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No. 36262-1-III

IN THE COURT OF APPEALS
OF THE
STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Respondent,

v.

P.W.W.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR YAKIMA COUNTY, JUVENILE
DIVISION

The Honorable Judge Richard Bartheld

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Sergeant Lewis of the Moxie Police Department stopped a vehicle containing four juveniles for a traffic infraction. P.W.W. was the front-seat passenger. Sergeant Lewis noted a strong odor of fresh marijuana upon contact with the occupants. After the driver admitted none of the occupants were over 18, he was questioned and denied knowing anything about the source of the smell. P.W.W. was similarly detained and after initial denial, admitted to having a blunt and a jar of marijuana in his backpack. The State charged him with Possession of Under 40 grams of Marijuana – under age 21.

The defense filed a suppression motion, alleging insufficient specific facts to detain P.W.W. pursuant to *Terry v. Ohio* and questioning without *Miranda* warnings. The trial court denied the motion. P.W.W. was found guilty after a stipulated fact trial.

P.W.W. now appeals, arguing the trial court erred in denying his suppression motion.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in denying P.W.W.'s motion to suppress, where the facts did not support an individualized suspicion of criminal activity as to P.W.W.
2. The trial court erred in entering Conclusion of Law No. 2:

Sgt. Lewis had specific and articulable facts to reasonably support the intrusion. The automobile was occupied by four juveniles, he could smell the marijuana from within the vehicle, and none of the individuals were of an age to lawfully possess marijuana.

(CP 39).

C. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether the trial court erred in denying P.W.W.'s motion to suppress and entering Conclusion of Law No. 2, where the facts did not support an individualized suspicion of criminal activity as to P.W.W.

D. STATEMENT OF THE CASE

On February 1, 2018, at approximately 5:14 p.m., Moxie Police Sergeant Mark Lewis observed a silver Chevrolet Malibu roll through a stop sign in the area of Postma and St. Hilaire Roads in Yakima County, Washington. (CP 4). He stopped the vehicle and contacted the driver, 17-year-old S.E. (CP 4; Defense Ex. 3 (COBAN) at 02:59, 03:12). S.E. had three passengers, including Appellant P.W.W. in the front passenger seat; K.M. in the right rear passenger seat; and T.W. in the left rear passenger seat. (CP 4). Sergeant Lewis believed all three passengers looked to be

under age 18. (CP 4). S.E. conceded to Sergeant Lewis that his passengers were 17. (Def. Ex. 3 at 04:00).

After returning to his patrol car with S.E.'s paperwork, Sergeant Lewis re-approached him, asking S.E. to step out of the car and talk to him. (Def. Ex. 3 at 04:33, 05:26). Sergeant Lewis told S.E. that he could smell marijuana in the car and he knew no one in the car was 18 years old. (Def. Ex. 3 at 05:40, 05:45, 05:48). He told S.E. that "honesty goes a long way," and asked who had the marijuana. (Def. Ex. 3 at 05:52). S.E. denied that he possessed any marijuana, that there was any marijuana in the car, or that any of his passengers had any marijuana. (Def. Ex. 3 at 05:52). Sergeant Lewis again told S.E., "honesty goes a long way. I'm not trying to hem any 16- or 17-year-old kids up. But I'm not going to let you out of here until I know for sure you ain't got any marijuana." (Def. Ex. 3 at 06:26). S.E. continued to deny knowledge of any marijuana. (Def. Ex. 3 at 06:34). He told Sergeant Lewis to obtain a warrant when he requested permission to search the vehicle. (Def. Ex. 3 at 06:57). Sergeant Lewis then patted S.E. down and placed him in the back of his patrol vehicle, telling him, "have a seat back here while I talk with your passengers and see if anyone wants to fess up." (Def. Ex. 3 at 07:04).

Sergeant Lewis returned to the patrol vehicle and opened P.W.W.'s door, telling him, "hop out and come talk to me." (Def. Ex. 3 at 08:06).

The two walked to the rear of the vehicle, where Sergeant Lewis told P.W.W., “so the reason he’s in the backseat of my car right now. None of you guys are 18 years old. I can smell the marijuana in that car so no one in this car can have a medical marijuana card to make it legal...so what do you know about any marijuana in the car or on you or anything like that?” (Def. Ex. 3 at 08:20). P.W.W. told Sergeant Lewis that he was smoking a little bit earlier, but he didn’t have any marijuana on his person or in his bag. (Def. Ex. 3 at 08:42).

