

NO. 79992-0

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

GARY NATHANIAL GATEWOOD, SR.,

Appellant.

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STATE OF WASHINGTON
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SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUE

1. Police officers may not seize a citizen unless they have a reasonable, articulable suspicion that he might be engaged in criminal activity. Here, police officers saw Gatewood react with demonstrable surprise when the officers rolled past a bus shelter in which Gatewood was sitting late at night; he turned his body suddenly to the side and appeared to drop something behind the bench in the bus shelter in a manner the officers had seen when people were sloughing drugs; Gatewood fled the shelter after the officers rounded the block and drove back to the shelter down a one-way street, going the wrong way; Gatewood then crossed a busy, four-lane thoroughfare in the dark, directly in front of the officers and refused to stop when they asked him to do so. Did the officers have reasonable suspicion to detain Gatewood?

2. State v. Ladson prohibits "pretext" stops wherein officers use a legal justification to detain someone whom they could not detain based on the available information. Gatewood was stopped based on the totality of the changing, escalating circumstances; circumstances which established reasonable suspicion of criminal activity. Is State v. Ladson inapplicable where officers make a stop believing they have a reasonable suspicion of criminal activity?

B. FACTS

1. PROCEDURAL FACTS.

Defendant Gary Gatewood was charged by second amended information with unlawful possession of a firearm in the second degree, violation of the uniform controlled substances act (possession of cocaine), and violation of the uniform controlled substances act (possession of less than forty grams of marijuana), all alleged to have occurred on or about June 26, 2004. CP 86-87. A CrR 3.6 hearing was held, wherein Gatewood unsuccessfully moved to suppress all evidence stemming from a traffic stop that led to his eventual arrest. CP 64-85.

A jury trial commenced before the Honorable Judge Douglass North on July 7, 2005. 1RP 1.¹ The jury found Gatewood guilty of the firearm and marijuana charges, but acquitted him of the cocaine charge. CP 47-49. Gatewood received a standard range sentence of six months in custody with thirty days converted to

¹ The Verbatim Report of Proceedings consists of a total of four volumes, referred to in this brief as follows: 1RP (July 7, 2005 and Sept. 2, 2005), 2RP (July 12, 2005), 3RP (July 13, 2005) and 4RP (July 14, 2005).

community service for the firearm charge, and ninety days in custody on the marijuana charge. CP 13-19, 20-22.

2. SUBSTANTIVE FACTS FROM THE CrR 3.6 HEARING.²

In June 2004, Seattle Police Officers Larry Longley and Edward Chan were both members of the department's Anti-Crime Team.³ 1RP 5-6. Chan was an eleven-year veteran; Longley had been a Seattle officer for eight years. 1RP 2, 34. Prior to his tenure with the Seattle Police Department (SPD), Longley also served with the Enumclaw Police Department and as a military police officer in the reserves. 1RP 3. In order to become members of ACT, both officers went through specialized training. 1RP 3, 35. Longley attended "undercover school" for narcotics investigation where he learned about street-level narcotics, their identification and testing, and about drug loitering and the like. 1RP 4-5. By July of 2005, after six years as a member of ACT, Longley had

² The testimony at trial largely mirrored the testimony offered by the State at the CrR 3.6 hearing as discussed below.

³ The Anti-Crime Team ("ACT") is a unit of specialized officers who patrol areas of high criminal activity in an effort to intercept street-level crime as it occurs. 1RP 36. Their duties are not unlike those of a regular patrol officer, except that they are not generally required to respond to 911 calls. 1RP 4.

performed “hundreds and hundreds” of narcotics arrests, participated in undercover buys, and served over 400 narcotics search warrants. 1RP 3-5; 3RP 12.

On June 26 at about 12:20 a.m., the two officers were on patrol together in a fully-marked patrol car. 1RP 5-6, 38; CP 90. As they drove northbound on Rainier Avenue South, Longley’s attention was drawn to a bus shelter near the intersection of Rainier Avenue South and 39th Avenue South. 1RP 6, 37-38. Several people were sitting in the bus shelter. 1RP 6. A man, later identified as Gatewood, was sitting on the bench at the south end of the shelter. CP 90. He looked up as the officers’ marked patrol car approached the shelter and his expression immediately turned to surprise—his eyes got big and he looked “shocked like he was surprised to see [the officers].” 1RP 7. Longley saw Gatewood twist his whole body to the left while reaching his left hand around, as if hiding or sloughing something. 1RP 7. Having seen many people throw drugs behind bus shelters with similar furtive movements in the past, Longley’s interest was piqued. 1RP 8, 13.

