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No. 36295-7-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent

v.

CHRISTOPHER LEE MURPHY,

Appellant

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR BENTON COUNTY

NO. 18-1-00063-1

AMENDED BRIEF OF RESPONDENT

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I. RESPONSE TO ASSIGNMENTS OF ERROR

- A. The defendant was properly seized under either the Fourth Amendment to the U.S. Constitution or the Washington State Constitution, article I, section 7.
- B. Findings of Fact 6 and 13 are not contradictory and are supported by substantial evidence.
- C. It is not clear that the defendant is assigning error to Finding of Fact 12. He states that Finding “is indicative of the fact that the officers exceeded the scope of the investigative stop and were conducting a general warrantless search” In any event, there is substantial evidence for this Finding.
- D. Conclusions of Law 3, 4, 5, 6, and 7 are consistent with caselaw in Washington State.

II. STATEMENT OF FACTS

911 call from Motel 6 employee:

Gina Manderson, an employee of Motel 6 in Richland, WA, called 911 on January 9, 2018 at around 6:56 P.M. to ask the police to come to the motel because a man was blocking the entrance to the front door of the motel with his truck and trailer. RP¹ at 6, 83; RP 06/14/2018 at 6. Ms.

¹ Unless otherwise indicated, “RP” refers to the verbatim report of proceedings from 3.6 suppression hearing on August 2, 2018.

Manderson stated she had requested the man to leave several times and he would not. RP 06/14/2018 at 6. She also said he tried to rent a room without a proper identification. *Id.* at 7. When she declined to rent him a room, he asked other individuals to rent a room for him and those individuals became belligerent. *Id.* Ms. Manderson described the pickup as a big, white Dodge with a trailer. *Id.* at 6-7.

Ms. Manderson called back to report that the suspect had moved his truck. *Id.* at 10. She probably did so to alert the police that they should look for the suspect elsewhere, rather than to say that her first call should be ignored because she saw the police officers across the street contact the defendant and stated, “[T]hey got him. They got him. Okay, good. Good.” *Id.* at 9.

Ms. Manderson called 911 a third time so the dispatcher could relay a message to the police that the suspect’s girlfriend was down the street. *Id.* at 11.

When Officer Noren arrives, the defendant makes a “beeline” for him in an aggressive, alarming manner.

Officer Noren of the Richland Police Department responded at approximately 7:00 P.M. and saw a pickup that perfectly matched the one described by the Motel 6 clerk, now in a Zip’s parking lot which was across the street from Motel 6. RP at 110, 117. As he drove to the scene,

he saw the defendant and his girlfriend milling around the pickup. RP at 105. The passenger door of the truck was open, and the female was going back and forth, looking in the back and then looking in the front. RP at 118.

As soon as Officer Noren pulled into the Zip's parking lot, the defendant made direct eye contact with him and began walking a beeline directly toward him. *Id.* Noren stated, "In 21 years of law enforcement I don't think I have ever seen somebody approach me in that manner" RP at 117. Noren stated that the defendant's demeanor and manner of approaching him was alarming. RP at 118. Officer Richman, who arrived just after Noren, said the way the defendant walked toward Noren was aggressive and not normal. RP at 65, 87.

Officer Noren stopped 30-50 yards from the defendant's location, rather than a normal distance of 25-30 feet, so he could tell the defendant to stop well before he got too close. RP at 118-19. Noren got out of his patrol car as soon as he parked and took a defensive position behind the A-pillar of his vehicle. RP at 119. The defendant's hands were in his pockets as he approached. *Id.* He ignored Noren's first command to show his hands and to stop. RP at 87, 119. The defendant continued approaching Noren until he came within five feet. RP at 88.

The Investigation of Criminal Trespass, Possession of Stolen Property and the decision to frisk the defendant.

The police detained the defendant for an investigation into a possible Criminal Trespass at Motel 6. RP at 74, 77. The police were also suspicious of the defendant's truck and trailer. RP at 76. The truck matched the description of a vehicle from the night before and the truck had numerous items in the bed, including a gun safe, a snowmobile, a dirt bike, a four-wheeler, and other items. RP at 13, 76, 112.