Sergeant Lewis told P.W.W., “honesty would go a long way here. I’m not looking to hem people up, 16- or 17-year-old kids up. If you’re not going to be honest with me, I only have one other way to go and that’s the hard way. That make sense? So do you have any marijuana in your bag?” (Def. Ex. 3 at 08:49). P.W.W. then admitted he had a small amount of marijuana in his bag. (Def. Ex. 3 at 09:06). Sergeant Lewis commended P.W.W. for his honesty and asked if the other passengers knew he had the marijuana. (Def. Ex. 3 at 09:37). Sergeant Lewis further went on, “like I said, I don’t want to hem anyone up. If you’re honest with me I’ll work with you. You’re a juvenile, you’re not in a big ton of trouble.” (Def. Ex. 3 at 10:00). Sergeant Lewis told P.W.W. to put his bag on the trunk, and P.W.W. admitted he also had a jar of marijuana in addition to the blunt he had previously disclosed. (CP 4, Def. Ex. 3 at 11:47).

Based on these events, the State charged P.W.W. with Possession of a Controlled Substance, Marijuana – Less than 40 grams under age 21. (CP 1). The defense filed a Motion to Suppress Physical Evidence Pursuant to CrR 3.6, alleging Sergeant Lewis had no individualized suspicion to detain P.W.W. pursuant to *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), and that Sergeant Lewis obtained P.W.W.’s statements in violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). (CP 15-20). The State’s Response argued that Sergeant Lewis was permitted to detain P.W.W. pursuant to *Terry*, and *Miranda* warnings were not required. (CP 22-27). During the motion hearing, the court did not hear testimony, but instead admitted the COBAN recording. (RP 17, CP 48, Def. Ex. 3).

The court denied the defense’s motion in Written Findings of Fact and Conclusions of Law on July 23, 2018, and incorporated its oral ruling. (CP 31, 37-40, RP 26-35, 49). The Findings of Facts were consistent with the facts as described above. (CP 37-39, RP 26-28). The trial court issued the following pertinent Conclusions of Law:

2. Sgt. Lewis had specific and articulable facts to reasonably support the intrusion. The automobile was occupied by four juveniles, he could smell the marijuana from within the vehicle, and none of the individuals were of an age to lawfully possess marijuana.

(CP 39, RP 29-30).

The court conducted a stipulated facts trial on July 23, 2018, pursuant to the Defendant's Stipulation to Possession of Marijuana; Acknowledgement and Setting of Stipulated Trial. (CP 41-42, RP 50-56). The court found P.W.W. guilty of Possession of a Controlled Substance, Marijuana and entered disposition on the same date. (RP 55, CP 43-47). This appeal timely follows. (CP 50).

E. ARGUMENT

Issue 1: Whether the trial court erred in denying P.W.W.'s motion to suppress and entering Conclusion of Law No. 2, where the facts did not support an individualized suspicion of criminal activity as to P.W.W.

The trial court erred in entering Conclusion of Law No. 2 and finding an odor of marijuana coming from a vehicle occupied by four juveniles was sufficient to constitute individualized suspicion of criminal activity as to P.W.W. Since the source of the smell could not be pinpointed, Sergeant Lewis did not have facts specific to P.W.W. supporting a detention under *Terry v. Ohio*.

A motion to suppress is reviewed "to determine whether substantial evidence supports the trial court's challenged findings of fact and, if so, whether the findings support the trial court's conclusions of law." *State v. Cole*, 122 Wn. App. 319, 322–23, 93 P.3d 209 (2004) (citing *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999)). Unchallenged findings of fact are verities on appeal. *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). Conclusions of law in

an order pertaining to the suppression of evidence are reviewed de novo. *State v. Arreola*, 176 Wn.2d 284, 291, 290 P.3d 983 (2012).

All police seizures of a person, including brief detentions, must be tested against the Fourth Amendment guaranty of freedom from unreasonable searches and seizures. U.S. Const. amend. IV; *Mapp v. Ohio*, 367 U.S. 643, 648, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961). The burden is on the State to justify a warrantless seizure of a person, as all warrantless seizures are presumed unlawful. *State v. Parker*, 139 Wn.2d 486, 496, 987 P.2d 73 (1999).

An officer may briefly detain and question an individual if the officer has reasonable and articulable suspicion of criminal activity. *Terry*, 392 U.S. at 21. The officer must be able to point to “specific and articulable facts which, taken together with rational inferences from those facts reasonably warrant the intrusion.” *Id.* To meet the *Terry* standard, an officer’s suspicion must be individualized. *Parker*, 139 Wn.2d at 497-98.

