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STATE OF WASHINGTON  
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Supreme Ct No. \_\_\_\_\_

COA No. 26573-1-III

SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, Respondent

v.

WALTER M. DOUGHTY, Petitioner

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PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Walter Doughty asks this court to accept review of the decision of Division Three of the Court of Appeals terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

The published opinion filed on February 5, 2009. A copy of the decision is in the Appendix at pages A-1 through A-8.

C. ISSUE PRESENTED FOR REVIEW

An individual parks his car near a suspected drug house at 3:30 in the morning, approaches the house, stays about two minutes, and returns to his car. Under Const. Art. I, § 7 and the Fourth Amendment, do these facts give rise to a well-founded suspicion that the individual is connected to actual or potential criminal activity that would justify an investigative seizure?

D. STATEMENT OF THE CASE

At 3:20 a.m. Officer Bishop saw Walter Doughty park in front of a house, walk up to the house, and return to his car less than two minutes

later. (CP 45)<sup>1</sup> Neighbors 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)

The officer stopped Mr. Doughty as he was driving away from the house, ran Mr. Doughty’s identification and learned that he was driving with a suspended license with prior convictions. (CP 45) He arrested Mr. Doughty and searched his car. (CP 45) The officer found items with residue that field-tested as methamphetamine and arrested Mr. Doughty for possession of a controlled substance. (CP 45-46)

The trial 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)

#### E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Review should be granted when a decision of the Court of Appeals conflicts with a decision of the Supreme Court or another division of the

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<sup>1</sup> The Court of Appeals decision states that Mr. Doughty “entered” the house. State v. Doughty, Slip Op. at 1 (Division III, February 5, 2009) The statement of facts upon which both parties rely, and the trial court’s findings of fact, merely state that “the officer saw [Mr. Doughty ] walk up to the house, return less than two minutes later and drive away.” (CP 43; *see* CP 14)

Court of Appeals, or involves a significant question of constitutional law or an issue of substantial public interest. RAP 13.4(b).

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). Under article I, § 7 of the Washington Constitution, warrantless seizures are per se unreasonable and the State bears the burden of demonstrating that the warrantless stop falls within one of the narrow exceptions to the general rule. *State v. Williams*, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). 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.

The information found to support the investigative stop in Mr. Doughty's case falls far short of the standard set in *Kennedy*. The *Kennedy* decision relied on detailed information provided by a reliable informant, specifically alleging that the defendant was engaged in criminal activity, and the corroboration of that information supplied by the officers' observation of the defendant's activities.

In *Kennedy*, the defendant was seen leaving a house in the afternoon and getting into a maroon car. 107 Wn. 2d at 3. The observing officer had received a tip from a reliable informant detailing that the defendant regularly bought marijuana at the house, went there only to buy

drugs, and often drove a particular maroon car. *Id.* The officer had also received frequent complaints about frequent foot traffic to the house. *Id.* After verifying that the maroon car he had seen was the particular car the defendant was said to drive, the officer stopped the car. *Id.* This court held that the information rendered an investigative stop reasonable. *Id.* at 8-9.

The *Kennedy* decision relies almost exclusively on the detailed nature of the reliable informant's information; the neighbors' complaints and Kennedy's actions were significant primarily because they substantially corroborated that information. In the present case, the reliable informant is nowhere to be found.

The Court of Appeals reasoned that the specific, articulable facts known to the officer in the present case were sufficient to justify a stop because they were more substantial than the facts known to the officer in *State v. Richardson*, 64 Wn. App. 693, 825 P. 2d 754 (1995). The suspect in *Richardson* was seen around 2:30 a.m. in the company of one Tom Gonzales, an individual whom the officer had observed engaging in possible criminal activity consistent with running drugs. *Id.* at 694-95. Acknowledging that Mr. Gonzales's activities could give rise to a reasonable suspicion that he was engaged in criminal activity, the court nevertheless concluded that walking with Mr. Gonzales at 2:30 a.m. was

insufficient to support an articulable suspicion the Mr. Richardson was also engaged in criminal activity. *Id.* at 697. In other words, consorting with a drug dealer at two o'clock in the morning is not enough to justify and investigative detention.

The Court of Appeals found that "Mr. Doughty's own suspicious behavior" provided the additional facts that justified the officer's suspicion. The only additional facts that distinguish Mr. Doughty's case from *Richardson* are that his visit in the proximity of a suspected drug source was very brief, only two minutes, and he was traveling by car rather than on foot. In *Richardson*, no evidence was provided as to the length of time the defendant had been in the company of the suspected drug dealer.

The *Doughty* dissent cites another case, *State v. Gleason*, 70 Wn. App. 13, 851 P. 2d 731 (1993), in which the factual basis for a stop was the defendant's "leaving an apartment complex where narcotics had been sold in the past." *Id.* at 18. The *Gleason* decision noted that this was insufficient to justify the stop, since the officers did not see any transaction, and Mr. Gleason was not seen to be acting suspiciously or carrying any unusual objects. *Id.*

Again, the only facts that distinguish Mr. Doughty's case from *Gleason* are that his visit in the proximity of a suspected drug source was very brief, only two minutes, and he was traveling by car rather than on foot.

