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Court of Appeals
Division III
State of Washington
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NO. 36044-0-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

JOSUE MANUEL OSORIO LOPEZ, Appellant.

BRIEF OF RESPONDENT

Tamara A. Hanlon, WSBA #28345
Senior Deputy Prosecuting Attorney
Attorney for Respondent

JOSEPH BRUSIC
Yakima County Prosecuting Attorney
128 N. 2nd St. Rm. 329
Yakima, WA 98901-2621

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I. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR

1. Did substantial evidence support the trial court's finding of fact number four?
2. Did the trial court correctly deny the motion to suppress because the stop was a valid investigative detention?

II. STATEMENT OF THE CASE

The appellant, Josue Manuel Osorio Lopez, was convicted by bench trial of Possession of a Controlled Substance, Cocaine, with Intent to Deliver. CP 104-7. The Court found that he committed the crime while armed with a firearm and within a drug protection zone. *Id.*

Prior to trial, Lopez brought a suppression motion, arguing that the evidence should be suppressed because of an unlawful *Terry* stop. CP 1-27. A hearing was held on February 16, 2018. The State filed a response which included a sketch of the scene. CP 28-54. The diagram is attached as Appendix A. The State called three witnesses, Detective John Gusby, Detective Michael Boone, and Deputy Justin Paganelli. VRP 3-42.

2016 Incident

Detective Gusby, a Sunnyside Police Department detective assigned to the L.E.A.D. drug task force, testified that on April 13, 2016, he was part of a surveillance team watching Lopez. RP 4,7. An informant advised Detective Gusby that Lopez was selling cocaine within Yakima County. RP 7. Detectives conducted surveillance at Lopez's home and

work. RP 8. They followed him around while he was driving. RP 8. Lopez drove a large lifted 4-door truck with the word "Bowtech" on the tailgate. *Id.* Detective Gusby testified that the truck is the only one like it in the city of Sunnyside. *Id.*

A controlled buy was set up by the Task Force. Before the meeting, the informant and informant's vehicles were searched for any drugs or excess amount of cash. RP 17. The Task Force gave the informant cash for the controlled buy. RP 17. On April 13, officers followed Lopez to a prearranged meeting location, a business parking lot in the city of Sunnyside. RP 9, 19. Lopez entered the parking lot of that location and drove up to the informant's car. RP 9-10. He parked with his driver's door facing the informant's driver's side door. RP 19. The informant got into Lopez's truck. Lopez drove around the parking lot, stopped for a second in a parking stall away from the informant's car, and then drove back to the informant's vehicle. RP 9-11. The informant got out of Lopez's truck Lopez parked his truck. RP 13. The informant walked to his car and after parking, Lopez walked up to the driver's side door of the informant's vehicle. RP 15. Detective Gusby observed the two shake hands and the informant got in his or her car and drove away. RP 16. The informant came back with a parcel containing a white powder

substance that tested positive for cocaine using a NIK test kit. RP 16-17, 23.

2017 Incident

Detective Boone is a special agent with the Washington State Gambling Commission and is assigned to the L.E.A.D. Task Force. RP 24. He has extensive surveillance training. His training, in addition to the basic law enforcement academy, includes 40 hours of rolling surveillance tactics, 80 hours with the criminal justice training commission, undercover certification school, 80 hours of drug enforcement administration, and 80 hours basic drug trafficking investigation school. RP 25. He has attended several different trainings pertaining to physical surveillance, including specific training in stationary and rolling surveillance. RP 25.

Detective Boone testified that on January 26, 2017, while he was at Bi-Mart for an unrelated investigation, he observed a white, lifted Ford F250 with a very distinctive “Botech” emblem on the tailgate. RP 26-7, CP 54. A photo of the emblem is attached as Appendix B. Detective Boone knew immediately that the truck belonged to or was operated by the suspect in a prior L.E.A.D. task force drug investigation headed by Detective Gusby. RP 27. Detective Boone testified that he had observed the truck throughout the community and knew Lopez to be the operator of the vehicle. RP 26. Detective Boone was in the parking lot when Lopez’s

truck passed by him and parked in a parking stall next to an unoccupied blue Chevrolet pickup truck. RP 27-8. When Lopez's truck passed by him, it was occupied by just one person. RP 27. The blue truck was not parked in a stall, but rather in one of the parking lot's lanes of travel. RP 29. Detective Boone moved to a better vantage point, a stall that was behind the two trucks. RP 28. When he observed Lopez's truck again, there were now two individuals in Lopez's truck and none in the blue truck. RP 28, 29. Lopez's truck then did a half-circle in the parking lot and stopped in the adjacent aisle, parallel to the blue truck. RP 29, 31.