A generalized suspicion based purely on an individual’s presence in a particular area cannot justify a *Terry* stop. *Sibron v. New York*, 392 U.S. 40, 62, 88 S. Ct. 1889, 20 L. Ed. 2d 917 (1968). Particularized suspicion requires “some suspicion of a particular crime or a particular person, and some connection between the two.” *State v. Martinez*, 135 Wn. App. 174, 182, 143 P.3d 855 (2006); *see also Brown v. Texas*, 443 U.S. 47, 52, 99 S.

Ct. 2637, 61 L. Ed. 2d 357 (1979) (“The fact that appellant was in a neighborhood frequented by drug users, standing alone, is not a basis for concluding that appellant himself was engaged in criminal conduct.”); *State v. Diluzio*, 162 Wn. App. 585, 593, 254 P.3d 218 (2011) (defendant’s having a conversation with a woman who got into the passenger side of his vehicle in area known for prostitution did not justify seizure); *State v. Doughty*, 170 Wn.2d 57, 63, 239 P.3d 573 (2010)(“[p]olice 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”).

Where police interact with passengers for an investigatory purpose, they must have independent reasonable suspicion to do so. *City of Spokane v. Hays*, 99 Wn. App. 653, 659, 995 P.2d 88 (2000); *see also State v. Rankin*, 151 Wn.2d 689, 699, 92 P.3d 202 (2004).

In *State v. Grande*, 164 Wn.2d 135, 144, 987 P.3d 248 (2008), the Court held that marijuana odor itself was not a basis of probable cause to arrest the passenger. The defendant in *Grande* was the passenger in a vehicle detained for a traffic violation. *Id.* at 138-39. While speaking to the driver, the officer observed a “moderate smell of marijuana” coming from the car. *Id.* at 139. Both the driver and the defendant were arrested. *Id.* The officer found a marijuana pipe with a small amount marijuana on the defendant while searching him incident to arrest. *Id.*

The Court's analysis turned on the premise that the articulable suspicion rising to the level of probable cause to arrest is individual to a person. *Id.* at 141. "Our constitution requires individual probable cause that the defendant committed some specific crime." *Id.* at 145. Further, "our cases have strongly and rightfully protected our constitution's protection of *individual* privacy." *Id.* at 146; *but see State v. Jimma*, No. 73422-9-I, 2016 WL 4081181, at *1-3 (Wash. Ct. App. Aug. 1, 2016) (upholding a *Terry* stop of a passenger to investigate the possible presence of marijuana in a car, finding *Grande* does not control); *see also* GR 14.1(a) (authorizing citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013, as nonbinding authority).

Here, while P.W.W.'s case differs factually from *Grande* in that Sergeant Lewis was conducting a *Terry* stop based on the odor of marijuana alone rather than an arrest, the analysis of P.W.W.'s individual right to privacy is the same. P.W.W. was the passenger in a vehicle detained for a traffic violation. Sergeant Lewis had no more reason to specifically suspect P.W.W. of being in possession of marijuana than the driver or the other two passengers. No articulable facts existed that could individualize the suspicion to P.W.W., or any of the other three people in the vehicle. Nothing in the record suggests that P.W.W. was exhibiting any effects of being under the influence, or even that Sergeant Lewis had any specific contact with him prior to having him step out of the vehicle.

The facts of P.W.W.'s case are also analogous those in the jurisprudence of cases where individuals were present in high-crime areas. *See, e.g., Doughty*, 170 Wn.2d at 63. P.W.W.'s mere presence in a vehicle that smelled of marijuana was not sufficient to connect him with the commission of a crime. It was not lawful to detain him to investigate any more than it was lawful to detain those defendants in high-crime areas without more facts particularized to them indicating they committed a crime. Sergeant Lewis did not have specific and articulable facts to support the intrusion. The trial court erred in denying P.W.W.'s motion to suppress.

F. CONCLUSION

The trial court erred in denying P.W.W.'s suppression motion and finding that individualized suspicion existed justifying a *Terry* stop of P.W.W. An odor of marijuana coming from a vehicle with four occupants, without more information as to its source, did not constitute specific and articulable facts individual to P.W.W. The trial court should have granted the suppression motion and excluded the evidence.

Respectfully submitted this 13th day of March, 2019.

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