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Division III
State of Washington
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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

SHILOH KELLEY, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erred when it denied Mr. Kelley's motion to suppress and dismiss because Mr. Kelley was unlawfully seized when Officer Rankin initially contacted him, and all evidence collected after that point is fruit of the poisonous tree.
2. Mr. Kelley assigns error to the trial court's Conclusions of Law 1-5.

II. ISSUES PRESENTED

1. Whether Mr. Kelley was illegally seized when Officer Rankin shined a flashlight into the vehicle in which Mr. Kelley was a passenger?
2. Whether Officer Rankin's observations of suspected methamphetamine and drug paraphernalia in the vehicle occupied solely by Mr. Kelley, along with the driver's adamant denial of knowledge of the presence of drugs, sufficed to provide the officer with a reasonable, articulable suspicion that Mr. Kelley was in constructive possession of methamphetamine?
3. Whether any evidence obtained after Officer Rankin detained Mr. Kelley was tainted, where there was no unlawful seizure?

III. STATEMENT OF THE CASE

Procedural History

On July 3, 2018, the defendant, Shiloh Kelley, was charged in the Spokane County Superior Court with one count of possession of a

controlled substance – heroin, and one count of making a false or misleading statement to a law enforcement officer. CP 4, 186.¹

On August 23, 2018, the defendant moved to suppress all evidence obtained as a result of an allegedly unlawful search and seizure. CP 11-32. Judge Shelley Szambelan denied the motion, as further discussed below. CP 112-118; RP 41-46. The matter then proceeded to a jury trial, and the defendant was convicted as charged. CP 105-06. The court sentenced the defendant, who had an offender score of “18,” to a residential chemical dependency treatment alternative sentence (DOSA), ordering the defendant to serve 24 months community custody and to engage in a residential chemical dependency treatment program for three to six months, along with other appropriate conditions of community custody. CP 173-83.

Substantive Facts and Suppression Hearing

Spokane Police Officer Brandon Rankin was on routine patrol at 3:00 a.m. when he observed a blue 2004 Saab vehicle parked on the west end of a Maverik gas station on Francis Avenue in Spokane, Washington. CP 112 (FF 1).² This gas station is open 24 hours a day, and is known to

¹ The State was permitted to amend count 2 of the information from obstructing a law enforcement officer to making a false or misleading statement to a law enforcement officer on October 2, 2018.

² The defendant gleans many of his facts from the *trial transcript*, not from the motion hearing or specific findings of fact entered after the motion hearing. *See e.g.*, Br. at 10, citing to RP 153-54 and RP 155-56. But the trial

law enforcement to be a high crime area, particularly for drug activity, including the use and distribution of controlled substances. CP 113 (FF 2). Officer Rankin observed a female outside the Saab, who, upon looking in the officer's direction, walked into the business. CP 113 (FF 3). Officer Rankin parked his vehicle to the rear and side of the Saab – and did not block the Saab's movement from the parking stall. CP 113 (FF 4).

Officer Rankin approached the Saab and observed a male, later identified as Mr. Kelley, sitting in the rear driver's side seat; the defendant was the only occupant of the vehicle. CP 113 (FF 5). From outside the vehicle, Officer Rankin asked the defendant how he was doing; the defendant responded to the officer. CP 113 (FF 6). From outside the vehicle, Officer Rankin shined his flashlight into the passenger compartment, and

court did not base its ruling upon the facts as presented at trial; it based its findings of fact upon the affidavits, police reports, limited testimony of Officer Rankin and the officer's body cam. RP 41.

This Court's consideration of the facts elicited during trial, rather than during the motion hearing could undercut the requirement that trial courts enter findings of fact based upon the facts actually heard and considered at the motion hearing; it may also encourage litigants to present limited evidence at motion hearings, assuming they will be permitted to claim the ruling on the motion was legally erroneous based upon new or different information testified to at trial.

To the extent that some of the facts may have been clarified at the trial in this case, the defendant did not renew his motion for suppression or request reconsideration based upon the clarified facts. This Court should, therefore, consider only what the trial court heard and considered at the motion hearing.

observed in the passenger side door storage compartment, a portion of a pen along with a plastic water bottle that had been modified into a device which the officer recognized, through his training and experience, as a device used to smoke methamphetamine. CP 113 (FF 7-8). Officer Rankin believed this device, called a “tooter,”³ had been used because the tip of the pen appeared to be burned or melted. CP 113 (FF 9).

Officer Rankin walked around the exterior of the vehicle to the passenger’s side, where he observed two pieces of white crystalline substance approximately an eighth of an inch in length, also on the passenger side floorboard; based upon his training and experience, he recognized this substance as methamphetamine. CP 114 (FF 10).