Officer Richman talked to the defendant, while Officer Noren talked to the female, later identified as Andrea Slocum. RP at 89-90. The defendant was very evasive about what happened at Motel 6, and he was giving the police inconsistent information. RP at 77, 120.

The defendant was wearing several layers of clothes, which were baggy, and Officer Richman at least five times told him to remove his hands from his pockets. RP at 90, 97. Officer Noren also told the defendant at least four times to take his hands out of his pockets. RP at 90. Between the two officers, there were at least eight or nine times they told the defendant not to put his hands in his pockets. *Id.*

Officer Noren told the defendant, "Listen. One more time and you are going to go in handcuffs for my safety." RP at 123. He had the defendant sit on the wheel well of the trailer. *Id.* Officer Noren peered into

the open bed of the pickup while he was talking to Ms. Slocum. RP at 124. The defendant stood up, took one or two steps toward Noren and again started to put his hands in his pockets. RP at 92. At that point, Officer Richman handcuffed the defendant and frisked him. *Id.*; RP at 94. During the frisk, Officer Richman found the firearm which was the subject of the prosecution of the defendant for Unlawful Possession of a Firearm. RP at 94-95. The firearm was reported to the 911 dispatcher at approximately 7:19 P.M. RP at 79.

Comments regarding statements in the defendant's brief.

The defendant states the Motel 6 desk clerk's second call advising the suspect had moved the truck "was prior to the contact by the officer." Br. of Appellant at 2. To the contrary, Ms. Manderson, the desk clerk, called back shortly after her first call. While on the phone she exclaimed, "[T]hey got him, they got him. Okay, good. Good." RP 06/14/2018 at 9. She then reported that she was calling to inform the police the suspect had moved his truck from the front door. *Id.* at 10.

The defendant states, "The desk clerk, in the 9-1-1 call, did not indicate that Mr. Murphy was told to leave." Br. of Appellant at 7. However, Ms. Manderson stated, "I've asked him several times to leave, and he won't." *Id.* at 6.

III. ARGUMENT

A. The detention and frisk of the defendant was justified as a *Terry* stop.

1. Standard on Review

For a *Terry* stop to be permissible, the State must show that the police officer had a reasonable suspicion that the detained person was, or was about to be, involved in a crime. A “reasonable suspicion” is one that is grounded in specific and articulable facts. *State v. Z.U.E.*, 183 Wn.2d 610, 617, 352 P.3d 796 (2015). The determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior. *State v. Alexander*, 5 Wn. App. 2d 154, 160, 425 P.3d 920 (2018).

While conducting a *Terry* stop, the police are authorized to make a brief, nonintrusive search for weapons, if “a reasonable safety concern exists to justify the protective frisk for weapons” so long as the search goes no further than necessary for protective purposes. *State v. Duncan*, 146 Wn.2d 166, 172, 43 P.3d 513 (2002). Under article I, section 7 of the Washington State Constitution, courts consider the totality of the circumstances, including the officer’s subjective belief, *State v. Day*, 161 Wn.2d 889, 898, 168 P.3d 1265 (2007), and the officer’s training and experience, *State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 760 (1991).

When reviewing the denial of a suppression motion, an appellate court determines whether substantial evidence supports the challenged Findings of Fact and whether the Findings support the Conclusions of Law. “Evidence is substantial when it is enough ‘to persuade a fair-minded person of the truth of the stated premise.’” *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). Conclusions of Law are reviewed de novo. *Id.*

2. The defendant was properly detained and frisked pursuant to a *Terry* stop.

a. The police had a reasonable suspicion that he had just committed a Criminal Trespass in the Second Degree.

The defendant is not challenging the Findings of Fact. He states, “Findings of Fact 6, 12 and 13 are indicative of the officers’ exceeding the scope of their initial contact with Mr. Murphy.” Br. of Appellant at 7.