Division One of the Court of Appeals described a case in which, it said, the facts were very close to the fine line between an articulable suspicion and an inchoate hunch. *State v. Pressley*, 64 Wn. App. 591, 825 P.2d 749 (1992). In *Pressley* the officer observed two individuals in a location well known for narcotics transactions in the evening after dark. 64 Wn. App. at 593-96. One individual was pointing to an object or objects in her hand, at which the other individual was looking intently. *Id.* at 594. The officer had previously observed drug transactions involving similar activity. *Id.* He approached the individuals, whereupon one of them said "Oh Shit" and closed the hand containing the objects. *Id.* The individuals then walked away from each other. *Id.* The officer saw something sticking out of the first individual's hand, and as he approached she put her hand in her pocket. *Id.*

Division One recognized that merely observing what could be a drug transaction in an area known for such activities would have been insufficient to justify a stop, since the behavior was "susceptible to a number of innocent explanations." *Id.* At 597. The individuals' words

and conduct as the officer approached, however, were viewed as sufficiently consistent with “an incipient drug deal” to justify the stop. *Id.* Even so, the court observed: “While the officer’s basis for the stop hovers near the line between sufficient and insufficient grounds for a *Terry* stop, it did amount to more than simple an ‘inarticulate hunch.’” *Id.*

Surely, if the activities described in *Pressley* hover near the line separating proper and improper *Terry* stops, then the decision in Mr. Doughty’s case represents a significant lowering of the bar. A brief visit to a house at 3:30 a.m. is susceptible to a number of innocent explanations, regardless of the neighbors’ concerns about possible drug activity. The officer stopped Mr. Doughty on an inchoate hunch, and the court erred in refusing to suppress the fruits of the ensuing search.

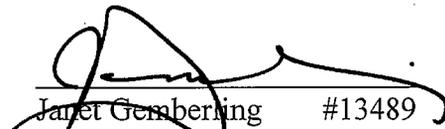
The decision in this case conflicts with this court’s decision in *State v. Kennedy* and with the decision of Division One of the Court of Appeals in *State v. Pressley*. Moreover, whether a police officer may seize a person who briefly approaches a drug house in the middle of the night involves a significant question of constitutional law and is an issue of substantial public interest.

F. CONCLUSION

Review should be granted and the Court of Appeals decision should be reversed.

Dated this 9<sup>th</sup> day of March, 2009.

Respectfully submitted,

  
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Attorney for Petitioner

# APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

No. 26573-1-III

Respondent,

Division Three

v.

WALTER MOSES DOUGHTY,

PUBLISHED OPINION

Appellant.

Sweeney, J.—The defendant here appeals the trial court’s refusal to suppress drug evidence seized after he visited a drug house at 3:20 a.m. for a two-minute-long visit. We conclude that the circumstances provided ample grounds for a *Terry*<sup>1</sup> stop and affirm the trial judge’s refusal to suppress the drug evidence.

FACTS

Officer Derek Bishop was watching a particular house for drug activity because informants identified it as a drug house. At 3:20 a.m., Officer Bishop saw a car park in front of the house. The driver, Walter Doughty, entered the house and returned to his car in less than two minutes. Mr. Doughty drove away from the house. Officer Bishop

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

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suspected drug activity based on the time of day, complaints of drug activities from neighbors, the fact that police had identified the house as a drug house, and the short duration of the visit. He stopped the car.

Officer Bishop ran a records check and discovered Mr. Doughty's license was suspended. He arrested Mr. Doughty and searched his car incident to arrest. The officer found a pipe and scale with methamphetamine residue. Police also found a baggy of methamphetamine in Mr. Doughty's shoe during the booking process.

Mr. Doughty moved to suppress the drug evidence. The trial judge concluded that the officer had a reasonable suspicion of criminal activity "[b]ased on the time of day, the designation by the police of the house as a drug house, the neighbors' complaints and the defendant's actions." Clerk's Papers (CP) at 14. The State and Mr. Doughty stipulated to the facts for trial, and the court found Mr. Doughty guilty of one count of possession of methamphetamine.

## DISCUSSION

### *Terry* Stop

Mr. Doughty assigns error to the trial judge's conclusion that police had sufficient grounds to warrant a *Terry* stop. The court concluded that "the officer had a reasonable suspicion that the defendant was involved in criminal activity." CP at 14. We review a conclusion of law de novo. *State v. Chang*, \_\_\_ Wn. App. \_\_\_, 195 P.3d 1008, 1010

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(2008).

Significantly, Mr. Doughty does not assign error to any of the trial court's findings of fact from the suppression hearing, including that the house had been identified as a drug house by police or that police were "watching a house, not a business open for legitimate activity." CP at 14. We accept unchallenged findings of fact following a CrR 3.6 suppression hearing as verities on appeal and will not review them. *State v. Hill*, 123 Wn.2d 641, 644-47, 870 P.2d 313 (1994).