Based on Detective Boone's training and experience, he concluded that the driver's maneuvers were consistent with counter-surveillance and the trafficking of illegal drugs. RP 32. Detective Gusby relayed to him that the actions were consistent with a previous controlled buy. RP 32. Both detectives agreed that the actions were atypical for normal shopping behavior. RP 32. Based on those facts, they believed that they had just observed a drug transaction or what would be consistent with a drug transaction. RP 32. Detective Boone left the parking lot and relayed what he saw to Detective Gusby. RP 33. He also contacted Deputy Paganelli with the Yakima County Sheriff's Office and requested that he stop Lopez's vehicle for an investigative detention based on their observations. RP 33.

Deputy Paganelli testified that the task force asked that he contact Lopez's vehicle. RP 36. He stopped the truck and Lopez was driving. RP 36-7. He contacted Lopez and advised him he was being stopped for an investigation. RP 37. Lopez was detained for officer safety due to a pistol being in the door. RP 38. A Sunnyside police department officer arrived and at the deputy's request, placed Lopez in handcuffs. RP 39-40. Deputy Paganelli pointed his narcotics canine on the exterior of the pickup and he alerted on the partially open driver's door. RP 41. The canine detected the odor of heroin, cocaine, or meth, or a combination of those. RP 41. Lopez was then taken to jail. RP 42.

During the 3.6 hearing, Lopez called Officer Cameron as a witness. RP 43-8. Officer Cameron testified regarding a test he did in a completely unrelated case. He testified that he used a NIK test kit for the first time in another case. RP 46. There was a problem reading the Nik test results and he had to get a senior officer's opinion on whether the test was positive or not. RP 47. Officer Cameron said that the Nik test was positive for cocaine, but the lab results came back as negative. RP 46.

The trial court denied Lopez's motion to suppress and entered findings of fact and conclusions of law. CP 55-8. The trial court concluded that the 2017 investigatory stop of the vehicle was lawful because investigating officers possessed specific and articulable facts

giving rise to reasonable suspicion that Lopez was involved in a criminal narcotics transaction. CP 57. The court also found that there was probable cause to arrest the defendant based on the earlier controlled buy that occurred on April 13, 2016. CP 58. Findings of fact and conclusions of law were filed. CP 55-8.

A stipulated facts trial was held on April 9, 2018. Lopez was found guilty of possession of cocaine with intent to deliver. Findings of fact and conclusions of law were filed. CP 63-5.

Lopez now appeals the trial court's denial of his suppression motion.

III. ARGUMENT

A. STANDARD OF REVIEW

When reviewing the denial of a suppression motion, the court must determine whether substantial evidence supports the findings of fact and then determine whether the findings support the conclusions of law. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999); *State v. Hill*, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994). Courts review de novo the trial court's conclusions of law. *State v. Duncan*, 146 Wn.2d 166, 171, 43 P.3d 513 (2002) (citing *Mendez*, 137 Wn.2d at 214).

B. SUBSTANTIAL EVIDENCE SUPPORTS THE TRIAL COURT'S FINDING OF FACT NUMBER FOUR.

Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Unchallenged findings are verities on appeal. *Id.*

Here, Lopez does not challenge any of the findings, other than finding number four “to the extent that it presumes criminal activity was afoot.” Appellant’s Brief at 1. The remaining unchallenged findings are verities on appeal. 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.

Substantial evidence supported this finding. The court heard about both the 2016 and 2017 observations. In addition, Detective Boone testified regarding what he concluded based on his observations:

Based on my training and experience, I identified that to be consistent with counter surveillance and the trafficking of illegal drugs and I called that out to Detective Gusby who was in the area...

...

Yeah, so Detective Gusby was also out in the area working surveillance in a different capacity, different location. I updated my observations and my interpretation of what I was seeing and Detective Gusby relayed that that was consistent with a previous controlled buy and we both agreed that the actions of moving in a lot in the way that the truck did very atypical for normal shopping behavior leaving the vehicle in a stall – or rather in a lane of travel instead of being in a stall. Once again, not something you would typically do in a parking lot, more consistent with counter surveillance. Based on those facts we believed mutually that I had just observed a drug transaction or what would be consistent with a drug transaction.

RP 32. Detective Boone explained the basis for the stop:

I believe based on what I saw that Mr. Lopez had engaged in a drug transaction because it was consistent with a controlled purchase that had occurred in the past and based on my training and experience what had occurred in front of me was consistent with drug trafficking as I've seen it.

