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No. 36326-1-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Hector Salinas,

Appellant.

Benton County Superior Court Cause No. 18-1-00129-7

The Honorable Judge Alexander Ekstrom

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. The trial court erred by denying Mr. Salinas's suppression motion.
2. The police violated Mr. Salinas's Fourth and Fourteenth Amendment right to be free from unreasonable seizures by seizing him in the absence of a reasonable suspicion.
3. The officer invaded Mr. Salinas's right to privacy under Wash. Const. art. I, §7 by seizing him in the absence of a reasonable suspicion.
4. The trial court erred by entering Finding of Fact "e". (CP 68).
5. The trial court erred by entering Conclusion of Law No. 2 (CP 68).
6. The trial court erred by entering Conclusion of Law No. 3 (CP 69).
7. The trial court erred by entering Conclusion of Law No. 4 (CP 69).

ISSUE 1: An investigatory stop is unlawful unless supported by specific, articulable facts giving rise to a reasonable belief that the person seized is engaged in criminal activity. Did police improperly seize Mr. Salinas in violation of his rights under the Fourth Amendment and Wash. Const. art. I, §7?

ISSUE 2: An informant's tip cannot provide reasonable suspicion unless it bears indicia of reliability. Should the court have suppressed the evidence here because (a) the State did not produce any evidence regarding the informant's reliability, and (b) the officers corroborated only innocuous facts unrelated to criminal activity?

8. The trial judge violated Mr. Salinas's Sixth and Fourteenth Amendment right to a jury trial.
9. The trial judge violated Mr. Salinas's state constitutional right to a jury trial under Wash. Const. art. I, §§21 and 22.
10. The trial court improperly coerced a verdict from the jury.
11. The trial court erred by directing the bailiff at 4:45 p.m. "to inquire of the jury how much additional time they intend to deliberate."

ISSUE 3: After the start of deliberations, a trial judge may not make any suggestion, however subtle, that jurors should reach an agreement. Did the trial court infringe Mr. Salinas's state

and federal constitutional right to jury verdicts free of judicial coercion?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

While driving in Richland, Washington, Mireles Landa was pulled over by police. RP (7/31/18) 75. Almost immediately, additional police cars arrived, and Ms. Landa was ordered out of her car at gunpoint. RP (7/31/18) 51, 69, 75.

As directed, Ms. Landa raised her arms and walked backward toward the officers. RP (7/31/18) 42-43, 71, 76, 87. Police ordered her to kneel, and she found herself being placed in handcuffs. RP (7/31/18) 43, 76.

Ms. Landa's passenger, Hector Salinas, opened the passenger door, stuck his head out, and yelled "Why are you arresting my wife?" RP (7/31/18) 59, 60. An officer drew his weapon and ordered Mr. Salinas to shut the door. RP (7/31/18) 60.

Mr. Salinas kept asking "Why are you arresting my wife?" RP (7/31/18) 60. The officer directed him to show his hands, and Mr. Salinas complied. RP (7/31/18) 60. He was then ordered to step out of the car and face away from the officer. RP (7/31/18) 60.

Mr. Salinas got out of the car, raised his hands, and stumbled. RP (7/31/18) 60. He was highly intoxicated; police later took him to the hospital after he repeatedly vomited. RP (7/31/18) 17, 31, 37, 62.

After regaining his balance, Mr. Salinas walked toward the officer. RP (7/31/18) 61. When he started to lower his arms, he was ordered to face away from the officer and to raise his hands. RP (7/31/18) 61.

As directed, Mr. Salinas turned away and raised his hands again. RP (7/31/18) 61. The officer tackled Mr. Salinas when he lowered his hands and began walking back to the car. RP (7/31/18) 62, 81.

Officers looked inside the car and saw a baggie containing what later turned out to be cocaine.¹ RP (7/31/18) 16, 35, 63; RP (8/13/18) 83. The car was towed, a warrant obtained, and the cocaine seized. RP (7/31/18) 17, 64, 73; RP (8/13/18) 54, 65, 67, 70-71.

Mr. Salinas was charged with possession, and he moved to suppress the cocaine. CP 1, 3. In his motion, Mr. Salinas challenged the officers' basis for stopping the car and seizing its occupants at gunpoint.² CP 3-19.

At the suppression hearing, the State did not introduce the 911 call that led to the stop. RP (7/31/18) 1-90. Nor did the State introduce the communications log showing what information was provided to the 911

¹ The parties disputed whether the officers opened the car door or simply looked in through the open door. RP (7/31/18) 76-79; CP 68. The court resolved this dispute against Mr. Salinas. CP 68.

