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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 BRIEF

Alex Newhouse
Attorney for Appellant

NEWHOUSE LAW PLLC
308 Yakima Valley Highway
Sunnyside, WA 98944
(509) 515-2113

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Mr. Lopez Osorio's motion to suppress evidence, pursuant to CrR 3.6.
2. To the extent that the finding presumes criminal activity was afoot, the trial court erred in entering Findings of Fact 4. (CP 56).
3. The trial court erred in entering Conclusions of Law 1-4. (CP 58).

B. ISSUES

1. Under both the Fourth Amendment and article I, section 7 of the Washington Constitution, warrantless seizures are presumptively unreasonable. An investigatory detention is one of the narrowly-drawn exceptions to the warrant requirement, but for such a detention to be constitutional the State must prove by clear and convincing evidence that the detention was justified at its inception by specific, articulable facts supporting a reasonable suspicion of criminal activity. Does a familiar but easily transferable and fungible vehicle involved in a prior supervised and controlled buy from over nine months earlier give rise to the reasonable suspicion necessary to seize the unknown driver of a comparable vehicle engaged in similar parking lot maneuvers?

2. The remedy for a violation of the rights guaranteed by article I, section 7 is suppression of all evidence gained by unconstitutional means. Here, the State used the evidence recovered during a search that followed an illegal seizure to support a prosecution for possession of a controlled substances with intent to deliver. Must the conviction be reversed and the case dismissed?

C. STATEMENT OF FACTS

In March of 2016, LEAD Task Force learned from a Confidential Informant (CI) that the defendant may be involved in selling narcotics. (RP 7). LEAD arranged for the CI to purchase illegal drugs from the defendant on April 13, 2016. (RP 7). The CI was directed to arrange the location and time of the contact with the defendant. (RP 9). The defendant allegedly drove to the location, exited his vehicle after some parking lot maneuvering, and conducted an alleged illegal transaction possibly outside of his vehicle with the CI. (RP 15-16). The substance allegedly sold to the CI field tested positive for cocaine. ***Lab results for this substance did not return until after January 26, 2018.*** (RP 23).

The maneuvering on April 13, 2016 that Detective Gusby described through his testimony went as follows: 1) the CI arrived first; 2) A

white Ford truck with a Botech sticker on the tailgate arrived after the CI; 3) the occupants of the vehicle met and the CI entered the white ford; 4) the white truck drives around the parking lot and parks in a stall; 5) after a few seconds, the white truck drives back to the CI's car and the CI gets out; 6) the white truck parks and the defendant is seen exiting and walking to the CI's car; 7) the CI and the defendant met in person outside of the CI's car and shook hands; 8) and finally the CI and defendant parted ways. (RP 12-16). Before this date, it is unknown if Mr. Osorio Lopez had ever even been the subject of any criminal investigation. It is also important to keep in mind that Detective Gusby did not testify about matching license plates or fleets of company vehicles with similar graphics.

Almost 9 ½ months later on January 26, 2017 Detective Boone of the LEAD task force was in the parking lot of Bi-Mart in Sunnyside, WA conducting surveillance for an unrelated investigation. (RP 26). He noticed a truck that he recognized involved in the controlled buy from almost 9 ½ months earlier. (RP 27). He recognized the vehicle as "being a suspect in . . . an unrelated investigation." (RP 27). He recognized the tailgate emblem and noticed that it was occupied by one individual. (RP 27). Detective Boone claims:

Yeah, immediately I recognized *it* as I participated in previous surveillance operations where I observed – I knew Mr. Lopez to be the operator of that vehicle. I observed that vehicle throughout the community and knew Mr. Lopez to be the driver of it and *it* was immediately recognizable to me.”

(RP 27), *Emphasis mine*.

Detective Boone testified about some vehicle maneuvering that he compared to the previous controlled buy. (RP 28 – 33). The maneuvering he testified to went as follows: 1) a white ford truck with Botech graphics on the tailgate arrived in the parking lot and pulled up side by side to a blue Chevrolet pickup; 2) it is unknown how many occupants if any were in the blue Chevrolet at the onset but when Detective Boone moved to get a better view he could see two individuals in the white truck; 3) the white truck began moving and so Detective Boone followed; 4) the white truck did not leave the parking lot so observation continued; 5) the white Ford was observed doing a half circle and then parked near the blue Chevrolet in the “adjacent aisle facing north;” 6) the decision was made to seize the Ford Truck and its occupant at this time. (RP 27-33). Detective Boone contacted Deputy Paganelli, a narcotics k-9 handler with the Yakima County Sheriff’s Office, and requested that Deputy Paganelli seize the defendant for what he testified as “an investigative detention.” (RP 33) Detective Boone never testified that he recognized the driver of this

suspect vehicle on January 26, 2017 before he was seized. No drugs or money were seen exchanged before the seizure either. There was no testimony or evidence offered about the commonality of the truck at issue, e.g., was it one company truck out of a fleet with similar graphics?