The female driver and registered owner, Antoinette Beeman, exited the store and spoke with Officer Rankin. Beeman told him that she did not know the male passenger in her vehicle⁴ and denied knowledge or possession of the smoking device or any drugs that might be in her car. CP 114 (FF 11-12).

³ This terminology was used by the prosecutor and trial court during the motion argument. RP 17, 33.

⁴ Beeman indicated that she was giving the defendant, and another individual she identified as Brandon, a ride home from a bar. CP 24.

Officer Rankin told the female that he would apply for a search warrant for her vehicle. At that time, the defendant told officers that he wanted to leave. CP 114 (FF 13-14). Officer Rankin told the defendant he needed to identify him for purposes of the investigation. CP 114 (FF 15). Officer Rankin conducted a frisk of the defendant and asked for his name and date of birth; the defendant stated he did not have identification with him, but orally identified himself as “Ryan Ogden” and provided a date of birth. CP 114 (FF 16). Officer Rankin viewed a Department of Licensing photograph of “Ryan Ogden” which did not match the defendant; the officer asked Mr. Kelley to confirm his name and Mr. Kelley insisted he was “Ryan Ogden.” CP 114 (FF 17).

Officer Rankin placed the defendant under arrest for obstructing a law enforcement officer. During a search incident to the defendant’s arrest, Officer Rankin located a small piece of a brown tar-like substance in a plastic bag inside the defendant’s pocket. CP 114 (FF 18-19). The officer believed this substance was heroin based on his training and experience, and this belief was confirmed by a field test (and later test by the Washington State Crime Lab). CP 115 (FF 20-21). Another officer at the scene ultimately identified the defendant as Shiloh Kelley, and found that Mr. Kelley had active warrants for his arrest. CP 115 (FF 22).

From these facts, the court determined that after Officer Rankin observed the “tooter” and suspected methamphetamine on the floorboard of a vehicle in which the defendant was the sole occupant, he was permitted to request the defendant identify himself pursuant to *Terry v. Ohio*.⁵ CP 117 (CL 2-3). Then, once the defendant lied to the officer about his identity, the officer had probable cause to arrest the defendant; the drugs found on the defendant were discovered pursuant to a lawful search incident to arrest. CP 117-18 (CL 4-5). Based upon these rulings, the trial court denied the defendant’s motion to suppress. CP 118. The propriety of this ruling is the sole issue on appeal.

IV. ARGUMENT

A. STANDARD OF REVIEW

Uncontroverted findings of fact are verities on appeal. *See, e.g., State v. Hill*, 123 Wn.2d 641, 644-45, 870 P.2d 313 (1994). The defendant does not challenge any of the court’s findings of fact and, therefore, those facts are to be treated as verities. On a motion to suppress, the appellate court reviews the trial court’s conclusions of law de novo. *See e.g., State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996).

⁵ *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

B. THE TRIAL COURT PROPERLY DENIED THE DEFENDANT’S MOTION TO SUPPRESS.

On appeal, Mr. Kelley claims that he was seized by Officer Rankin *prior* to the officer’s discovery of the suspected methamphetamine and water pipe in the vehicle. Br. at 10 (“The police only discovered the suspected methamphetamine and water pipe after Mr. Kelley had been illegally seized inside the car”). From that premise, the defendant argues that the subsequent discovery of methamphetamine in plain view did not establish a reasonable suspicion that he was involved in criminal activity, and all subsequent events, including both the discovery of the methamphetamine and the defendant’s act of providing a false name were tainted by the allegedly unlawful seizure. Br. at 10-12.

1. The initial detention of the defendant was lawful.

Under the Fourth Amendment to the United States Constitution and article I, section 7, of the Washington Constitution, an officer generally cannot seize a person without a warrant. *State v. Fuentes*, 183 Wn.2d 149, 157-58, 352 P.3d 152 (2015). If a seizure occurs without a warrant, the State has the burden of showing that it falls within one of the carefully drawn exceptions to the warrant requirement. *State v. Z.U.E.*, 183 Wn.2d 610, 617, 352 P.3d 796 (2015). One established exception is a brief investigative

detention of a person, known as a *Terry* stop.⁶ *Id.* For such an investigative stop to be permissible, an officer must have an “individualized, reasonable suspicion” based on specific and articulable facts that the detained person was or was about to be involved in a crime. *State v. Flores*, 186 Wn.2d 506, 520, 379 P.3d 104, 112 (2016). A “generalized suspicion that the person detained is ‘up to no good’ [is not enough]; the facts must connect the particular person to the particular crime that the officer seeks to investigate.”⁷ *Z.U.E.*, 183 Wn.2d at 618 (italics omitted). No greater level of articulable suspicion is required for a car stop than for a pedestrian stop. *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). Articulable suspicion is a substantial possibility that criminal conduct has occurred or

⁶ *Terry*, 392 U.S. 1; see *Adams v. Williams*, 407 U.S. 143, 146, 92 S.Ct. 1921, 1923, 32 L.Ed.2d 612 (1972) (“[the Fourth Amendment] recognizes that it may be the essence of good police work to adopt an intermediate response[;] ... [a] brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time”).