² He also argued that the officers had unlawfully opened the car door before seeing the cocaine. RP (7/31/18) 76-79; CP 3, 6, 8. The court found that the door was open when the officers approached and saw the baggie of drugs. CP 68.

dispatcher, or what information dispatch shared with the officers involved in the stop. RP (7/31/18) 1-90.

Richland Police Sgt. Bryce Henry acknowledged that “a lot of times dispatch is talking to people who are, you know, really jacked up or excited and not giving information as clearly as they could.” RP (7/31/18) 67. According to Henry, the call leading to the stop of Ms. Landa’s car was “just a fight involving several individuals in the parking lot at the Gaslight [bar] and that someone may have had a knife or had reported to have had a knife,” and that the person with the knife had driven away in a vehicle that matched the description of Ms. Landa’s car.³ RP (7/31/18) 57.

Henry did not know anything about the caller or how they knew about the fight. RP (7/31/18) 68.

Richland Officer Brigit Clary also knew nothing about the caller, except to say “I believe it was somebody at the Gaslight.” RP (7/31/18) 20. Clary described learning of “a fight with a weapon involved, possibly a knife,” and recalled being told that a person “had assaulted a security guard and then a bouncer at the bar.” RP (7/31/18) 8.

³ There was no indication that the knife had been drawn or used during the fight. RP (7/31/18) 66-68. Although police searched Ms. Landa’s car, they did not find a knife. RP (7/31/18) 53; RP (8/13/18) 49.

Like Clary and Henry, Sheriff's Corporal Scott Hutson did not know anything about the person who called 911. RP (7/31/18) 38-54. Nor did he know how the caller learned about the fight. RP (7/31/18) 38-54.

According to Hutson, the call involved "a large fight" at the Gaslight: "a large group of people were involved, and there were witnesses saying somebody had a knife." RP (7/31/18) 40, 45. He also testified that the vehicle described by dispatch was "associated with a person taking part in the fight." RP (7/31/18) 40. He didn't get any more information about the incident or about the 911 caller. RP (7/31/18) 52.

At the conclusion of the suppression hearing, the prosecutor explained that he did "consider... going a little deeper at this hearing, playing the 911 call, playing the dispatch traffic." RP (7/31/18) 92. He concluded that additional information was unnecessary because

[t]hat analysis is really designed for informants. It's designed for people that are kind of deliberately contacting police, supplying other information, whether or not police can use that information for a warrant or further investigation in a case.
RP (7/31/18) 92.

The court denied the motion to suppress. CP 67-69. The court's written findings did not include any information about the caller. CP 67-69. Instead, the court concluded that "[t]he description of the vehicle, its direction of travel, the partial plate, and the time of night gave Cpl. Hutson reasonable suspicion to believe the vehicle contained an individual,

possibly armed with a knife, that had been involved in the altercation at the Gaslight Bar and Grill.” CP 69.

The case went to trial. In closing argument, the prosecutor acknowledged that the State could not prove actual possession. RP (8/13/18) 109. Instead, the prosecuting attorney argued that Mr. Salinas had dominion and control over the drugs, and that “the only thing that the defendant can offer is that, well, it’s his wife’s car.” RP (8/13/18) 104. The prosecutor reiterated this in rebuttal. RP (8/13/18) 114.

During deliberations, jurors submitted a question, seeking “a definition of dominion and control.” CP 62. The court responded by saying “[p]lease refer to the instructions.” CP 62.

The judge noted that this response was given at 4:45 p.m., and then said “I will ask our bailiff to inquire of the jury how much additional time they intend to deliberate, understanding that we don't want to influence the length of their deliberations but we also want to know what we're in for.” RP (8/13/18) 119.

At 5:06 p.m., the court received the jury’s guilty verdict. CP 63; Minutes filed 8/13/18, Supp. CP.

Mr. Salinas appealed. CP 80.

ARGUMENT

I. THE STATE DID NOT SHOW THAT THE INFORMANT’S TIP HAD INDICIA OF RELIABILITY THAT WOULD JUSTIFY A “FELONY STOP” OF MS. LANDA’S CAR.

At the suppression hearing, the State did not introduce any evidence about the person who called 911. The State did not call the dispatcher to testify, did not offer the dispatch log reports, and did not introduce the 911 call into evidence. The prosecutor did not clarify whether the caller was anonymous or named and made no effort to establish if the caller had personal knowledge or was relaying hearsay allegations. Under these circumstances, the evidence seized following a warrantless stop should have been suppressed.

Under the Fourth Amendment and Wash. Const. art. I §7, warrantless seizures are *per se* unreasonable.⁴ *State v. Doughty*, 170 Wn.2d 57, 61-62, 239 P.3d 573 (2010). The State bears the burden of proving that a warrantless seizure falls into one of the “jealously and carefully drawn” exceptions to the warrant requirement. *Id.* The State failed to meet its burden in this case, because it did not show that officers had a valid basis to stop Ms. Landa’s car.