Longley told Chan, who was driving, what he had seen, and asked Chan to drive around the block so they could investigate further. 1RP 8. Chan did so, and as they came back around the

block, Gatewood, apparently seeing the officers return, got up, walked a short way north of the bus shelter and then crossed Rainier Avenue midblock. 1RP 8. Because Rainier Avenue is a major arterial, the officers immediately made the decision to contact Gatewood for "jaywalking."⁴ 1RP 56. Given the nature of the street, and presumably also the darkness, it was clear to Chan that Gatewood's choice to illegally cross a major arterial at night posed a risk to traffic and to Gatewood. 1RP 56. To effectuate the stop, the officers pulled their patrol car just in front of Gatewood, as if to cut him off. 1RP 11. Longley got out of the car first and told Gatewood, "Stop, I need to talk to you." 1RP 11. Gatewood, who was facing Longley, looked at the officer, turned 180 degrees, and walked in the opposite direction. 1RP 11, 42.

Despite repeated orders to stop, Gatewood refused to comply. 1RP 11, 42. Instead, Gatewood turned toward a large bush, bent over, and stuck both his hands into the waistband of his pants. 1RP 11, 42. Concerned that Gatewood was reaching for a

⁴ There is no offense actually designated as "jaywalking" under the Revised Code of Washington or the Seattle Municipal Code ("SMC"). The parties and the trial court, however, referred to the event as "jaywalking" and this brief will do the same. Seattle Municipal Code §11.40.140 provides that "no pedestrian shall cross an arterial street other than in a crosswalk except upon [designated] streets within the Pike Place Market Historical District...." Regardless of what it is called, violations of SMC §11.40.140 are considered traffic infractions. See State v. Rife, 133 Wn.2d 140, 142, 943 P.2d 266 (1997).

gun, both officers drew their service weapons. 1RP 12, 23, 42-43. Gatewood then appeared to pull something out of his pants, and reached his arms into the nearby bush. 1RP 14, 42-43. The officers repeatedly yelled at Gatewood to show his hands, but only after he discarded something in the bush did he finally turn and face the officers with empty hands. 1RP 12, 43. He was then immediately told to get on the ground, and handcuffs were placed on him. 1RP 43.

After arrest, a search of the ground under the bush located a loaded .22 caliber semiautomatic handgun with a bullet in the chamber. 1RP 14. A search incident to arrest of Gatewood revealed both suspected cocaine and suspected marijuana. 1RP 46. Longley then returned to the bus shelter to see what Gatewood had discarded there, and he found suspected crack cocaine near where Gatewood had appeared to throw something. 1RP 14-15.

C. ARGUMENT

Gatewood claims that the court of appeals miss-applied -- or deliberately ignored -- State v. Ladson in deciding this case. He is mistaken. Ladson applies when officers who lack reasonable

suspicion of criminal activity to justify a stop lie in wait or follow the suspect until he commits a relatively minor infraction, and the officers use the minor infraction to justify the stop they lacked authority to make. The trial court and the court of appeals in this case both concluded that officers had a reasonable suspicion to stop Gatewood; they did not simply wait for him to commit an infraction. Thus, Ladson is immaterial; Gatewood was stopped based on his behavior, and the reasonable suspicion of criminal activity that was raised by his behavior.

1. OFFICERS LONGLEY AND CHAN HAD REASONABLE SUSPICION THAT GATEWOOD WAS INVOLVED IN CRIMINAL ACTIVITY.

In order to justify a seizure for investigatory purposes, a police officer must “point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [an] intrusion.” Terry v. Ohio, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). The level of articulable suspicion necessary to support an investigatory detention is “a substantial possibility that criminal conduct has occurred or is about to occur.” State v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1986).

To determine whether an investigatory stop was justified, courts "must first ascertain at what point during the continuum of events [a defendant] was seized." State v. Sweet, 44 Wn. App. 226, 230, 721 P.2d 560, rev. denied, 107 Wn.2d 1001 (1986). Once that time is pinpointed, courts must then inquire whether, leading up to that point, officers had specific and articulable facts upon which to base the stop. Id. If they did, the court must also analyze whether the stop was reasonably related in scope to the circumstances that justified the interference in the first place. Id. at 229.