Here, Ms. Manderson, the Motel 6 desk clerk, told the police that a white Dodge pickup with a trailer had blocked the front entrance and that the driver would not leave after she asked him to. Finding of Fact 2, CP 51; RP 06/14/2018 at 6. That meets the elements for Criminal Trespass in the Second Degree, RCW 9A.52.080, to a) knowingly, b) enter or remain unlawfully, c) upon premises of another.

When Officer Noren arrived, he saw a matching vehicle with a trailer across the street in a parking lot. See Findings of Fact 2 and 3, CP 51; RP at 117.

The defendant emphasizes that the police did not speak with Ms. Manderson, the Motel 6 desk clerk. From the defendant's brief: "The officers did not make any independent determination prior to contacting Mr. Murphy to support their seizure of him." Br. of Appellant at 4. "They did not corroborate anything that was conveyed by the Motel 6 desk clerk . . ." *Id.* at 8. "The officers lack of contact with Motel 6 equates to a lack of corroboration of the information provided by the desk clerk . . . They did not corroborate any other information from the clerk." *Id.* at 9. "The absence of any contact with the desk clerk negates the extent of the interference with Mr. Murphy's liberty." *Id.* at 10.

In this case, a named individual, Gina Manderson, called 911 to report a crime which she was witnessing and for which she was the representative of the victim. It is true that the police did not speak with Ms. Manderson but based on her statements to 911 they had specific reasons to investigate the defendant for criminal trespass. The trial court stated that the standard of reasonable suspicion is very low, and the court was correct. RP 08/09/2018 at 41.

Compare this case to *State v. Guzman-Cuellar*, 47 Wn. App. 326, 734 P.2d 966 (1987). Shortly after 2:00 A.M., the police spotted an individual walk out of a residential driveway, cross the street and enter another yard walking between a fence and a garage. *Id.* at 329. These facts were sufficient for a *Terry* stop to investigate a criminal trespass. *Id.* at 330. There was no report of a prowler in the area and the court held this was not dispositive. “It is generally recognized that crime prevention and detection are legitimate purposes for an investigatory stop.” *Id.* at 331.

In accord is *State v. Glover*, 116 Wn.2d 509, 806 P.2d 760 (1991), where the police stated they stopped the defendant for the following reasons: They were familiar with residents at an apartment complex and saw him exit one of the apartment buildings and did not recognize him; he turned and walked away from the officers; and twisted his baseball cap. *Id.* at 512. Although the defendant claimed to reside at the complex, the court held that there was reasonable suspicion to stop him to investigate a Criminal Trespass. *Id.* at 514.

See also *State v. Little*, 116 Wn.2d 488, 806 P.2d 749, 59 U.S.L.W. 2603 (1991), where a group of juvenile respondents were at the same apartment complex as in *Glover*. The police did not recognize them. Some ran when the police asked them to approach. The court held this was sufficient to justify a detention. *Id.* at 496-97.

The police in *Little* and *Glover* did not confirm with an apartment manager that the individuals they arrested were not residents of the apartment complex in those cases. Likewise, the police in *Guzman-Cuellar* did not confirm with the homeowner that the defendant was not allowed in his or her yard. There was much more evidence in this case. Here, the 911 dispatcher told the police that the Motel 6 desk clerk stated the suspect was not leaving the premises of the business after she asked him to. Officers Noren and Richman did not need to have Ms. Manderson repeat this information.

Based on the totality of circumstances—the desk clerk’s report that the suspect was blocking the entrance to Motel 6 and would not leave, the police seeing the matching vehicle and trailer in a parking lot across the street, and the defendant’s aggressive behavior to the first officer on the scene—the police had a reasonable suspicion that he had committed the crime of Criminal Trespass in the Second Degree.

b. The *Terry* stop was also justified to allow an investigation of the possibility the defendant was in possession of stolen property.

