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Division III
State of Washington
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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

APPEAL FROM THE SUPERIOR COURT
OF YAKIMA COUNTY

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

I. Issue Presented For Review.....1

II. Statement of the Case.....1

III. Argument.....4

 A. Sergeant Lewis was authorized to briefly seize P.W.W. as
 Sergeant Lewis had reasonable suspicion to investigate each
 occupant of the vehicle for possessing marijuana while not
 of legal age.....4

IV. Conclusion.....9

TABLE OF AUTHORITIES

Washington Cases

<i>Crosswhite v. Department of Social & Health Services</i> , 197 Wn. App. 539, 389 P.3d 731 (2017).....	6
<i>State v. Acrey</i> , 148 Wn.2d 738, 64 P.3d 594 (2003).....	6
<i>State v. Doughty</i> , 170 Wn.2d 57, 239 P.3d 573 (2010)	7
<i>State v. Eserjose</i> , 171 Wn.2d 907, 259 P.3d 172 (2011)	4
<i>State v. Fuentes</i> , 183 Wn.2d 149, 352 P.3d 152 (2015)	4, 5
<i>State v. Grande</i> , 164 Wn.2d 135, 187 P.3d 248 (2008).....	5, 6
<i>State v. Heritage</i> , 152 Wn.2d 210, 95 P.3d 345 (2004).....	7
<i>State v. Jimma</i> , No. 73422-9-I, 2016 Wash. App. LEXIS 1808 (Aug. 1, 2016).....	6, 7
<i>State v. Ruem</i> , 179 Wn.2d 195, 313 P.3d 1156 (2013).....	7
<i>State v. Tarango</i> , 7 Wn. App. 2d 425, 434 P.3d 77 (2019)	5
<i>State v. Weyand</i> , 188 Wn.2d 804, 399 P.3d 530 (2017)	4, 5

Federal Cases

<i>Terry v. Ohio</i> , 392 U.S. 1, 88 S. Ct. 1868 (1968).....	4
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I. ISSUE PRESENTED FOR REVIEW

1. The reasonable suspicion required to briefly detain a suspect for investigatory purposes imposes a lower burden on law enforcement than probable cause to justify a formal arrest. Here, P.W.W. was removed from a vehicle for questioning after the officer, having detected the odor of marijuana emanating from the vehicle, had determined that all occupants of the vehicle were not of legal age to possess marijuana. Was P.W.W. lawfully seized when P.W.W. was briefly questioned outside the vehicle to facilitate the officer's investigation into suspected criminal conduct?

II. STATEMENT OF THE CASE

On March 15, 2018, P.W.W. was charged with possessing less than forty grams of a controlled substance, marijuana, while under twenty-one years of age. Clerk's Papers (hereinafter "CP") at 1.

On May 18, 2018, P.W.W. filed a motion seeking to suppress physical evidence pursuant to CrR 3.6. *See* CP at 15–20. A motion hearing was conducted on June 8, 2018. VRP 6/8/18 at 12. The parties agreed via a stipulation that Moxee Police Department Sergeant Mark Lewis' dashboard camera video could be played in lieu of testimony. *Id.* at 16–18. The facts concerning the underlying traffic stop are not in dispute.

On February 1, 2018, in Yakima County, Washington, Sergeant Lewis performed a justified traffic stop on a silver 1999 Chevrolet Malibu which contained four occupants. CP at 37. The vehicle was driven by S.E. *Id.* at 38.

Immediately upon contacting S.E. at the front driver's side window, Sergeant Lewis, based on his training and experience, recognized a strong odor of marijuana emanating from the vehicle. *Id.* Noting that the occupants appeared to be young, Sergeant Lewis asked S.E. if he was eighteen years or older. *Id.* S.E. responded that he was seventeen years old. *Id.* After Sergeant Lewis asked if any of the remaining occupants were over eighteen years old, S.E. responded that they were not. *Id.*

Sergeant Lewis removed S.E. from the vehicle and asked him if he had any marijuana in his possession. *Id.* S.E. denied possessing marijuana and was placed in Sergeant Lewis' patrol vehicle. *Id.*

Returning to the Malibu, Sergeant Lewis asked P.W.W. to exit the vehicle. *Id.* P.W.W. admitted to being under the age of eighteen and denied possessing marijuana. *Id.* Sergeant Lewis continued questioning P.W.W. as follows

[h]onesty would go a long way here, I am not looking to hem people up, 16, 17-year old kids up, okay, but if you are not going to be honest with me, then I only have one other

way to go and that is the hard way, does that make sense?