⁷ Although police may not detain a suspect based merely on a “hunch,” under *Terry* and its progeny “the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard.” *United States v. Arvizu*, 534 U.S. 266, 274, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002). This Court has recognized: “While certainly an ‘inchoate hunch’ is not sufficient to justify a stop, experienced officers are not required to ignore arguably innocuous circumstances that arouse their suspicions.” *State v. Santacruz*, 132 Wn. App. 615, 619-20, 133 P.3d 484 (2006).

is about to occur. *Id.* Significantly, an officer can rely on his or her experience to identify seemingly innocent facts as suspicious. *State v. Moreno*, 173 Wn. App. 479, 492, 294 P.3d 812 (2013). Facts that appear innocuous to an average person may appear suspicious to an officer based on his or her past experience. *Id.* at 493. And “officers do not need to rule out all possibilities of innocent behavior before they make a stop.” *Fuentes*, 183 Wn.2d at 163.

A threshold question, however, is whether, under article I, section 7, a person is actually seized by the officer’s conduct; a seizure occurs “‘only when, by means of physical force or a show of authority’” the person’s freedom of movement is restrained and a reasonable person would not have believed he or she is free to leave, given all the circumstances, or free to terminate the encounter. *State v. O’Neill*, 148 Wn.2d 564, 574, 62 P.2d 489 (2003). “The standard is ‘a purely *objective* one, looking to the actions of the law enforcement officer.’ *State v. Young*, 135 Wn.2d, 498, 501, 957 P.2d 681 (1998) (emphasis added).” *Id.* The defendant has the burden of proving that a seizure occurred in violation of article I, section 7. *Id.* at 574.

In *O’Neill*, under similar facts to those presented here, a law enforcement officer observed a vehicle that was parked in front of a business that had been closed for approximately an hour, and knowing that

the business had been twice burglarized in the preceding month, the officer pulled in behind the car and activated his spotlight in order to see the license plate and run a computer check on the plate. He approached the driver's side of the car and shined his flashlight into the driver's face; the driver was later identified as O'Neill. However, when asked, O'Neill identified himself by a different name. When O'Neill stepped from the vehicle at the officer's request, the officer observed a spoon on the floorboard next to the driver's seat which appeared to the officer to have been used to cook a narcotic. *Id.* at 572-73.

One issue on appeal was whether O'Neill was seized under article I, section 7, of the Washington Constitution *prior* to the officer's request for him to step from the vehicle. *Id.* at 574. First, the Supreme Court rejected the premise that under our state constitution, "a police officer cannot question an individual or ask for identification because the officer subjectively suspects the possibility of criminal activity, but does not have a suspicion rising to the level [required] to justify a *Terry* stop." *Id.* at 577. Thus, a "police officer's conduct in engaging a defendant in conversation in a public place and asking for identification does not, alone, raise the encounter to an investigative detention." *Id.* at 580.

The court analyzed whether a person in O'Neill's position would have believed he or she was free to leave or otherwise terminate the

encounter given the actions of the officer. *Id.* The court determined that (1) the shining of a spotlight on the defendant's car was not a seizure, and (2) based on its prior precedent, the use of a flashlight to illuminate at night what is plainly visible during the day was not a disturbance of private affairs. *Id.* (citing *State v. Rose*, 128 Wn.2d 388, 909 P.2d 280 (1996); *Young*, 135 Wn.2d at 513-14. The defendant fails to distinguish *O'Neill* from the facts presented by his case.

Likewise, a seizure does not occur when a law enforcement officer merely "strikes up a conversation." See *State v. Harrington*, 167 Wn.2d 656, 660-61, 222 P.3d 92 (2009) (Officer who said, "hey, can I talk to you" did not convert contact into seizure). The *Harrington* court reiterated the nonexhaustive list of police actions which likely result in a seizure: "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Id.* at 661, (citing *Young*, 135 Wn.2d at 512).

A "social contact," which "occupies an amorphous area in our jurisprudence, resting someplace between an officer's saying 'hello' ... and ... an investigative detention," may include requesting an individual's identification; such a request does not automatically elevate the "encounter

to an investigative detention.” *Harrington*, 167 Wn.2d at 665 (citing *Young*, 135 Wn.2d at 511). The extent to which Officer Rankin and Mr. Kelley exchanged words, prior to Mr. Kelley exiting the vehicle, was limited to Officer Rankin asking Mr. Kelley, “how are you doing?” CP 113 (FF 6). Mr. Kelley’s response was not recorded. Officer Rankin asked Mr. Kelley no other questions, and made no show of force, other than the earlier discussed use of his flashlight to observe what was within plain view in the passenger compartment of the vehicle. This brief contact did not elevate the officer’s conduct to a detention.

