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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

82852-1
26573-1-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

WALTER M. DOUGHTY, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

APPELLANT'S BRIEF

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A. ASSIGNMENT OF ERROR

1. The trial court erred in denying the motion to suppress evidence obtained following the *Terry* stop.

B. ISSUES

1. Does an investigative detention based on anonymous complaints to police about heavy traffic and brief visits to a residence and observation of an individual who briefly visits the residence at three o'clock in the morning violate the Fourth Amendment right to be free of unreasonable seizures?
2. Is an arrest for driving with a suspended license an unlawful pretext arrest when it occurs following an initial *Terry* stop to investigate drug activity that fails to produce sufficient evidence to justify further investigations?

C. STATEMENT OF THE CASE

Neighbors of the house at 2311 West Gardner had "made numerous complaints of large quantities of short stay traffic everyday, including people on foot" and in vehicles. (CP 45) As a result, two law

enforcement agencies had "identified this address as a drug house." (CP 45)

Officer Bishop was watching the house for drug activity. (CP 45) At 3:20 a.m. he saw Walter Doughty park in front of the house, walk up to the house, and return to his car less than two minutes later. (CP 45)

The officer stopped Mr. Doughty as he was driving away from the house. (CP 45) Mr. Doughty told Officer Bishop he lived nearby and had had an argument with his girlfriend. He stopped to visit a friend at the Gardner address, but the friend was asleep so he left. (CP 45)

Officer Bishop ran Mr. Doughty's identification and learned that he was driving with a suspended license with prior convictions. (CP 45) He arrested Mr. Doughty for the traffic offense, and searched his car. (CP 45) He found items with residue that a field test showed was methamphetamine. (CP 45-46) He then arrested Mr. Doughty for possession of a controlled substance. (CP 46) The booking officer at the jail found additional methamphetamine in Mr. Doughty's shoe. (CP 46)

The court denied Mr. Doughty's motion to suppress the evidence obtained following the investigative detention, and convicted him on stipulated facts. (CP 8, 20-35)

D. ARGUMENT

1. THE INVESTIGATIVE STOP, BASED SOLELY ON COMPLAINTS BY UNIDENTIFIED INFORMANTS, WAS AN UNLAWFUL SEIZURE.

The Fourth Amendment, made applicable to the states by the Fourteenth Amendment, guarantees the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. *Mapp v. Ohio*, 367 U.S. 643, 647, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, 86 Ohio Law Abs. 513 (1961). Searches and seizures must be supported by probable cause whether or not a formal arrest or search pursuant to a warrant occurs. *Dunaway v. New York*, 442 U.S. 200, 208, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979). Exceptions authorizing seizure on less than probable cause are narrowly drawn and carefully circumscribed. *State v. White*, 97 Wn.2d 92, 640 P.2d 1061 (1982).

One such exception is a brief stop to investigate suspicious activity. *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); *State v. Hudson*, 124 Wn.2d 107, 112, 874 P.2d 160 (1994); *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). Although lacking probable cause to arrest or search, police may briefly detain and question a person if they have a well-founded suspicion that the person is connected

to actual or potential criminal activity. *State v. Sieler*, 95 Wn.2d 43, 46, 621 P.2d 1272 (1980) (*citing Brown v. Texas*, 443 U.S. 47, 51, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979); *Terry*, 392 U.S. at 21); *State v. Glover*, 116 Wn.2d 509, 513-14, 806 P.2d 760 (1991).

Although less intrusive than an arrest, a *Terry* stop must nevertheless be reasonable. *Kennedy*, 107 Wn.2d at 4. To justify a seizure on less than probable cause, the officers' suspicion must be based on specific, objective facts indicating that the person seized has committed or is about to commit a crime. *Terry*, 392 U.S. at 21; *Duncan*, 146 Wn.2d at 172.

"An informant's tip cannot constitutionally provide police with such a suspicion unless it possesses sufficient 'indicia of reliability.'" *State v. Sieler*, 95 Wn.2d at 47 (*citing Adams v. Williams*, 407 U.S. 143, 147, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972); *State v. Lesnick*, 84 Wn.2d 940, 943, 530 P.2d 243 (1975)). Reasonable suspicion to stop requires "'circumstances suggesting the informant's reliability, or some corroborative observation which suggests either the presence of criminal activity or that the informer's information was obtained in a reliable fashion.'" *Sieler*, 95 Wn.2d at 47 (*quoting Lesnick*, 84 Wn.2d at 943).

In the context of an investigative detention, "[a]n informant's tip cannot constitutionally provide police with [an articulable] suspicion unless it possesses sufficient 'indicia of reliability.'" *State v. Jones*, 85 Wn. App. 797, 799, 934 P.2d 1224 (*quoting Sieler*, 95 Wn.2d at 47), *review denied*, 133 Wn.2d 1012, 946 P.2d 402 (1997); *see State v. Hopkins*, 128 Wn. App. 855, 863-864, 117 P.3d 377 (2005).

The police may make an arrest on the basis of reasonable suspicion of grounds communicated by fellow officers, or from a police bulletin based on sufficient facts. *State v. O'Cain*, 108 Wn. App. 542, 550, 31 P.3d 733 (2001); *See State v. Rothenberger*, 73 Wn.2d 596, 440 P.2d 184 (1968).

The State must prove that the dispatch "was based on a sufficient factual foundation to justify the kind of seizure at issue." *O'Cain*, 108 Wn. App. at 544. "This is not to say that police officers receiving the dispatch may not act on it without further inquiry. They certainly may do so; indeed, effective law enforcement may very well require that they do so." *Id.* at 552. In such cases, however, the State has the burden to prove the reliability of the dispatch at a subsequent suppression hearing. One way to satisfy this requirement is to "elicit the source of the information and the factual basis underlying the [information provided by fellow officers.]" *Id.* at 556.