Id. P.W.W. then admitted possessing a “blunt” of marijuana as well as a jar containing marijuana. *Id.* at 39.

After hearing argument from counsel, the trial court denied P.W.W.’s motion to suppress. *Id.* at 31, *see also* VRP 6/8/18 at 26–34. Findings of fact and conclusions of law were entered on July 23, 2018. CP at 37–40. Specifically, the trial court found, in Conclusion of Law 2, that “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 at 39.

On July 23, 2018, P.W.W. agreed to a stipulated facts bench trial. CP at 41–42; VRP 7/23/18 at 50. After reviewing the submitted reports, the trial court found P.W.W. guilty of possessing less than forty grams of a controlled substance, marijuana, while under twenty-one years of age. VRP 7/23/18 at 56. P.W.W. was sentenced to twelve months of supervision and sixteen community service hours. CP at 43–47.

III. ARGUMENT

A. Sergeant Lewis was authorized to briefly seize P.W.W. as Sergeant Lewis had reasonable suspicion to investigate each occupant of the vehicle for possessing marijuana while not of legal age

P.W.W. claims that “[s]ince the source of the [marijuana] smell could not be pinpointed, Sergeant Lewis did not have facts specific to P.W.W. supporting a detention under *Terry v. Ohio*.” Brief of Appellant at 6.

A trial court’s conclusions of law following a motion to suppress evidence are reviewed *de novo*. *State v. Eserjose*, 171 Wn.2d 907, 912, 259 P.3d 172 (2011).

A warrant is generally required for a police officer to seize a person suspected of criminal activity. *State v. Weyand*, 188 Wn.2d 804, 811, 399 P.3d 530 (2017). However, under *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968), an officer may “briefly detain a person for questioning, without a warrant, if the officer has reasonable suspicion that the person is or is about to be engaged in criminal activity.” *Weyand*, 188 Wn.2d at 811. “A valid *Terry* stop requires that the officer have reasonable suspicion of criminal activity based on specific and articulable facts known to the officer at the inception of the stop.” *State v. Fuentes*, 183 Wn.2d 149, 158, 352 P.3d 152 (2015). A reviewing court looks at the “totality of the

circumstances” when evaluating the reasonableness of an officer’s suspicion including “the officer’s training and experience, the location of the stop, the conduct of the person detained, the purpose of the stop, and the amount of physical intrusion on the suspect’s liberty.” *Id.*

“A suspect’s activity that is consistent with noncriminal activity as well as criminal activity may still justify a brief detention under *Terry*.” *State v. Tarango*, 7 Wn. App. 2d 425, 433, 434 P.3d 77 (2019). “The question for the officer and for a reviewing court is whether the circumstances support a reasonable suspicion that there is a ‘substantial possibility that criminal conduct has occurred or is about to occur.’” *Id.* (quoting *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986)).

“Reasonable suspicion must be *individualized* to the person being stopped.” *Weyand*, 188 Wn.2d at 816 (emphasis in original). In *Weyand*, the Court found that “[p]olice cannot justify a suspicion of criminal conduct based only on a person’s location in a high crime area.” *Id.* at 817; *see also Fuentes*, 183 Wn.2d at 161 (finding no reasonable suspicion when “[t]he officer admitted that he did not have facts to believe Sandoz engaged in drug activity; he just felt ‘the entire circumstance was suspicious.’”).

P.W.W. relies on *State v. Grande*, 164 Wn.2d 135, 187 P.3d 248 (2008). In *Grande*, the Court determined that “the smell of marijuana in

the general area where an individual is located is insufficient, without more, to support probable cause to arrest.” *Id.* at 146–47. However, the Court clarified that

[t]his does not mean . . . that a law enforcement officer must simply walk away from a vehicle from which the odor of marijuana emanates and in which more than one occupant is present if the officer cannot determine which occupant possessed or used the illegal drug. In this case, because the officer had training and experience to identify the odor of marijuana and smelled this odor emanating from the vehicle, he had probable cause to search the vehicle.

Id. at 146.