Deputy Paganelli was nearby and followed the white Ford pickup out of the parking lot. (RP 37). In less than a minute, he had pulled the vehicle over and knew which vehicle to stop because it was “described to him over the radio.” (RP 37). Deputy Paganelli never testified that he saw and recognized the individual driving before he initiated the investigative detention. No pat downs were conducted. Instead, this was a quick stop and resulted in the rapid removal of the defendant from his vehicle and the use of restraints soon thereafter. (RP 41-41).

Based on evidence recovered after the stop in question, the State charged Mr. Lopez Osorio with Possession with intent to deliver a controlled substance. The defense filed a 3.6 motion challenging the seizure in question, which the trial court denied. (CP 58). Though the state and the defense were arguing about the existence of reasonable suspicion for the seizure, the trial court denied the motion finding

reasonable suspicion because – at least in part, as the defense interprets the ruling – of the existence of probable cause. (CP 58). The state did not argue that the stop was based on probable cause, nor did the defense. Mr. Lopez was not arrested for the April 13, 2016 offense on January 26, 2018. Furthermore, there were no labs available for the substance obtained on April 13, 2016. (RP 23). A stipulated trial followed for purposes of bringing this appeal.

D. ARGUMENT

1. A Terry stop must be supported by a reasonable suspicion of criminal activity or it will violate article I, section 7 and the Fourth Amendment. The State bears the burden of proving the validity of an investigatory detention by clear and convincing evidence.

Warrantless searches or seizures are per se unreasonable under both the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution. State v. Doughty, 170 Wn.2d 57, 61 (2010). A brief investigatory detention based on a reasonable suspicion that criminal activity is afoot is one of the “narrowly-drawn” exceptions to the warrant requirement. Terry v. Ohio, 392 U.S. 1, 22, (1968); State v. Garvin, 166 Wn.2d 242, 250 (2009). However, the State bears the burden of proving the exception to the warrant

requirement by clear and convincing evidence. Garvin, 166 Wn.2d at 250.

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. Doughty, 170 Wn.2d at 62. A “well-founded suspicion” requires the State to demonstrate that the circumstances at the time of the stop were more consistent with criminal than with innocent conduct. State v. Pressley, 64 Wn. App. 591, 596 (1992). In addition, “in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” Id. (quoting Terry, 392 U.S. at 21). “Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction.” Terry, 392 U.S. at 22.

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). The court's conclusions of law regarding the constitutionality of a stop are reviewed de novo. Id.

2. 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, does not permit the seizure of an unknown occupant in what is perceived to be the same truck engaged in similar though not identical maneuvering in a public parking lot.

Identity is key here. What law enforcement in this case believed they were investigating was a violation of RCW 69.50.401(1):

Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.

RCW 69.50.401(1) It is important to note that no officer testified that he visually observed the exchange of narcotics or cash in this case. The stop is completely based off vehicle recognition and maneuvering. The drivers involved were unknown. (CP 56) (RP 27). The defense argues that this simply cannot be enough to justify a seizure, either as an investigative detention or as arrest. Do we now live in a time that requires an interpretation of the Fourth Amendment and Article I, section 7 of the Washington Constitution that permits seizures based on facts such as these?

To be constitutional, a Terry stop must be justified at its inception. Gatewood, 163 Wn.2d at 539. If the initial detention is invalid, then nothing else matters because everything will be suppressed as fruit of the poisonous tree. In this case, the officers never would have learned the defendant's name had the vehicle in question not been seized.

What was observed by Detective Boone during the day in public was not inherently suspicious behavior. There is nothing suspect or criminal about an unknown individual pulling up and speaking to others in a parking lot and ultimately letting them in to show off a new stereo, a new phone, or recently taken vacation pictures. Commonsense and societal experience dictates that these types of observations can easily be indicative of completely innocent and lawful behavior.

