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NO. 36377-5-III

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

THE STATE OF WASHINGTON

Respondent

v.

CHARLES GIBSON

Petitioner/Appellant

BRIEF OF RESPONDENT

Mr. Tim Rasmussen, # 32105
Prosecuting Attorney
Stevens County

Lech Radzinski, # 39437
Deputy Prosecuting Attorney
Attorneys for Respondent

Stevens County Prosecutors Office
215 S. Oak Street
Colville, WA
(509) 684-7500

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I. APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erred by entering the following finding of fact that was not supported by substantial evidence:

...the court finds the *Terry* pat-down search of the defendant was justified. (CP 28)

2. The trial court erred when it entered the following conclusion of law:

The subsequent discovery of the suspected narcotics was proper. (CP 28)

3. The trial court erred when it denied Mr. Gibson's motion to suppress the suspected narcotics because the police did not have reasonable articulable suspicion of criminal activity to justify a *Terry* stop or search.

II. ISSUES PRESENTED

1. Did Deputy Russell have a reasonable and articulable suspicion based on reliable and corroborated information to detain Mr. Gibson so as not to violate his State and Federal Constitutional rights?
2. Was the *Terry* frisk of Mr. Gibson appropriate given the facts of the case?

III. STATEMENT OF THE CASE

The respondent accepts the appellant's statement of the case.

IV. ARGUMENT

1. Mr. Gibson's State and Federal Constitutional rights were not violated as Deputy Russell had a reasonable and articulable suspicion to detain and search Mr. Gibson that was based on reliable and corroborated information.

Mr. Gibson's rights were not violated as Deputy Russell did have a reasonable articulable suspicion that Mr. Gibson has engaged in criminal activity. Appellate Courts review a trial court's order following a motion to suppress evidence to determine if substantial evidence supports the trial court's factual findings. *State v. Hill*, 123 Wash.2d 641, 647, 870 P.2d 313 (1994). The Appellate Court will review the trial court's legal conclusions de novo. *State v. Carneh*, 153 Wash.2d 274, 281, 103 P.3d 743 (2004).

"[A] stop, although less intrusive than an arrest, is nevertheless a seizure and therefore must be reasonable under the Fourth Amendment [to the United States Constitution] and article 1, section 7 of the Washington Constitution." *State v. Kennedy*, 107 Wash.2d 1, 4, 726 P.2d 445 (1986). An investigatory *Terry* stop is permissible if the investigating officer has, "a reasonable and articulable suspicion that the individual is involved in criminal activity." *State v. Walker*, 66 Wash.App. 622, 626, 834 P.2d 41 (1992). A reasonable suspicion is the, "substantial possibility that criminal conduct has occurred or is about to occur." *Kennedy*, 107 Wash.2d at 6, 726 P.2d 445. A reasonable suspicion can arise from

information that is less reliable than that required to establish probable cause. *Alabama v. White*, 496 U.S. 325, 330, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990). The Court will review the reasonableness of the police action in light of the particular circumstances of each case. *State v. Lesnick*, 84 Wash.2d 940, 944, 530 P.2d 243 (1975).

An informant's tip can provide police with reasonable suspicion to justify an investigatory *Terry* stop if the tip possesses sufficient, “ ‘indicia of reliability.’ ” *State v. Sieler*, 95 Wash.2d 43, 47, 621 P.2d 1272 (1980) (quoting *Adams v. Williams*, 407 U.S. 143, 147, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972)). Courts employ the totality of the circumstances test to determine whether an informant's tip possessed sufficient indicia of reliability to support reasonable suspicion. *State v. Marcum*, 149 Wash.App. 894, 903, 205 P.3d 969 (2009): see *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). When deciding whether this indicia of reliability exists, the courts will generally consider several factors, primarily “(1) whether the informant is reliable, (2) whether the information was obtained in a reliable fashion, and (3) whether the officers can corroborate any details of the informant's tip.” *State v. Lee*, 147 Wash.App. 912, 918, 199 P.3d 445 (2008). “The existing standard does not require all three factors to establish indicia of reliability.” *State v. Sagers*, 182 Wash.App. 832, 840, 332 P.3d 1034 (2014).