RP 34. He was then asked if he factored in the prior contact that Detective

Gusby had with Lopez in his analysis. RP 34. He responded:

I factored that in as being consistent with what I had known Mr. Lopez to do in the

past and that further corroborated what I was viewing in the moment.

RP 34.

The finding in question has two parts. The first part is that the observations in 2017 were *consistent* with the observations in 2016. The testimony at the 3.6 hearing supported this fact. Based on the description of each incident and Detective Boone's testimony, the trial court could have concluded that the observations of each incident were consistent with each other. On both occasions, Lopez's maneuvers in the parking lot were abnormal and indicative of counter-surveillance and a drug transaction.

The second part of finding four is that based on the detective's training and experience, the 2017 observations are *consistent with* the trafficking of illegal drugs and counter-surveillance employed by those involved in the trafficking of illegal drugs. The trial court heard about the detective's training and experience. RP-25. The trial court also heard about what detectives look for during surveillance, such as hand-to-hand transactions and abnormal driving behavior such as seemingly erratically switching between parking positions, stopping at unconventional spots in a parking lot, or pulling over to a side of the road where it would not make sense to pull over. RP 25-6. The trial court then heard about Lopez's behavior on January 26, 2017, and Detective Boone's testimony that the

actions were consistent with drug trafficking and counter-surveillance. As such, this Court should find that there was substantial evidence of finding of fact number four and that it is a verity on appeal.

C. THE TRIAL COURT CORRECTLY DENIED THE MOTION TO SUPPRESS BECAUSE THE STOP WAS A VALID INVESTIGATIVE DETENTION.

The detention of Lopez's truck was a valid investigative detention, or a *Terry* stop. Under *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), police may briefly detain and question an individual—even though probable cause is lacking—if they have a well-founded suspicion based on objective facts that he is connected to actual or potential criminal activity. *See also State v. Sieler*, 95 Wn.2d 43, 46, 621 P.2d 1272 (1980). A police officer making such a stop must be able to point to “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” *Terry*, 392 U.S. at 21. Such facts are “judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search “warrant a [person] of reasonable caution in the belief” that the action taken was appropriate?” *State v. Almanza-Guzman*, 94 Wn. App. 563, 566, 972 P.2d 468 (1999) (quoting *State v. Barber*, 118 Wn.2d 335, 343, 823 P.2d 1068 (1992)). In other words, an articulable suspicion is a “substantial possibility that criminal conduct has occurred or is about to

occur.” *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). And the level of articulable suspicion required for a car stop is no greater than required for a pedestrian stop. *Id.* at 6 (citing *Delaware v. Prouse*, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979)).

Lopez argues that there was no exigency or need for haste. However, a vehicle’s potential mobility is an exigent circumstance. *See, e.g., State v. Day*, 161 Wn.2d 889, 897, 168 P.3d 1265 (2007) (explaining that “*Terry* has also been extended to traffic infractions, ‘due to the law enforcement exigency created by the ready mobility of vehicles’” (quoting *State v. Johnson*, 128 Wn.2d 431, 454, 909 P.2d 293 (1996)); *State v. Patterson*, 112 Wn.2d 731, 774 P.2d 10 (1989) (recognizing a vehicle’s potential mobility as one exigent circumstance, but holding there must be additional exigencies to justify a warrantless search of a parked, unoccupied vehicle). In this case, Lopez was leaving the area in a vehicle after a suspected drug transaction. As such, there was a clear exigency created by his mobility--the suspect and potential evidence were leaving the scene in a vehicle.

Lopez argues that no one saw drugs or cash pass hands. Appellant’s Brief at 8. However, the fact that no one saw drugs or cash pass hands does not negate that there was articulable suspicion that criminal conduct had occurred. An investigative stop can be based upon

unusual activity recognized by an experienced police officer, standing alone. *Terry v. Ohio* is an example: in that case, the stop was based upon an officer's observation of two men repeatedly taking turns walking past and peering into a store window; he reasonably suspected they were casing the location for a robbery. 392 U.S. 1, 6, 88 S.Ct. 1868, 20 L. Ed. 2d 889 (1968); see also *State v. White*, 76 Wn. App. 801, 888 P.2d 169 (1995) (veteran narcotics officer's recognition that unknown man's actions were consistent with those of a lookout or setup man were sufficient to establish probable cause for arrest), *aff'd*, 129 Wn.2d 105, 915 P.2d 1099 (1996). A number of cases dealing with suspected drug transactions involve no firsthand observation of any exchange. See, e.g., *Kennedy*, 107 Wn.2d at 3 (officer "saw nothing in Kennedy's hands nor any suspicious activity"); *Glover*, 116 Wn.2d 509, 806 P.2d 760 (no observed transaction). The detective's failure to see a transaction hardly means that none occurred--Lopez and others would be expected to make their movements as discreet as possible.

