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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.

JOSUE MANUEL OSORIO LOPEZ,
Appellant.

APPEAL FROM THE SUPERIOR COURT
OF YAKIMA COUNTY

APPELLANT'S RESPONSE BRIEF

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A. ISSUES PRESENTED

1. Did Substantial Evidence support the trial court's finding of fact number 4?
2. Did the trial court correctly deny the motion to suppress?

B. ARGUMENT

1. SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THE TRIAL COURT'S FINDING OF FACT NUMBER FOUR

First, for our purposes here, finding number four states:

What Detective Boone observed on January 26, 2017 was consistent with the controlled buy involving the defendant that occurred on April 13, 2016 which was the subject of LEAD Task Force investigation under case number 16X00040. Furthermore, based on Detective Boone's training and experience, Detective Boone's observations on January 26, 2017 were consistent with the trafficking of illegal drugs and counter surveillance employed by those involved in the trafficking of illegal drugs.

CP 56. The Appellant maintains, and a great majority of his previous brief lays this out, that what the officer observed *and* what he did not observe did not give rise to the requisite reasonable suspicion for seizure. What does not support finding four is as follows as listed in 12 critical points: *With respect to the April 13, 2016 event*, 1) we do not know where in the City of Sunnyside the controlled buy occurred; and 2) the suspected contraband from the controlled buy was not tested before the seizure on January 26, 2017; *and with respect to the January*

26, 2017 event, 3) the driver of the vehicle was not identified until after the vehicle was seized; 4) the commonality of the vehicle in question was never adequately addressed; 5) the time of day was never adequately addressed; 6) the driver of the other vehicle is still unknown; 7) no money or drugs were ever observed being exchanged; 8) there was no testimony concerning other similar identifiers of the vehicle, such as license plates; 9) there is nothing in the record indicating officers believed there was a threat of imminent harm, the presence of exigent circumstances, or the need for haste despite the number of officers in the area (recall how quickly and easily he was seized); 10) we do not know how much time passed between the arrival of the unknown individual that contacted the suspect vehicle; 11) Detective Boonee level of expertise is not adequately addressed by any means and 12) we do not know how likely the behavior observed could also be indicative of common innocent behavior that routinely occurs within the community of Sunnyside or even Yakima County, *specifically*.

With respect to points 3, 6, and 9 immediately above, it is important to note that Detective Gusby testified when it comes to parking lot surveillance:

It depends - - it all depends on what we're doing at that time. If we're watching a drug transaction we try to set up depending on how many people we have on our team at the time, either in a parking lot, outside the parking lot, so we can see all traffic in. See our target if it's a specific drug dealer, who he's meeting with, vehicles, try to get identification so we can – we try to set up also for a – we call it a takeaway so if they leave the parking lot we're able to follow him no matter what direction they leave out of the parking lot.

RP 5. By Detective Gusby's own testimony, we know just how important it is to get an identification and just how easy it is to trail a suspect under the circumstances we are dealing with here. None of this was done as law enforcement was not concerned with the vehicle's mobility in this case. Furthermore, it is important to note that law enforcement knew exactly where the defendant lived and worked and had known these things for some time. RP 8. They could have and should have conducted a better investigation before seizing the defendant, and the State should not be allowed to rely on imminent harm, the presence of exigent circumstances, or vehicle mobility to justify the stop in question given the testimony presented. *See State v. Day*, 161 Wn.2d 889, 897 (2007). State's Response, 11.

Considering all 12 critical points the defense has pointed out, the observations of law enforcement on January 26, 2017 were not consistent enough with the observations of April 13, 2016 and it is

unknown if the behavior observed is truly more consistent with illegal activity than innocent/lawful activity. CP 3 – 55.

It is important to specifically address the experience of Detective Boone given the wording of Finding Four (4). Detective Boone started working for the Gambling Commission in July of 2012. RP 24. He was assigned to the LEAD Drug Task Force in December of 2015. On the date of the 2017 incident, he had been working with LEAD for approximately 13-14 months. It is unknown when he received his 280 hours (7 days) of training “regarding drug detention and interdiction.” RP 24 – 25. For all we know, he could have just finished it leaving him rather inexperienced or he could have finished it or started and completed it after January 26, 2017. We do not know how many instances of surveillance he had conducted up into the day in question. RP 25- 26.

We do not know if what was observed by Detective Boone during the day in public was more inherently suspicious or innocent because the record is silent on this issue. *This should matter. See State v. Pressley, 64 Wn. App. 591, 596 (1992).* Is evidence of just how innocuous and common behavior actually is within this community not necessary? RP 5-6, 31-31. Would what was observed justify a seizure if

it involved a van as opposed to a familiar pickup? Is it more suspect or innocent in Sunnyside, WA for an unknown individual to pull up and speak to another unknown individual in a parking lot and ultimately let them in to show off a new stereo, a new phone, a new truck gadget, or recently taken vacation pictures? Would identity matter? What if it was known that the individuals in question were teenagers? Commonsense and societal experience dictates that the types of observations we are dealing with here can easily go either way absent evidence showing otherwise.