In determining what constitutes reasonable articulable suspicion, Washington courts have identified a number of factors that may be considered. In State v. Pressley, a case not unlike this one, the court found the officer had articulated specific facts to justify their stop of Pressley based upon his testimony that Pressley was seen in a high-narcotics area with another woman, pointing at something in her upturned palm. 64 Wn. App. 591, 593-94, 825 P.2d 749 (1992). When the officer drove up, Pressley closed her hand, said "Oh, shit," and walked away from the other woman. Id. Upon contact, Pressley appeared to the officer to be trying to hide something in her pocket. Id. In ruling the stop justified, the court

stated that, among other things, factors that play into reasonableness include the officer's training and experience, the location of the stop, and the conduct of the person detained. Id. at 596. With regard to that last factor, the Pressley court stated that "it was the defendant's behavior itself which supplied the additional inferences necessary to provide an articulable basis for the officer's suspicion that what he was witnessing was probably illegal activity." Id. at 597. In the end, the Court found that the officer's basis for the stop "did amount to more than simply an 'inarticulable hunch.'" Id.

Other courts have relied on similar factors. In both State v. Glover, 116 Wn.2d 509, 514, 806 P.2d 760 (1991) and State v. Samsel, 39 Wn. App. 564, 570-71, 694 P.2d 670 (1985), the experience of the arresting officer was an important factor to be considered: "While an inchoate hunch is insufficient to justify a stop, circumstances which appear innocuous to the average person may appear incriminating to a police officer in light of past experience. The officer is not required to ignore that experience." Samsel, 39 Wn. App. at 570-71.

Flight by a suspect may also play into an officer's basis for a stop. In Pressley, one factor considered among the totality of the circumstances was that the defendant walked away as soon as the

officer entered the area. Pressley, 64 Wn. App. at 597. The court also considered flight as a factor in State v. Sweet, 44 Wn. App. 226, 230, 721 P.2d 560 (1986), a case relied on by the trial court in this case. 2RP 42. In Sweet, where the defendant fled as soon as the investigating officers turned their car toward him, the court stated: "Courts have generally regarded flight in the presence of police officers to be a circumstance that may be considered along with other factors in determining whether an investigatory stop is justified." Sweet, 44 Wn. App. at 230. There is no rule as to how quickly a suspect must flee, or how far they must go, before the fact of his flight is relevant. See, e.g., Pressley, 64 Wn. App. at 597; see also, State v. Swaite, 33 Wn. App. 477, 481, 656 P.2d 520 (1982) (using the fact that the defendant jumped into bushes upon seeing police officers, and thus "fled," to justify a Terry stop).

In addition to the above, the time of the stop, any furtive gestures made by a suspect, and a suspect's reaction to the presence of officers may be, and often are, considered. State v. Graham, 130 Wn.2d 711, 715, 927 P.2d 227 (1996); Pressley, 64 Wn. App. at 597; Sweet, 44 Wn. App. at 230. A defendant's nervousness in the presence of officers may also be considered when evaluating the legitimacy of a given stop. Glover, 116 Wn.2d

at 512-14 (holding that the mere fact that the defendant, who was not recognized by officers, turned away from them when he saw them and acted nervous by playing with his baseball cap provided reasonable articulable suspicion sufficient to justify a Terry stop for trespassing); Graham, 130 Wn.2d at 715. The factors discussed above, however, are not exhaustive.

Here, the officers saw this defendant sitting in a bus shelter in the middle of the night. As they approached, he suddenly and for no apparent reason -- other than the fact that he was unexpectedly staring at the police -- got wide-eyed with a look of surprise on his face. He quickly turned his body and appeared to slough something in the bus shelter. Based on his training and his experience making hundreds of narcotics arrests in Seattle and elsewhere, Officer Longley concluded that Gatewood was likely sloughing drugs. The sudden widening of the eyes are largely involuntary facial expressions, and naturally suggest surprise and alarm. And, the sudden twisting of his whole body to his left as if to hide something suggested he had something he did not wish the officers to see. These specific, articulable facts, taken together with rational inferences from those facts, would reasonably cause an officer of Longley's tenure and experience to suspect that a crime

might be occurring. Thus, it was reasonable at that point for the officers to swing their car around and approach the bus stop for further investigation.