⁴ Appellate courts review *de novo* the constitutionality of a warrantless seizure. *State v. Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008). Unlike the Fourth Amendment, the analysis under art. I, §7 “focuses on the rights of the individual rather than on the reasonableness of the government action.” *State v. Eisfeldt*, 163 Wn.2d 628, 639, 185 P.3d 580 (2008).

An investigatory stop must be based on “reasonable suspicion.” *Id.* Police must have a suspicion of criminal activity that is well-founded, reasonable, and based on specific and articulable facts. *Id.*

Where suspicion is based on an informant’s tip, “the State must show that the tip bears some ‘indicia of reliability’ under the totality of the circumstances.” *State v. Z.U.E.*, 183 Wn.2d 610, 618, 352 P.3d 796 (2015). The 911 call in this case did not satisfy this constitutional requirement.

At a suppression hearing, the prosecution can show indicia of reliability in one of two ways. *Id.* The State must either show “(1) circumstances establishing the informant’s reliability or (2) some corroborative observation, usually by the officers, that shows either (a) the presence of criminal activity or (b) that the informer’s information was obtained in a reliable fashion.” *Id.* Here, the State made no effort to demonstrate the informant’s reliability, and the officers’ observations did not provide corroboration.

To demonstrate the informant’s reliability, the State could have produced testimony from the dispatcher; it could have introduced the dispatch logs; it could have offered a recording of the 911 call. At a minimum, it could have introduced evidence showing that the 911 caller gave a name and contact information.

The prosecutor considered “going a little deeper at this hearing, playing the 911 call, playing the dispatch traffic.” RP (7/31/18) 92. He elected not to. As a result, the court had before it no evidence of “circumstances establishing the informant's reliability.” *Z.U.E.*, 183 Wn.2d at 618.

Nor did the State produce evidence corroborating the caller’s information. An officer’s corroborative observations “need [not] be of particularly blatant criminal activity, but they must corroborate more than just innocuous facts, such as an individual's appearance or clothing.” *Id.* at 618-619. Here, the officers were only able to corroborate innocuous facts relating to the car’s description and direction of travel. CP 68-69. Accordingly, *Z.U.E.* requires suppression of the evidence.

In *Z.U.E.*, multiple 911 callers reported seeing a man with a gun. *Id.*, at 613. Because one caller alleged that a 17-year-old girl had handed the man a gun, police performed a “felony stop” on a car occupied by a young woman who matched the description provided. *Id.*, at 615-616. One of the car’s juvenile occupants was found to have marijuana and was later convicted of possession. *Id.*

The Supreme Court reversed the conviction. *Id.*, at 622-625. The court found that the 911 calls did not have sufficient indicia of reliability

to support the stop. *Id.* This was so even though two of the callers gave their names and contact information to dispatch. *Id.*, at 614.

The court found that “the officers had no basis on which to evaluate” reliability. *Id.*, at 622. The court also determined that the officers’ observations did not corroborate the caller’s allegations:

At most, the officers were able to verify that a female of a matching description was located in the general area. But corroboration of an innocuous fact, such as appearance, is insufficient.

Id., at 623.

This case is controlled by *Z.U.E. Id.*

The State made no effort to produce evidence regarding the 911 call. Nothing in the record of the suppression hearing shows whether the caller provided a name or remained anonymous. RP (7/31/18) 1-90. There’s no indication the caller provided any information that would allow for later contact and follow-up investigation. RP (7/31/18) 1-90.

The prosecutor did not show that the caller had first-hand knowledge, as opposed to hearsay reports from other witnesses. RP (7/31/18) 1-90. Nor was there any other way of determining “whether the tips were obtained in a reliable manner.” *Id.* As Sgt. Henry observed, “a lot of times dispatch is talking to people who are, you know, really jacked

up or excited and not giving information as clearly as they could.” RP (7/31/18) 67.

Finally, the police did not make the kind of “corroborative observations” that would support a finding of reliability. *Id.*, at 623. As in *Z.U.E.*, “the State can point to no observations supporting a reasonable suspicion of criminal activity.” *Id.* Instead, as in *Z.U.E.*, the officers’ observations here corroborated only innocuous facts - the description and direction of travel of Ms. Landa’s car. *Id.*

The trial court in this case had even less information than that produced in *Z.U.E.* The totality of the circumstances outlined during the suppression hearing do not provide indicia of reliability to support an investigatory stop.

