS THE STATUTORY MAXIMUM. THE DEFENDANT'S DNA HAS PRESUMPTIVELY BEEN COLLECTED PURSUANT TO HIS SENTENCING ON AT LEAST ONE OF HIS PRIOR 16 FELONY CONVICTIONS, SO THE DNA FEE IMPOSED AT SENTENCING SHOULD BE STRICKEN.

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).

were not required to ignore their observations. *Id.* at 448. The appellate court explained that officers may bring their experience to bear on a situation, and it is necessary only that the circumstances at the time of the stop be more consistent with criminal than innocent conduct. *Id.* Given the high crime nature of the area in question and the drive-by shooting profile, the facts that existed immediately before the stop did not comport with innocent activity. *Id.* at 448-49.

Remand for sentencing that complies with RCW 9.94A.701(9) 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).

Where, as here, the defendant has multiple felony convictions resulting in an offender score of 16, it is reasonable to conclude that he has had a prior DNA test such that the DNA database fee must be stricken pursuant to *State v. Ramirez*, __ Wn.2d __, 426 P.3d 714 (2018).

IV. CONCLUSION

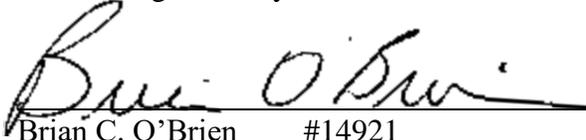
The trial court did not err in denying defendant's motion to suppress because the trial court's unchallenged factual findings supported its conclusion of law that, under the totality of the circumstances, Deputy Miller had a reasonable articulable suspicion to conduct an investigatory stop to contact the defendant.

The 62-month combined sentence exceeds the statutory maximum for this offense by two months. This matter should be remanded for resentencing to comply with RCW 9.94A.701(9).

It is reasonable to conclude that Mr. Buck has had a prior DNA test such that the DNA database fee must be stricken pursuant to *State v. Ramirez*.

Dated this 10 day of December, 2018.

LAWRENCE H. HASKELL
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Brian O'Brien", written over a horizontal line.

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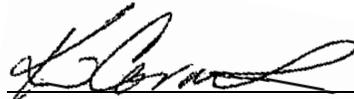
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on December 10, 2018, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Marie Trombley
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Spokane, WA
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SPOKANE COUNTY PROSECUTOR

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