Here, the State provided no reliable information to support the assertion that the house on Gardner was a drug house. Unidentified neighbors had complained of heavy traffic at that address. The record fails to show any effort by law enforcement to determine the identity of the informants, to verify the accuracy of their complaints, or to obtain additional information that would support the inference the traffic was related to drugs.

Officer Bishop's purpose in observing the house may have been to obtain such additional information, but there is no evidence he succeeded in such an endeavor. Apart from Mr. Doughty's visit, he did not report any traffic to or from the suspected house. The brief visit of a single individual in the early hours of the morning does not substantiate the suspicion that the delivery of drugs was occurring at that address.

The State failed to establish that Officer Bishop and his fellow law enforcement officers possessed "specific, objective facts" indicating that Mr. Doughty had committed or was about to commit a crime. *See Terry v. Ohio*, 392 U.S. at 21. The court erred in concluding "the officer had a reasonable suspicion that the defendant was involved in criminal activity." The evidence obtained by Officer Bishop following Mr. Doughty's detention should have been suppressed.

2. LACKING PROBABLE CAUSE TO ARREST FOR SUSPECTED DRUG ACTIVITY, THE OFFICER USED THE DWLS ARREST AS A PRETEXT TO SEARCH THE VEHICLE.

The Washington Constitution abjures pretextual stops, because pretext – the use of a lawfully sufficient, but false, reason to detain, with the intent to conduct an unrelated criminal investigation – fails to supply the authority of law article I, § 7 demands. *Ladson*, 138 Wn.2d at 358. "Pretext is, by definition, a false reason used to disguise a real motive." *Id.* at 359 n. 11 (*quoting* Patricia Leary & Stephanie Rae Williams, Toward a State Constitutional Check on Police Discretion to Patrol the Fourth Amendment's Outer Frontier: A Subjective Test for Pretextual Seizures, 69 Temp. L. Rev. 1007, 1038 (1996)).

Pretextual stops "generally take the form of police stopping a driver for a minor traffic offense to investigate more serious violations-violations for which the officer does not have probable cause" to investigate. *State v. Myers*, 117 Wn. App. 93, 94-95, 69 P.3d 367 (2003). Pretextual stops are not permitted under article 1, § 7 of the Washington Constitution. *Ladson*, 138 Wn.2d at 353. When determining if a stop is pretextual, courts look to the totality of the circumstances, including both the objective reasonableness of the officer's behavior and the subjective intent of the officer. *Id.* at 358-59.

> Thus, a warrantless traffic stop based on mere pretext violates article I, section 7 of the Washington Constitution because it does not fall within any exception to the warrant requirement and therefore lacks the authority of law required for an intrusion into a citizen's privacy interest.

State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007).

> When determining whether a given stop is pretextual, the court should consider the totality of the circumstances, including both the subjective intent of the officer as well as the objective reasonableness of the officer's behavior.

Ladson, 138 Wn.2d at 358-59. The Supreme Court explained, "what is needed is a test that tests real motives. Motives are, by definition, subjective." *Id.* at 359 n. 11 (*quoting* Leary & Williams).

Ladson and the several cases that have considered *Ladson's* rule since that decision held that evidence of improper subjective intent will invalidate an otherwise-lawful stop. *Nichols*, 161 Wn.2d at 10-11; *Ladson*, 138 Wn.2d at 353; *State v. Meckelson*, 133 Wn. App. 431, 437, 135 P.3d 991 (2006); *State v. DeSantiago*, 97 Wn. App. 446, 451-52, 983 P.2d 1173 (1999). Indeed, this is the axiomatic principle that animates *Ladson's* holding: that the basis for the stop is itself lawfully sufficient is beside the point, as "our constitution requires we look beyond the formal justification for the stop to the actual one." *Ladson*, 138 Wn.2d at 353.

An officer may briefly detain an individual in order to investigate suspicious activity, but the detention may last no longer than the time necessary to confirm or dispel the officer's suspicions. *Florida v. Royer*, 460 U.S. 491, 498-99, 75 L. Ed. 2d 229, 103 S. Ct. 1319(1983); *State v. White*, 97 Wn.2d at 105-06.

Officer Bishop undeniably detained Mr. Doughty in order to investigate suspected drug activity. Assuming, for the sake of argument, that the officer possessed sufficient information to justify a brief investigative stop, the State provided no evidence that Mr. Doughty's explanation for his presence at that time and place confirmed or failed to dispel the officer's suspicions. There is no evidence he pursued his investigation of suspected drug activity after Mr. Doughty identified himself and explained his actions. At that point, Officer Bishop could no longer lawfully detain Mr. Doughty. *See State v. Penfield*, 106 Wn. App. 157, 160-61, 22 P.3d 293 (2001).

Nevertheless, Officer Bishop obtained additional information, namely the fact that Mr. Doughty's license had been suspended, and used that information to supply a basis for arresting Mr. Doughty and searching his vehicle for evidence of drug activity. The record demonstrates that Mr. Doughty's arrest was a pretext for prolonging and extending the scope of the officer's investigation of suspected drug activity.

E. CONCLUSION

The court erred in failing to suppress evidence obtained by the use of an unlawful investigative stop followed by a pretext arrest. This court should reverse Mr. Doughty's conviction.

Dated this 31st day of March, 2008.

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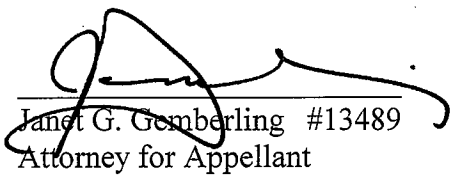

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