Had Gatewood remained in the bus shelter it is likely that the officers would have approached him to talk and would have simultaneously checked the area behind the shelter to see whether he had sloughed drugs. It may not have even been necessary to seize him. The officers could have engaged in a consensual encounter and checked the bus shelter for sloughed drugs. 1RP 57-59.

But, as is frequently true of street encounters, the situation was dynamic, not static. So, instead of a simple investigation at the bus shelter, the officers faced a changing -- and possibly escalating -- situation. The officers drove around the block and came the wrong way down a one-way street toward the bus shelter. Although Gatewood had apparently been content to remain in the shelter as the police drove around the block, he showed a sudden interest in leaving the shelter when the officers reappeared driving the wrong way down a one-way street. Again, this fact would have raised the officers' suspicions that Gatewood was not simply tired of waiting for the bus.

Gatewood then got up and walked across a four-lane thoroughfare in the dark, directly in front of the officers. This behavior would suggest to a reasonable, seasoned police officer that the defendant had not been waiting for a bus but, rather, that he had been using the shelter to deal drugs, that he had sloughed drugs upon seeing them, and that he wanted to get away from police. At this point, the officers reasonably believed that Gatewood was trying to get away from them. They had a right to briefly detain him and ask a few questions. The fact that he was jaywalking might also justify a separate citation but whether they issued a citation or not, they clearly wanted to talk to him, and had a legal basis to do so. 1RP 57-59. Thus, the officers had a reasonable suspicion of criminal activity that justified a brief detention at this point.

But, again, the situation did not proceed in a linear fashion. As the officers pulled up in front of Gatewood to block his path, Officer Longley got out of his car and told Gatewood that he wanted to speak to him. 1RP 10-11. Gatewood was legally "seized" at this point. He then looked directly into the officer's face and, after about

a second of delay for the situation to sink in, Gatewood turned 180 degrees and began walking in the opposite direction. Id. at 22. At this point, there could be no question but that he was attempting to avoid them and it was reasonable for them to conclude, on this additional basis, that he changed his direction of travel because he had sloughed drugs in the shelter and perhaps held still more drugs.

In the next moments, the situation again escalated, justifying a greater level of response by the officers. Gatewood reached into his waistband and appeared to be fishing around in the front of his pants. Based on his training and experience, the officer suspected that he was pulling out a gun. The officers were required to immediately draw their weapons and order Gatewood to show his hands. He did not comply. Instead, he pulled out a gun and ditched it into the bushes, where the officers retrieved it. 1RP 12-13.

For these reasons, the trial court and the Court of Appeals were correct in determining that Gatewood could be detained.

2. THIS CASE INVOLVES NO PRETEXT ARREST;
GATEWOOD WAS STOPPED BASED ON HIS
SUSPICIOUS BEHAVIOR.

Gatewood says that the courts of appeal are refusing to apply State v. Ladson, and that this case exemplifies their neglect. Neither statement is true.

First, there is an important distinction between Ladson-type pretext cases and this case. In a pretext case, like Ladson, an officer wants to stop a suspect for one reason -- a reason that is legally insufficient to justify the stop -- so the officer follows the suspect until he finds a reason to justify the stop. The second reason is a "pretext" because it is not the real reason the suspect was stopped.

In this case, however, the officers stopped Gatewood not simply because he jaywalked; they stopped him because he had made a series of highly suspicious moves, including jaywalking to avoid the officers, that aroused suspicion of criminal activity. Officers Longley and Chan did not follow Gatewood waiting for him to jaywalk to justify an investigation; they did not lay in wait for him to commit an offense that would justify a stop. Rather, they approached him because they suspected he had sloughed drugs, and they intended to talk to him further, whether or not he

jaywalked, spit on the sidewalk, or tossed litter in the gutter. When he abruptly left the shelter -- something a bus rider would not ordinarily do -- their suspicions were further aroused. When he unexpectedly crossed the street illegally right in front of them, their suspicions were further aroused. When he turned on heel and walked in the other direction after they called out to him, their suspicions would have been further aroused. And when he started fumbling for a gun, and then dumped a gun, they certainly had a basis to order him to show his hands, and to then recover the gun.