The scope of an investigatory stop may be enlarged or prolonged as required by the circumstances if the stop arouses further suspicions. *Guzman-Cuellar*, 47 Wn. App. at 332. A good example of this principle is

State v. Alexander, 5 Wn. App. 2d 154, 425 P.3d 920 (2018). In *Alexander*, a motorist called 911, identified herself, and said that she saw a man punch a woman. The caller gave a description of the man and woman and a direction of travel. A police officer stopped a man and woman who were walking but who matched the caller's description. *Id.* at 157.

Both denied that he assaulted her. The police ran the man's name through a law enforcement database and found he had a no-contact order protecting a Danyail Carlson. The female with the defendant gave a false name, but the police almost immediately discovered her true identity as Ms. Carlson. *Id.* at 158.

The trial court granted a motion to suppress holding that the *Terry* stop should have been completed when the officer determined there was no assault. The Court of Appeals reversed, holding that the police were authorized to investigate not just the reported assault, but could expand their investigation into whether the defendant's companion was the protected party on the no-contact order. *Id.* at 167.

In this case, the suspicions of Officers Noren and Richman were raised immediately, even before Officer Noren parked, by the defendant walking aggressively at him and refusing commands to stop and take his hands out of his pockets. Findings of Fact 4 and 5, CP 52. Those

suspicious were heightened by the defendant failing to give straight answers to questions about the Motel 6. Finding of Fact 11, CP 52.

The suspicions were further heightened when they learned the pickup and trailer were not owned by the defendant, that they matched the description of a vehicle involved in a crime the night before, and that the pickup and trailer were both loaded with multiple off-road vehicles, equipment, and a gun safe. Finding of Fact 6, CP 52. Was it a coincidence that, just before he was handcuffed, the defendant stood up and began taking one or two steps toward Officer Noren when Noren was looking into the bed of the pickup? Perhaps it was a coincidence, but the police could reasonably suspect that there was something in the pickup or the trailer the defendant did not want them to see.

The fact that the police determined later that the pickup and the property were not stolen does not mean they could not reasonably suspect the defendant was in possession of stolen property. Any reasonable police officer would be suspicious after a pickup matching a description of one involved in a crime the previous night, seeing it loaded with property, and being approached aggressively by the driver. The police lawfully extended the scope of the *Terry* stop based on this information.

- c. **The scope of the *Terry* stop, particularly the duration, was appropriate.**

The defendant also emphasizes the duration of the *Terry* stop. “It does not take nineteen minutes to determine whether or not a criminal trespass occurred.” Br. of Appellant at 10.

There is no rigid time limitation of *Terry* stops. The proper scope of a *Terry* stop depends on the purpose of the stop, the amount of physical intrusion upon the suspect’s liberty, and the length of time the suspect is detained. *State v. Lee*, 7 Wn. App. 2d 692, 702, 435 P.3d 847 (2019).

Consider these factors in this case. The defendant was very evasive and would not elaborate about any incident at Motel 6. RP at 120. When he provided information, it was inconsistent. RP at 77. This is borne out by the defendant’s own testimony.

He had an opportunity to explain simply and directly his side of the Motel 6 incident; he did so in his testimony. RP 08/09/2018 at 4-5. But instead, the defendant in response to questions from the police about what happened at Motel 6 repeatedly told them to go to Motel 6 and would not answer. RP 08/09/2018 at 14-15. The trial court found that the defendant was hesitant to answer questions and the evidence supports this Finding. Finding of Fact 11, CP 52.

Ms. Slocum’s attitude was no better. Her unwillingness to assist the police is illustrated by the following exchange about who drove the pickup from the Motel 6 to the Zip’s parking lot. Note that the defendant’s

driving privilege was suspended, so she did not want to state that the defendant drove the pickup. Finding of Fact 9, CP 52.

Q: [W]ho drove the vehicle [to Zip's]?

A: A friend of ours.

Q: Okay. And does that friend have a name?

A: Yes, he does.

Q: Okay. And what is his name or her name?

A: Huh?

Q: What is that person's name?

A: Billy.

Q: Okay. What is the last name of Billy?

A: I am not actually sure what his last name is.