Lopez also argues that the driver of the truck was not identified. Appellant's Brief at 11. However, caselaw does not require that a suspect be identified prior to a *Terry* stop. See, e.g., *State v. Biegel*, 57 Wn. App. 192, 194, 787 P.2d 577 (actions fitting the normal mode of conduct for a drug transaction in high crime area supported *Terry* stop, even though

neither individual was known to officer to be a user or a dealer), *review denied*, 115 Wn.2d 1004 (1990); *State v. Glover*, 116 Wn.2d 509, 511-12, 806 P.2d 760 (1991) (unknown suspect in apartment complex having a history of high drug activity). Here, Lopez was stopped because he was suspected of criminal activity. Nothing requires that an officer know the name of a suspect or positively identify a suspect they are following *before* stopping him to investigate whether a crime was committed.

Lopez argues that the behavior observed was not inherently suspicious and that there could be innocent explanations for the behavior. Appellant's Brief at 9. However, actions equally consistent with criminal or non-criminal activity may justify a *Terry* stop. *See Kennedy*, 107 Wn.2d at 6. That the circumstances could also be consistent with noncriminal activity does not defeat the articulable suspicion of criminal activity justifying an investigative stop. Innocent explanations can be imagined for all but the most unusual conduct, and some conduct would almost always be seen as innocent were it not for surrounding circumstances that reasonably arouse suspicion. *See, e.g., Glover*, 116 Wn.2d at 515 (notice that defendant was carrying something in a plastic baggie is not inherently suspect, but was a factor in an area where plastic baggies are commonly used to transport narcotics).

Here, the information about the 2016 incident, combined with the actions in 2017 that were recognized by trained law enforcement officers as characteristics of a drug deal, amounted to articulable suspicion justifying the *Terry* stop of Lopez.

In support of his argument, Lopez relies on *State v. Doughty* and *State v. Richardson*. Both cases are distinguishable from the case at hand. In *Doughty* the defendant visited a suspected drug house at 3:20 a.m., stayed for two minutes and then drove away. Those facts did not warrant a *Terry* stop. The court held that “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.” *State v. Doughty*, 170 Wash. 2d 57, 63, 239 P.3d 573, 575 (2010). The case at hand did not involve Lopez visiting a suspected drug house in the middle of the night.

In *Richardson*, an officer stopped the defendant because he was in a high crime area, late at night, walking near someone the officer suspected of “running drugs.” *State v. Richardson*, 64 Wash. App. 693, 697, 825 P.2d 754, 757 (1992). The officer did not see any suspicious activity between them. *Id.* The officer seized both of them and the court found that the officer did not articulate objective facts warranting a reasonable suspicion of Mr. Richardson. *Id.*

In this case, Detective Boone had much more than the officer had in *Richardson*. In *Richardson*, the officer suspected criminal activity solely because the suspect was walking with a known drug dealer in a high crime area late at night. Here, Detective Boone had much more. He observed abnormal parking lot maneuvers indicative of counter-surveillance techniques in which one attempts to determine whether he or she is being followed and to evade followers. On top of that, there were observations from a prior controlled buy involving the same truck. The counter-surveillance techniques were observed in both incidents and were consistent each time. These techniques were observed through the lens of the detectives' collective experience and strongly suggested a drug transaction. By the time Lopez was stopped, there was an articulable suspicion of criminal activity i.e. facts sufficient to create a substantial possibility of a crime. As such, this court should affirm the trial court's decision to deny Lopez's motion to suppress.

IV. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Lopez's conviction.