Finding four without including, being based on, or alluding to all of the other established facts on the record that are clearly detrimental to a finding of reasonable suspicion, was made in error. The totality of the circumstances must be considered, which the defense argues should include everything established on the record about the circumstances behind the seizure in question absent a reason why an established fact was excluded. *See State v. Z.U.E.*, 183 Wn.2d 610, 620-621 (2015).

Again, to meet its burden of showing a Terry stop was valid, the State must prove the officer had a well-founded suspicion that *the defendant* was engaged in criminal conduct. *State v. Doughty*, 170 Wn.2d 57, 62 (2010). Contrary to what the state seems to be arguing,

this does require the State to demonstrate that the circumstances at the time of the stop were more consistent with criminal than with innocent conduct. Pressley, 64 Wn. App. at 595-596. Was there any demonstration at the hearing in question that what was observed on January 26, 2017 did or did not happen frequently in Sunnyside, WA for completely lawful reasons? The answer is a resounding “no.” Though what occurred may appear to the trained officer as suspicious or indicative of criminal activity, and while an officer is not required to ignore the behavior observed, reality may easily tell us that it could just as easily be innocent behavior in the community in which it occurred. Id. We cannot pretend this reality does not exist, it may differ in intensity from culture to culture and community to community, and we must remember it is the State’s burden here. “The State must establish the exception to the warrant requirement by clear and convincing evidence.” State v. Garvin, 166 Wn.2d 242, 250 (2009). It is a heavy burden of proof. Id. The state simply cannot meet its heavy burden here since “. . . it is an elementary maxim that a search, seizure or arrest cannot be retroactively justified by what is uncovered.” U.S. v. Como, 340 F.2d 891, 893 (1965).

The trial court considers the totality of the circumstances in evaluating the reasonableness of a Terry stop. The court’s findings of

fact are reviewed for substantial evidence. State v. Gatewood, 163 Wn.2d 534, 539 (2008). Were some facts excluded because of concerns that they were not supported by substantial evidence or because there were perceived issues with the credibility of testimony? We don't know. The record is basically silent on this point.

2. Since Finding Four is not supported by substantial evidence, the Conclusions of Law to the Extent that they are drawn from this finding are in error and the defendant's motion should have been granted.

The court's conclusions of law regarding the constitutionality of a stop are reviewed de novo. Id. The defense has assigned error to all four Conclusions of Law because they find the stop justified based on the totality of the circumstances laid out in the findings of fact, specifically number four (4), which was used to conclude that the stop was based on probable cause and reasonable suspicion. CP 56.

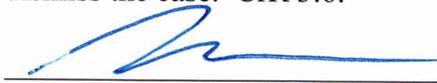
A prior controlled buy over 9 months prior without any labs having been conducted or any other known further investigation including verification of continued ownership of the truck in question, should not – in this country - permit the seizure of an unknown occupant in what is *perceived* to be the same truck engaged in similar maneuvering in a public parking lot.

Again, the defense points out that the Supreme Court has noted that a person's presence in a high-crime area at a "late hour" does not give rise to a reasonable suspicion sufficient to detain that person. Doughty, 170 Wn.2d at 62. Even though the house Doughty visited was a suspected drug house, his visit occurred late at night, and he was there for less than two minutes (more than long enough to obtain contraband), the Supreme Court found the stop unlawful ruling, "Police may not seize a person who visits a location—even a suspected drug house—merely because the person was there at 3:20 a.m. for only two minutes." Id. at 63. In light of Doughty and other case law the defense has cited, it is clear that the State did not meet its heavy burden of establishing that this rapid investigative detention was justified. Was the suspicion present in this case really more than what existed in Doughty when considering all the established facts? It is hard to believe so.

C. CONCLUSION

Again, at its most fundamental level and without artful legal language, the question really is this: should one single controlled act that is never charged or pursued through lab analysis be allowed to attach to a *vehicle* in order to elevate subsequent hunches to a degree permitting seizure of all of the vehicle's occupants even when their

identities are not known? And if so, for how long? Forever? Mr. Osorio Lopez continues to request that the Court reverse the conviction and dismiss the case. CrR 3.6.



Alex Newhouse, wsba#40052



Date:

D. DEFENDANT'S ACKNOWLEDGMENT

I, Josue Osorio Lopez, acknowledge that I have been personally served with an exact copy of the Appellant's Response Brief hereto attached. I received a hardcopy on January 7, 2019 from my attorney, Alex Newhouse.

I acknowledge that I have been served with a copy of the appellant's first brief, the State's response, the appellant's response, and that I am the appellant. I have no further argument at this time.

I declare under penalty of perjury under the laws of the State of Washington that the above is true and correct to the best of my knowledge.

1-7-19, Sunnyside WA
Date and Place of Signature

Josue Lopez
Josue Osorio Lopez

NEWHOUSE LAW PLLC

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Response brief that was due within 30 days of the State's brief.

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