Q: Okay. And where does Billy go?

A: I don't know. He left and was—he left with a girl.

Q: So there was another person with you?

A: No.

Q: So how do you know Billy left with a girl?

A: Well, because he said he was. So I am assuming. I don't know. I didn't see him leave with a girl.

RP at 25-26.

This testimony was contradicted by the defendant who said that “Billy’s” girlfriend was with them in the truck. RP 08/09/2018 at 7. The defendant also seemed to admit that “Billy” was not driving the pickup:

Q: Now with the same green pen, can you show us the route that *you* drove across the street (Emphasis added.)

A: [W]e drove around the building this way We were going try to park in this area right here. So we did. We did circle Zip's.

RP 08/09/2018 at 10.

It is not important whether the defendant drove to Zip's while suspended. What is important is that both the defendant and Ms. Slocum

were being evasive with the police. Their stories were not consistent. The police were concerned for their safety because of the defendant's actions. Given the circumstances, 19 minutes is a reasonable time for the police to contact both the defendant and Ms. Slocum, try to cut through their reluctance to speak with them, make sure they are safe given the defendant's aggressive behavior, and check of the status of the truck and the property in the truck and trailer.

d. The frisk of the defendant was appropriate.

The defendant is not contesting that it was appropriate. Officer Richman testified the defendant was wearing baggy clothing, with multiple layers. RP at 97. Finding of Fact No. 5 reflects this. CP 52. The defendant continued to put his hands in his pockets, up to eight or nine times, even after the police told him not to. RP at 90. Findings of Fact 7, 10, 14 and 15 reflect this. CP 52.

A police officer may conduct a protective *Terry* frisk for weapons if the officer can articulate specific facts that create an objectively reasonable belief that the person is armed and dangerous. *State v. Rooney*, 190 Wn. App. 653, 664, 360 P.3d 913 (2015). In this case, the frisk is well within this standard. The police gave the defendant many chances to heed their warnings to keep his hands out of his pockets. They only frisked him

after he stood up from a wheel well on a trailer and took one or two steps toward Officer Noren, who was looking into the bed of the pickup. As he began to approach Officer Noren, the defendant again started to put his hands in his pockets.

The defendant wisely did not contest that the police had sufficient reason to frisk him.

3. The cases cited by the defendant can be distinguished.

The defendant offers two cases to support his argument that there was not a reasonable suspicion to detain the defendant for a crime. *State v. Sieler*, 95 Wn.2d 43, 621 P.2d 1272 involved a named informant telling a school secretary that while he was waiting to pick up his son at a high school, he observed what he believed to be a drug sale in another car in the parking lot. It was not known why the informant concluded a drug transaction had occurred and he could not be located. *Id.* at 45.

Meanwhile a vice-principal talked to the occupants of the car a few minutes before the police arrived. He told the officers that he had not observed any contraband in the car or anything unusual or suspicious. *Id.* The Court concluded that this was insufficient to conduct a *Terry* stop of the occupants of the car. “Some underlying factual justification for the

informant's conclusion must be revealed so that an assessment of the probable accuracy of the informant's conclusion can be made." *Id.* at 48.

The *Sieler* case has been called into doubt by *State v. Z.U.E.*, 183 Wn.2d 610, 352 P.3d 796 (2015). In *Z.U.E.*, the court declined to adopt a rule whereby both the "veracity" and "factual basis" prongs are treated as necessary elements for a *Terry* stop. The *Z.U.E.* court held that a more flexible approach is needed, and a stop precipitated by an informant should be based on the reasonableness of the suspicion under the totality of circumstances. *Id.* at 620-21. Under the totality of circumstances test, a known citizen informant is presumptively reliable. *State v. Howerton*, 187 Wn. App. 357, 366, 384 P.3d 781 (2015).

The *Alexander* case, *supra*, supports the idea that *Sieler* may no longer be good law. In *Alexander*, a named, but otherwise unknown, citizen called 911 to report that she saw a man strike a woman and gave their descriptions. That was sufficient for the police to conduct a *Terry* stop on a man and woman matching the descriptions to investigate an assault. *Alexander*, 5 Wn. App. 2d at 158.