Respectfully submitted this 13th day of December, 2018,

s/Tamara A. Hanlon
TAMARA A. HANLON WSBA 28345
Deputy Prosecuting Attorney

DECLARATION OF SERVICE

I, Tamara A. Hanlon, state that on December 13, 2018, via the portal, I emailed a copy of BRIEF OF RESPONDENT to Alex Newhouse.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 13th day of December, 2018 at Yakima, Washington.

s/Tamara A. Hanlon
TAMARA A. HANLON
WSBA#28345
Senior Deputy Prosecuting Attorney
Yakima County, Washington
128 N. Second Street, Room 329
Yakima, WA 98901
Telephone: (509) 574-1210
Fax: (509) 574-1211
tamara.hanlon@co.yakima.wa.us

APPENDIX A

Bi-Mart

1. Driver of black truck got into Lopez's passenger side

3. Lopez Comes Back To Same Spot and Drops Off Driver Of Black Truck

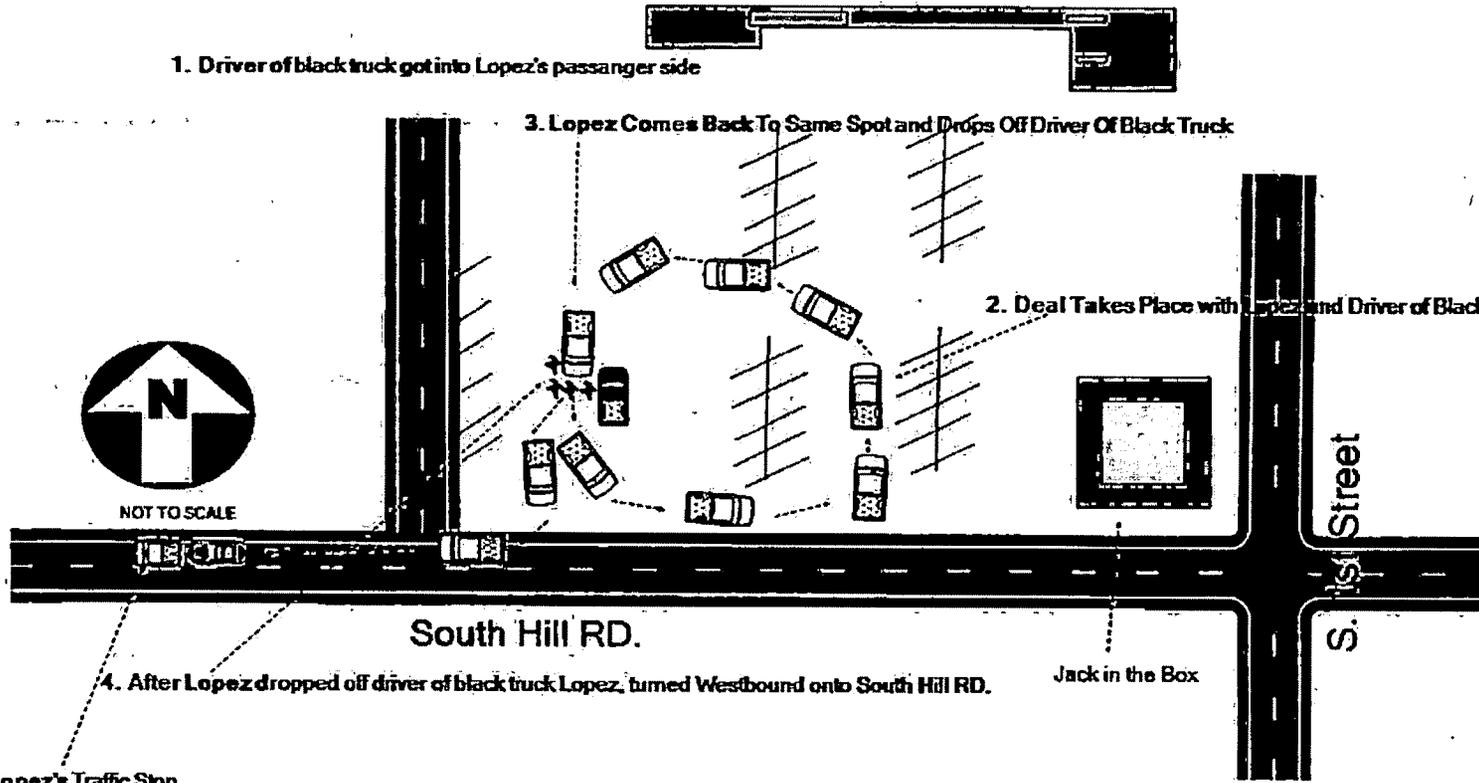
2. Deal Takes Place with Lopez and Driver of Black Truck



NOT TO SCALE

4. After Lopez dropped off driver of black truck Lopez, turned Westbound onto South Hill RD.

5. Lopez's Traffic Stop



APPENDIX B



YAKIMA COUNTY PROSECUTING ATTORNEY'S OFF

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Transmittal Information

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