The officers did not have a well-founded and reasonable suspicion that Mr. Salinas was engaged in criminal activity. *Doughty*, 170 Wn.2d at 62. The seizure was unlawful and tainted all that followed. *Z.U.E.*, 183 Wn.2d at 624-625.

Accordingly, Mr. Salinas’s conviction must be reversed. *Id.* The evidence (including his statements) must be suppressed and the charge dismissed with prejudice. *Id.*

II. THE TRIAL JUDGE SHOULD NOT HAVE DIRECTED THE BAILIFF (AT 4:45 P.M.) “TO INQUIRE OF THE JURY HOW MUCH ADDITIONAL TIME THEY INTEND TO DELIBERATE.”

At 4:45 p.m., the trial judge directed the bailiff “to inquire of the jury how much additional time they intend to deliberate.” RP (8/13/18)

119. Shortly thereafter, the jury returned its guilty verdict. CP 63; Minutes filed 8/13/18, Supp. CP. This violated Mr. Salinas’s constitutional right to a jury trial.

The state and federal constitutions protect an accused person’s right to a jury trial. U.S. Const. Amends. VI, XIV; Wash. Const. art. I, §§21 and 22. Among other protections, these provisions secure “the right to have each juror reach his verdict uninfluenced by factors outside the evidence, the court’s proper instructions, and the arguments of counsel.” *State v. Boogaard*, 90 Wn.2d 733, 736, 585 P.2d 789, 791 (1978).

A judge presiding over a criminal trial may not interfere in the jury’s deliberative process. *Id.*, at 737. Any suggestion that a juror “should abandon his conscientiously held opinion for the sake of reaching a verdict invades [the jury] right.” *Boogaard*, 90 Wn.2d at 736.

This is true “however subtly the suggestion may be expressed.” *Id.* The rule is intended “to prevent judicial interference in the deliberative process... [T]he jury should not be pressured by the judge into making a decision.” *Id.*, at 736.

A claim that judicial coercion affected a verdict may be raised for the first time on review. *State v. Ford*, 171 Wn.2d 185, 188, 250 P.3d 97 (2011) (citing RAP 2.5(a)(3)). To prevail, the appellant must show a reasonably substantial possibility that the verdict was improperly influenced. *Id.*

In *Boogaard*, for example, the trial judge asked jurors who had deliberated into the night if they thought they could reach a verdict within half-an-hour. When eleven of the jurors thought it possible, the court instructed the jury to continue deliberating for 30 minutes. *Boogaard*, 90 Wn.2d at 735. The Supreme Court reversed the defendant’s conviction because the court’s questions “unavoidably tended to suggest to minority jurors that they should ‘give in’ for the sake of that goal which the judge obviously deemed desirable namely, a verdict within a half hour.” *Id.*, at 736.

In this case, at 4:45 p.m. the court answered a jury question and directed the bailiff “to inquire of the jury how much additional time they intend to deliberate.”⁵ RP (8/13/18) 119. This was improper. *Id.*

By asking “how much additional time they intend[ed] to deliberate” at 4:45 p.m., the court applied subtle pressure suggesting the

⁵ The judge also expressed his “understanding that we don’t want to influence the length of their deliberations but we also want to know what we’re in for.” RP (8/13/18) 119.

jury ought to reach a decision. *See Boogaard*, 90 Wn.2d at 736. This crossed the line into “judicial interference in the deliberative process.” and violated Mr. Salinas’s state and federal constitutional rights. *Id.*; U.S. Const. Amend. VI, XIV; Wash. Const. art. I, §§21 and 22.

This directive created “a reasonably substantial possibility that the verdict was improperly influenced.” *Ford*, 171 Wn.2d at 188. This is especially true because of the timing. The question—posed shortly before the end of the workday—implied to jurors in the minority “that they should ‘give in’ for the sake of [reaching a verdict.]” *Boogaard*, 90 Wn.2d at 736.

The error deprived Mr. Salinas of his right to a jury trial. *Id.* His conviction must be reversed, and the case remanded for a new trial. *Id.*

CONCLUSION

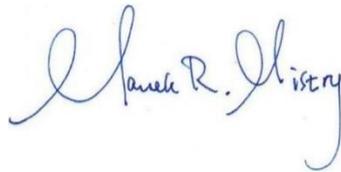
For the foregoing reasons, Mr. Salinas’s conviction must be reversed, the evidence suppressed, and the case dismissed. In the alternative, the case must be remanded for a new trial.

Respectfully submitted on February 14, 2019,

BACKLUND AND MISTRY

Handwritten signature of Jodi R. Backlund in blue ink.

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CERTIFICATE OF SERVICE

I certify that on today's date:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division III, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on February 14, 2019.



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