Grande involved whether the officer had probable cause to arrest, a higher constitutional bar than when officers seize an individual for brief investigatory questioning. *See State v. Acrey*, 148 Wn.2d 738, 746–47, 64 P.3d 594 (2003) (“A police officer may conduct an investigatory stop based upon less evidence than is needed for probable cause to make an arrest.”). In *State v. Jimma*, No. 73422-9-I, 2016 Wash. App. LEXIS 1808 (Aug. 1, 2016),¹ an officer, after smelling the odor of marijuana while speaking with the driver, asked all four underage occupants of a vehicle

¹ Following *Crosswhite v. Department of Social & Health Services*, 197 Wn. App. 539, 389 P.3d 731 (2017), the State cites this unpublished opinion under GR 14.1 as persuasive authority. The unpublished opinion is not binding upon this Court.

whether they possessed marijuana. *Id.* at *2. The court found that the officer “had a reasonable suspicion that one of the car’s underage occupants had marijuana. He was therefore entitled to ask a moderate number of questions to confirm or dispel his suspicions as part of a *Terry* stop.” *Id.* at *6; *see also State v. Ruem*, 179 Wn.2d 195, 222, 313 P.3d 1156 (2013) (Johnson, J.M., J., concurring in part, dissenting in part) (“*Grande* merely sought to prohibit law enforcement officers from arresting a car full of people just because they smell marijuana inside, which could originate from one person or even the car itself.”).

Similarly, in *State v. Heritage*, 152 Wn.2d 210, 95 P.3d 345 (2004), park security officers approached a group of minors and asked who a suspected marijuana pipe belonged to. *Id.* at 218–19. The Court found that *Heritage*’s constitutional rights were not violated as “[a]n officer making a *Terry* stop may ask a moderate number of questions to determine the identity of the suspect and to confirm or dispel the officer’s suspicions.” *Id.* at 219.

Unlike suspected drug house cases such as *Weyand* and *State v. Doughty*, 170 Wn.2d 57, 239 P.3d 573 (2010), Sergeant Lewis had more than P.W.W.’s location to base his suspicion that P.W.W. had committed a crime. At the time of the detention, Sergeant Lewis knew that P.W.W. was under 21 years of age. Further, Sergeant Lewis had evidence tying P.W.W.

directly to a marijuana—P.W.W. was seated in the vehicle from which the odor was emanating. By contrast, Weyand, Sandoz, Doughty, and other defendants were merely seen in areas generally known for drug activity without any specific, observed links to controlled substances at the time of their seizures.

Sergeant Lewis had reasonable suspicion to detain, for investigatory purposes, all four occupants of the vehicle to determine which juvenile was in possession of the suspected marijuana. When the seizure occurred, Sergeant Lewis knew that P.W.W. was under 21 years of age and could smell marijuana emanating from the vehicle in which P.W.W. was seated. While, under *Grande*, Sergeant Lewis did not have probable cause to arrest P.W.W. simply for being inside the suspect vehicle, Sergeant Lewis was authorized to briefly question P.W.W. to investigate whether P.W.W., as an individual under 21 years of age, was in violation of the law by possessing the suspected marijuana. The State urges the Court to follow *Jimma* and find that Sergeant Lewis, conducting an investigatory stop rather than a formal arrest, was authorized to briefly detain P.W.W. to inquire as to the marijuana's location.

As Sergeant Lewis merely detained P.W.W. for investigatory purposes and did not perform a formal arrest, Sergeant Lewis did not exceed the scope a lawful warrantless seizure. Accordingly, this Court

should affirm the trial court's ruling denying P.W.W.'s motion to suppress evidence.

IV. CONCLUSION

Sergeant Lewis had reasonable suspicion to briefly detain P.W.W. to investigate suspected illegal activity. The State asks this Court to affirm the trial court's decision denying P.W.W. motion to suppress.

Dated this 23rd day of May, 2019.

STATE OF WASHINGTON

/s/Michael J. Ellis
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DECLARATION OF SERVICE

I, Michael J. Ellis, state that on May 23, 2019, I emailed a copy of BRIEF OF RESPONDENT to Ms. Jill Reuter at admin@ewalaw.com and Ms. Brooke Hagara at brooke@hagaralaw.com. It is also expected that Ms. Reuter and Ms. Hagara will be served using E-Service via the filing portal.

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

DATED this 23rd day of May, 2019, at Yakima, Washington.

/s/Michael J. Ellis

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