It would be important to note the time of day the events at issue occurred but based on the testimony presented we can only assume that it was during normal business hours ("normal shopping behavior"). (RP 32). It was likely daylight. This fact does not support an inference that the driver of the white ford truck was involved in criminal conduct. In Doughty, for instance, a Spokane police officer stopped Doughty after he saw him park his car outside a suspected drug house at 3:20 a.m.,

return to his car less than two minutes later, and then drive away. Doughty, 170 Wn.2d at 59. The Supreme Court 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. Id. 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, the Supreme Court invalidated the stop, 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 State v. Richardson, Division III held that a stop was not supported by a reasonable suspicion of criminal activity where officers observed Richardson at 2:30 a.m. walking with someone who earlier had been seen engaging in suspicious activity consistent with "running drugs." State v. Richardson, 64 Wn. App. 693, 697 (1992). Doughty and Richardson do not support the justifications for the seizure in this case.

There was no exigency or need for haste that might justify invocation of a less stringent standard for the seizure of Mr. Osorio Lopez. In limited circumstances, Washington courts have held that the

totality of the circumstances may warrant a less onerous showing in support of an officer's reasonable suspicion of criminal activity. See Cardenas-Muratalla, 179 Wn. App. 307, 314 (2014) (noting that “[o]fficers investigating reports of emergent risks of imminent violence do not have the opportunity to make detailed inquiries to establish the veracity or vantage point of individuals reporting suspicious activity”). Here, however, there was a hunch of a single narcotic sale without any identifications or observations of drugs or cash passing hands. Had the testimony at the 3.6 hearing established that officers took their time to identify the driver of the white Ford truck, we would very likely be having a different discussion here.

Conducting an immediate Terry stop of Mr. Osorio Lopez was not law enforcement's only option. They could have done this right. As made clear through testimony on the motion to suppress, at least 3 officers were on scene. After the observations that were made, it is hard to imagine why law enforcement didn't take the small extra step of positively identifying the driver of the white truck. They could have easily done so and established specific, articulable facts that *may* have supported a reasonable suspicion that a illegal drug sale occurred. But this is not what happened, it is not what the State argued, and it is not

what the trial court found. The State did not meet its heavy burden of establishing that an investigative detention was justified.

3. Mr. Osorio Lopez's conviction must be reversed and dismissed.

Whenever the rights protected by article I, section 7 are violated, the exclusionary remedy must follow. State v. Winterstein, 167 Wn.2d 620, 632 (2009). "The exclusionary rule mandates the suppression of evidence gathered through unconstitutional means." Garvin, 166 Wn.2d at 254. "It is by now axiomatic that article I, section 7 provides greater protection to an individual's right of privacy than that guaranteed by the Fourth Amendment." State v. Parker, 139 W.2d 486, 493 (1999). The Washington Constitution has consistently provided greater protection of individual rights than its federal counterpart. See State v. Ladson, 138 Wn.2d 343 (1999); State v. Ferrier, 136 Wn.2d 103, 111 (1998); State v. Hendrickson, 129 Wn.2d 61, 69 n.1 (1996); State v. Young, 123 Wn.2d 173, 180 (1994); State v. Williams, 102 Wn.2d 733 (1984). Indeed, the scope of the protections offered by article I, section 7 is "not limited to subjective expectations of privacy but, more broadly, protects 'those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.'"

Parker, 139 Wn.2d at 494 (quoting State v. Myrick, 102 Wn.2d 506, 511 (1984)).

The same remedy is compelled under the Fourth Amendment. Wong Sun v. United States, 371 U.S. 471, 488 (1963). The evidence found in Mr. Osorio's vehicle must be suppressed, which would render the state incapable of securing a conviction. This case must be dismissed.

D. CONCLUSION

At its most fundamental level and without artful legal language, the question really is this: should one single act that is never charged 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 when their identities are not known? And if so, for how long? Forever? In Washington State, the defense is arguing that 9 months is too long. For the foregoing reasons and in light of our State's heightened privacy protections, Mr. Osorio Lopez is requesting that the Court reverse the conviction and dismiss the case.



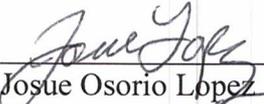
Alex Newhouse, wsba#40052
Attorney for Appellant

I, Josue Osorio Lopez, acknowledge that I have been personally served with an exact copy of the Appellant's Brief. I received a copy via email on August 25, 2018 and September 6, 2018 from my attorney, Alex Newhouse. I also received the final hard copy of the same brief to filed with Division III of the Court of Appeals on September 9, 2018 at the office of my attorney.

I acknowledge that I have been served with the appellant's brief and that I am the appellant.

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.

9-12-18, Sunnyside WA
Date and Place of Signature


Josue Osorio Lopez

NEWHOUSE LAW PLLC

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