Known citizen informants are presumptively reliable. “Citizen informants are deemed presumptively reliable.” *State v. Gaddy*, 152 Wash.2d 64, 73, 93 P.3d 872 (2004); *see also State v. Kennedy*, 107 Wash.2d 1, 8, 726 P.2d 445 (“The neighbors' information does not require a showing of the same degree of reliability as the informant's tip since it comes from ‘citizen’ rather than ‘professional’ informants.”); *State v. Conner*, 58 Wash.App. 90, 96, 791 P.2d 261 (1990) (“We hold that ... a citizen informant reporting a crime can be inherently reliable for purposes of a *Terry* stop, even if calling on the telephone rather than speaking to the police in person.”). When a citizen informant provides information, a relaxed showing of reliability suffices, “because there is less risk of the information being a rumor or irresponsible conjecture which may accompany anonymous informants” and, “an identified informant's report is less likely to be marred by self-interest.” *State v. Ollivier*, 178 Wash.2d 813, 850, 312 P.3d 1 (2013). A citizen-witness's credibility is enhanced when he or she purports to be an eyewitness to the events described. *State v. Vandover*, 63 Wash.App. 754, 759, 822 P.2d 784 (1992).

Under the totality of the circumstances test, courts also consider whether the information was obtained in a reliable fashion. *Lee*, 147 Wash.App. at 918, 199 P.3d 445. In *Navarette*, the Court stated that use of the 911 system enhances the reliability of an informant's tip. *Navarette v.*

California, 134 S.Ct. 1683, 1689–90 (2014). Specifically, “[a] 911 call has some features that allow for identifying and tracing callers, and thus provide some safeguards against making false reports with immunity... Given the foregoing technological and regulatory developments...a reasonable officer could conclude that a false tipster would think twice before using such a system.” *Id.* at 1689–90; *see also Saggars*, 182 Wash.App. at 847, 332 P.3d 1034 (2014).

When the above case law is applied to the facts of this case it is clear that there was sufficient reliable information provided to Deputy Russell that furnished him a reasonable and articulable suspicion that Mr. Gibson has engaged in criminal activity. First, the information that was provided to Deputy Russell was provided by an identified, named, citizen-informant. *See CP* at 33. An individual by the name of Brian Reinhart called into the Stevens County Dispatch Center and reported that there was an individual trespassing on his property. *See id.* and *RP* at 15 – 17. Mr. Reinhart also reported that this individual was cutting a white powdery substance on his phone. *Id.* When Deputy Russell responded to the scene he contacted Mr. Reinhart at the top of his driveway and confirmed the information that had been provided to dispatch. *RP* at 17. Deputy Russell observed Mr. Gibson sitting in his vehicle on the property where he was reported to be trespassing. *Id.*

Based on these facts this Court can conclude that the informant is reliable. Mr. Reinhart contacted the Stevens County Dispatch Center, identified himself, and provided law enforcement with information regarding Mr. Gibson's activities. Mr. Reinhart is an identified citizen-informant who was an eyewitness to what he was reporting. Furthermore, Mr. Reinhart remained on scene and interacted with Deputy Russell when he arrived on scene. All of these facts support a finding that Mr. Reinhart is reliable.

The information provided by Mr. Reinhart was obtained in a reliable fashion. Mr. Reinhart called into the Stevens County Dispatch Center when he reported Mr. Gibson trespassing on his property. Deputy Russell confirmed the information that Mr. Reinhart possessed when he arrived on scene.

Lastly, Deputy Russell corroborated the information that had been provided by Mr. Reinhart. Mr. Reinhart called to report that Mr. Gibson was trespassing on his property. Drug activity was observed in conjunction with the trespassing offense. When Deputy Russell arrived on scene he observed Mr. Gibson still in the act of trespassing on the property. This observation corroborated the information that had been provided by Mr. Reinhart.

Based upon the forgoing, Deputy Russell did have a reasonable articulable suspicion that Mr. Gibson has engaged in criminal activity. Information was provided to law enforcement by a credible individual and was collected in a reliable matter. Lastly, Deputy Russell corroborated the information that had been provided to him. Deputy Russell's contact with Mr. Gibson was appropriate and lawful.

2. The *Terry* frisk of Mr. Gibson was appropriate given the facts of the case.

Pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968), police officers may make limited searches for the purposes of protecting the officers' safety during an investigative detention. An officer who, "observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous to stop such person and to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him." *Terry*, at 30-31. An officer who makes a lawful investigatory stop of a person has no general authorization to search that person. *See State v. Russell*, 180 Wn.2d 860, 867-868, 330 P.3d 151 (2014).

An officer may conduct a protective frisk for weapons only if the officer has reasonable grounds, based on specific and articulable facts, to believe that the person is armed and presently dangerous. *Id.* It is enough that the officer reasonably believes that a search should be conducted to protect his or her own safety and the safety of others. *Id.* The officer is not required to be absolutely certain that the person is armed—only a founded suspicion is necessary. *State v. Harrington*, 167 Wn.2d 656, 668, 222 P.3d 92 (2009). When reviewing an officer's decision to conduct a search the court should be reluctant to substitute our judgment for an officer's judgment exercised in the field. *Russell* at 867-868.