In any event, in this case the desk clerk was not only named but was telling the 911 dispatcher about a crime in progress in which she was a victim. "He's parked blocking the front door with his truck and his trailer. And I've asked him several times to leave, and he won't." RP

06/14/2018 at 6. Unlike in *Sieler*, the police did not have to guess why the informant reached the conclusion about a crime or how to reach the informant. Coupled with seeing the defendant's truck and trailer across the street and the defendant's behavior in aggressively approaching Officer Noren as soon as he arrived, under either standard the police had a reasonable suspicion that the defendant was involved in a Criminal Trespass.

The other case the defendant cites is *State v. Carriero*, 8 Wn. App. 2d 641, 439 P.3d 679 (2019) decided April 25, 2019. In *Carriero*, the Yakima Police Department received a phone call at 2:00 A.M. about a vehicle with its lights off, parked at the dead end of the alley. *Id.* at 683. The neighborhood was in a high-crime area. *Id.* Two police officers responded and stopped their patrol cars in the alley, which blocked Carriero's egress. *Id.* Both officers approached the car with flashlights in hand, engaged in friendly conversation, and asked if the occupants had identification. *Id.* Mr. Carriero was a felon and had no outstanding warrants. One officer saw a gun behind the driver's seat. *Id.* at 684.

The issue was whether the police seized Mr. Carriero. The trial court held there was no seizure. The *Carriero* court held the defendant was seized. It is clear the police did not have a reasonable suspicion that the occupants of the car had, or were going to, commit a crime.

The issue here is virtually the mirror opposite. There is no doubt the police seized the defendant after he began walking aggressively toward Officer Noren. The issue at trial and on appeal is whether the police had a reasonable suspicion to seize him. *Carriero*, with all due respect to the defendant, has little relevance in this case.

IV. CONCLUSION

There are no factual issues. The police responded after a Motel 6 desk clerk said the defendant was blocking the front entrance with his pickup and trailer and was refusing requests to leave. The police contacted the defendant across the street in a parking lot where he immediately walked aggressively to a police officer who was telling him to stop and take his hands out of his pockets.

The defendant continuously put his hands in his pockets and was not forthcoming about what happened at Motel 6. The police officers' suspicions were also raised by the defendant's pickup and trailer which was loaded with various snowmobiles, off road vehicles, and equipment, especially since a matching vehicle had been involved in a crime the night before.

The final straw for the police came when Officer Noren started looking into the bed of the truck. At that point the defendant stood up, started to approach him and began again putting his hands in his pockets.

He was then handcuffed and frisked. The police found the firearm on his person which lead to the charge of Unlawful Possession of a Firearm in the Second Degree.

The police had sufficient reason to investigate the defendant for Criminal Trespass in the Second Degree. Based on the defendant's actions, the truck and trailer full of property, and a matching vehicle involved in a crime the previous night, they also had sufficient reason to investigate the possibility that the defendant was in possession of stolen property.

Based on the defendant's continuous refusal to keep his hands out of his pockets, his aggressive behavior, and his baggy clothing, the police were authorized to frisk him.

At every step in the process, the police operated within the bounds of a *Terry* stop. The trial court properly did not suppress the evidence and the defendant's conviction should be affirmed.

RESPECTFULLY SUBMITTED on August 14, 2019.

ANDY MILLER

Prosecutor

A handwritten signature in black ink, appearing to read "Terry J. Bloor", written over a horizontal line.

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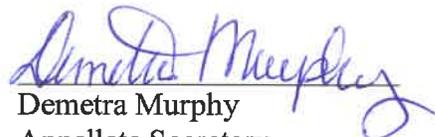
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I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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was made to the following
parties:
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Signed at Kennewick, Washington on August 14, 2019.


Demetra Murphy
Appellate Secretary

BENTON COUNTY PROSECUTOR'S OFFICE

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