From the record, no other events occurred between the time that Officer Rankin shined his flashlight into the vehicle and asked Mr. Kelley how he was doing and when he ultimately observed, in plain view, in the passenger compartment of the vehicle, suspected methamphetamine and used drug paraphernalia. At that point in time, Officer Rankin had a reasonable, articulable suspicion that a crime was occurring (or had occurred) – the possession of methamphetamine and the use of drug paraphernalia.⁸

⁸ Possession of a controlled substance is unlawful under RCW 69.50.4013. Possession may be actual or constructive. *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). Constructive possession of a controlled substance is established by showing the person charged has dominion and control over the substance. *State v. Shumaker*, 142 Wn. App. 330, 174 P.3d 1214 (2007), *as amended on denial of reconsideration* (Feb. 26, 2008); *State v. Olivarez*,

Based upon his reasonable, articulable suspicion that someone associated with the vehicle was in possession of methamphetamine and had used drug paraphernalia, Officer Rankin was permitted, pursuant to *Terry*, to speak to the driver of the vehicle about those suspicions. The information Ms. Beeman provided – that she did not know the defendant and did not know of drugs in her car – reasonably heightened the officer’s suspicion that Mr. Kelley, as the sole occupant of the vehicle at the time Officer Rankin approached and observed the vehicle’s contents, was engaged in the crime of possession of a controlled substance, and, at a minimum, had constructive possession over the drugs. As such, when Mr. Kelley requested to leave, the officer was permitted, again, pursuant to *Terry*, to temporarily detain and identify Mr. Kelley for investigative purposes related to the methamphetamine in the vehicle.

2. After the lawful detention of the defendant pursuant to *Terry*, all subsequent actions of the officer were also lawful.

Under Washington’s exclusionary rule, wherever the right to privacy is unreasonably violated, the remedy of suppression must follow. *See, e.g., State v. Mayfield*, 192 Wn.2d 871, 887, 434 P.3d 58 (2019). As demonstrated above, however, no violation of the defendant’s right to

63 Wn. App. 484, 820 P.2d 66 (1991). Dominion and control need not be exclusive in order to sustain a conviction for a crime requiring possession of a contraband item. *State v. Weiss*, 73 Wn.2d 372, 438 P.2d 610 (1968).

privacy occurred when Officer Rankin shined his flashlight into the vehicle, or asked him “how he was doing.” Once the officer observed methamphetamine in plain view, he was permitted, pursuant to *Terry*, to detain potential suspects for an investigation.

Assuming then that the original basis for the *Terry* stop was valid, i.e., it was justified at its inception by the officer’s suspicions that Mr. Kelley was in possession of methamphetamine, the scope of this detention was properly expanded when Mr. Kelley lied about his identity to the officer. If an officer’s initial suspicions justifying the investigation are dispelled, then the officer must end the investigative detention; however, if the initial suspicions are confirmed, or are further aroused, the scope of the stop may be extended and its duration may be prolonged. *State v. Acrey*, 148 Wn.2d 738, 747, 64 P.3d 594 (2003). Such is the case here. When Mr. Kelley provided the officer a false name and date of birth, the detention was rightfully prolonged to determine his identity, and once Officer Rankin viewed the Department of Licensing photograph of “Ryan Ogden,” and that photograph did not match the defendant, Officer Rankin then had probable cause to arrest the defendant for providing false information. *See*, RCW 9A.76.175 (“A person who knowingly makes a false or misleading material statement to a public servant is guilty of a gross misdemeanor”).

Thus, the search incident to the defendant's arrest for providing a false statement was entirely proper.⁹

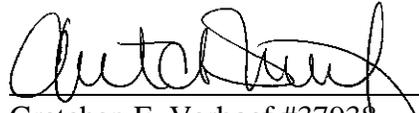
V. CONCLUSION

The trial court properly denied the defendant's motion to suppress.

The State requests this Court affirm the trial court's decision.

Dated this 15 day of July, 2019.

LAWRENCE H. HASKELL
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Gretchen E. Verhoef", written over a horizontal line.

Gretchen E. Verhoef #37938
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⁹ An officer may conduct a search incident to arrest of the arrestee's person and the area within his or her immediate control. *See, e.g., State v. Valdez*, 167 Wn.2d 761, 769, 224 P.3d 751 (2009).

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

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SHILOH KELLEY,

Appellant.

NO. 36450-0-III

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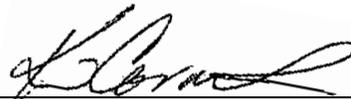
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