The discovery of one weapon is a basis that will support a frisk for determining if additional weapons are present. *See, e.g., State v. Olsson*, 78 Wn. App. 202, 895 P.2d 867 (1995) (officer who was informed by a driver that he was carrying a knife had grounds for frisking the driver to determine whether he was carrying additional weapons); *State v. Swaite*, 33 Wn. App. 477, 481, 656 P.2d 520 (1982) (officer was justified in conducting frisk for additional weapons where detainee had a knife in his belt).

Likewise, a suspect's placing his hands in his pockets after being advised to keep his hands visible, turning sideways away from the officer, and entering the officer's space after being advised to step away from the

officer provided sufficient grounds for a frisk. *State v. Ibrahim*, 164 Wn. App. 503, 509-510, 269 P.3d 292 (2011) (suspects contacted behind an abandoned motel in Yakima, after they walked away from a vehicle that was registered in Seattle and whose ignition assembly had been broken apart, presumably with the screwdriver that was visible on the floorboard of the vehicle).

When the court is faced with a defendant's challenge to the permissibility of a protective search the court, "must evaluate the reasonableness of a particular search in light of the particular circumstances" and must apply "an objective" – belief of a " ' a man of reasonable caution.' " *Terry* at 21, 22, 88 S. Ct. 1868, (quoting *Carroll v. United States*, 267 U.S. 132, 162, 45 S.Ct. 280, 69 L.Ed. 543 (1925)).

In the present case Deputy Russell was justified in conducting a *Terry* frisk of Mr. Gibson. Deputy Russell responded to investigate a trespassing complaint. When he arrived, Mr. Gibson, was standing outside of his vehicle. RP at 9. Deputy Russell observed that Mr. Gibson kept putting his hand in his right pocket and that he had what appeared to be knife sheaths with knives on his belt. RP at 9 – 10. When Deputy Russell asked Mr. Gibson how many knives he had on his person he responded that he had several and that he liked knives. RP at 10. When asked if Mr. Gibson presented an officer safety issue Deputy Russell

responded, "You never know." RP at 10. Deputy Russell went on to explain that whenever he is in a situation where he's the only law enforcement officer on scene and observes weapons, he secures them for officer safety reasons. RP at 11. At this point Deputy Russell was justified to conduct a frisk of Mr. Gibson's person. RP at 11. As the interaction continued Deputy Russell found five knives. RP at 11. When he asked Mr. Gibson how many more knives he had, Mr. Gibson indicated that he wasn't sure but that there were more. RP at 11. This discovery and Mr. Gibson's comments provided Deputy Russell with further justification to keep searching. Ultimately Deputy Russell recovered a controlled substance during the pat down search. RP at 11.

When looking at the above facts from the perspective of a man of reasonable caution it is apparent that Deputy Russell's actions were appropriate. Deputy Russell responded to this call alone. When he contacted Mr. Gibson he observed weapons and was provided vague answers as to how many knives Mr. Gibson had on his person. When Deputy Russell attempted to determine how many knives in total Mr. Gibson had on his person Mr. Gibson's answer was noncommittal. Deputy Russell's description of what transpired articulates an officer safety concern. The search and subsequent recovery of controlled substances from Mr. Gibson was lawful. Therefore, the trial court's

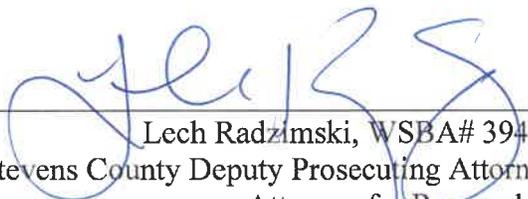
decision to deny Mr. Gibson's request to suppress evidence was not in error.

V. CONCLUSION

For the above stated reasons, the State respectfully requests that this court deny the relief sought by Mr. Gibson.

Respectfully submitted this 11th day of June, 2019

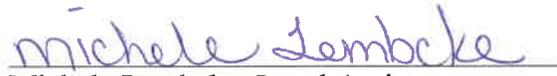
Tim Rasmussen, WSBA # 32105
Stevens County Prosecutor



Lech Radzinski, WSBA# 39437
Stevens County Deputy Prosecuting Attorney
Attorney for Respondent

Affidavit of Certification

I certify under penalty of perjury under the laws of the State of Washington, that I electronically filed a true and correct copy of the Brief of Respondent to the Court of Appeals, Division III, and e-mailed a true and correct copy to Liseellnerlaw@comcast.net on June 12, 2019.


Michele Lembcke, Legal Assistant
for Lech Radzimski

STEVENS COUNTY PROSECUTOR'S OFFICE

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