The officers' thought-process is reflected in the whole record, but is succinctly described in this exchange during cross-examination of Officer Chan:

- Q. ...You said the basis for stopping him is jaywalking and other things. Is that what you said?
- A. Yes. And other activity, yes.
- Q. You decided to stop Mr. Gatewood before you saw him jaywalking?
- A. No.
- Q. No?
- A. No. All things combined, what Officer Longley told me he saw was a motion to hide something. And as I was coming down 39th, it appeared to me that Mr. Gatewood moved quickly through the shelter. Whether he saw our car or saw us, I don't

know, but as soon as my car pulled aside of him, he stopped on Rainier, to cross Rainier, it appeared to me, to leave the area. It was very clear that he did not want to be at that bus shelter any longer. So, all those things combined, including jaywalking, yes.

Q. So, when you drove up to Rainier and went eastbound on Hudson, and went the wrong way on 39th, you were going to contact him?

A. I was going to see what was going on. I hadn't made up my mind whether we were going to contact him. Whether or not to see what is under the seat, anything. We never got the chance to get there, to do anything before he decided to leave and cross Rainier.

* * *

Q. You went up to Hudson and came down the wrong way?

A. Yes.

Q. Because you were going back to investigate the suspicious activity?

A. Yes.

Q. You weren't necessarily going to contact Mr. Gatewood when you came back down?

A. I don't think we had made the decision whether or not we were going to contact him yet. "Contact" meaning what, are we going to stop him?

Q. You drove right up and say anything to him

A. We might have done that. We might have stopped the car in front of the bus stop and said, [""]How you doing?" and looked under the seat. We hadn't gotten that far yet because the situation took another direction.

Q. And, if you had gone to the bus shelter, you would have contacted the target of your suspicion?

A. We may have, yes.

Q. And then you are saying that it was the initial description that Officer Longley gave you, seeing Mr. Gatewood is the target of suspicion,

crossing the street, that gave you the reason for stopping him, when you got down or here to 39th Avenue.

A. All things combined, yes.

1RP 57-59.

The seizure of Gatewood rises or falls on this combination of facts observed by the officers, the totality of the circumstances, and the reasonable inferences that these officers drew from the facts and circumstances. The stop does not rise or fall on whether the officers had authority to stop Gatewood for jaywalking. Gatewood was stopped because of what he did in the bus shelter, and because he tried to leave once he realized that the police had seen him slough something in the bus shelter. This does not become a "pretext" stop simply because Gatewood provided an additional reason for officers to stop him when he jaywalked across a four-lane thoroughfare at night.

If Ladson requires that officers have only *one* reason to stop a suspect, it would require officers to abandon a legitimate investigation simply because the situation ripened, and more reasons to investigate unfolded. Most stops involve multiple factors that unfold quickly in an unpredictable, dynamic fashion. It is difficult to imagine how any such "single purpose rule" would ever

be described, much less applied by officers on the streets. For these reasons, Gatewood's approach -- which would create a de facto "single purpose rule" -- should be rejected.

There is also no basis for Gatewood's claim that the court of appeals is generally ignoring Ladson. This is a serious charge and it is not supported by citation to any pattern of cases showing that the Court of Appeals is derelict in its duty. Moreover, it is unsupported by the evidence in this case. At bottom, Gatewood simply disagrees with the way the trial court and Court of Appeals interpreted the evidence. He believes that the evidence should be segregated into discrete chunks and analyzed as such. The trial court and the Court of Appeals correctly noted the artificiality of such a detached, sterile, academic approach. Those courts properly understood that the totality of the developing situation had to be considered and, that looking at the totality of the circumstances, the officers acted properly. Gatewood's argument and rhetoric should be rejected.

D. CONCLUSION

The Court of Appeals properly applied settled law and held that Gatewood was detained based on a reasonable suspicion of

criminal activity. The Court of Appeals neither misapplied nor ignored Ladson; the pretext doctrine is simply inapplicable here.

Gatewood's conviction should be affirmed.

DATED this 19th day of February, 2008.

Respectfully submitted,

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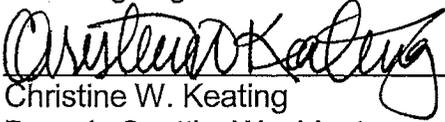
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Today I sent via electronic mail to Susan Wilk, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Supplemental Brief of Respondent, in STATE V. GARY NATHANIAL GATEWOOD, Cause No. 79992-0, in the Supreme Court, for the State of Washington.

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


Christine W. Keating #30821
Done in Seattle, Washington

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