A police officer may conduct an investigatory stop based on less than probable cause if the officer has a well-founded suspicion of criminal activity based on specific and articulable facts. *State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 760 (1991). The level of articulable suspicion necessary to support an investigative 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). We decide the "reasonableness" of the officer's suspicion based on the totality of the circumstances, including the officer's training and experience, the location of the stop, and the conduct of the person detained. *Glover*, 116 Wn.2d at 514.

The trial court concluded that the stop in this case was justified because of the early morning hour, the designation by the police of the house as a drug house, the neighbors' complaints, and Mr. Doughty's "actions." CP at 14. Mr. Doughty argues that

the State provided no reliable information to support its assertion that the house on Gardner was a drug house, noting that the record fails to show any efforts by law enforcement to determine the identity of the informants or verify the accuracy of their complaints. But that misses the essential point on appeal here. The house had already been identified as a drug house, and Mr. Doughty does not challenge that finding of fact. Indeed, the finding appears to us to be well supported by the record, in any event.

So the question before us is whether the following facts give rise to a reasonable suspicion of criminal activity sufficient to support a *Terry* stop:

- A house identified as a drug house;
- Mr. Doughty stops at the drug house;
- he is there for only two minutes; and
- he visits the drug house at 3:20 in the morning.

The stop here was a seizure. *State v. Santacruz*, 132 Wn. App. 615, 619, 133 P.3d 484 (2006). The question is whether it was reasonable given these circumstances. *Id.* The stop is reasonable if the State can point to ““specific and articulable facts giving rise to a reasonable suspicion that the person stopped is, or is about to be, engaged in criminal activity.”” *Id.* (internal quotation marks omitted) (quoting *State v. Villarreal*, 97 Wn. App. 636, 640, 984 P.2d 1064 (1999)). The stop must be based on more than the officer’s hunch. *Id.* The Washington Supreme Court has held a stop valid under similar circumstances. *Kennedy*, 107 Wn.2d at 8-9

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(*Terry* stop after police see defendant leave a suspected marijuana dealer's house and, before police reached the car, defendant leaned forward in his car as if to place something under the driver's seat). And we conclude there are sufficient grounds here to justify the stop.

We have required more than simple presence in a high crime area or physical proximity to a suspected drug dealer to justify a stop. In *State v. Richardson*, a patrolling officer saw the appellant walking in a "high drug activity" neighborhood of Yakima with a person the officer suspected of "running drugs." 64 Wn. App. 693, 694-95, 825 P.2d 754 (1992). The officer stopped both men, questioned them, and examined the contents of the appellant's pockets. *Id.* at 695. The primary question in *Richardson* was whether the search was consensual. *Id.* at 696. Here, the State does not argue that the search of Mr. Doughty was consensual because it clearly was not. The *Richardson* court also addressed the question whether the Yakima police had reasonable grounds to seize the defendant. *Id.* The court concluded that presence in a high crime area and proximity to a suspected drug runner was not enough to support the necessary suspicion for the stop. *Id.* at 697.

Here, however, Officer Bishop's suspicion was supported by more than Mr. Doughty's proximity to a drug dealer or his mere presence in a certain neighborhood that supported the officer's suspicion. It was supported instead by Mr. Doughty's own

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suspicious behavior. He drove to a drug house at 3:20 a.m., entered the house for a mere two minutes, and then left. We conclude that this scenario, in this setting, is legally sufficient to support with substantial probability the officer's reasonable suspicion that criminal conduct had occurred.

#### Pretextual Stop

Mr. Doughty also contends that the stop was a pretextual stop under article I, section 7 of the Washington Constitution. *State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833 (1999). We need not address that issue since we conclude the officer had ample reason to stop Mr. Doughty based on factors other than a traffic infraction; and, in fact, the officer never claimed that he stopped Mr. Doughty for a traffic infraction.

We affirm the judgment of the trial court.

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Sweeney, J.

I CONCUR:

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Brown, J.

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Schultheis, C.J. (dissenting) — I disagree with the majority’s conclusion that Officer Derek Bishop had a sufficient basis for an investigatory stop. Therefore, I respectfully dissent.

Under the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution, warrantless searches and seizures are per se unreasonable and the State bears the burden of demonstrating that the warrantless search falls within one of the few narrow exceptions to the general rule. *State v. Williams*, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). Under the *Terry*<sup>1</sup> stop exception, police officers may briefly detain a person if they “have a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.” *Brown v. Texas*, 443 U.S. 47, 51, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979). When determining whether police have reasonable suspicion sufficient to justify a *Terry* stop, we apply the totality of the circumstances test. *State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 760 (1991) (citing *Terry*, 392 U.S. at 25-26). Evaluated against this standard, I conclude that the facts known to Officer Bishop at the time he stopped Walter Doughty fall short of reasonably indicating that Mr. Doughty

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

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was engaged at the time in criminal activity.

The majority identifies the following facts to justify the stop: (1) a house identified by law enforcement as a drug house, (2) Mr. Doughty’s two-minute visit at that house, and (3) the early morning hour. The majority asserts that *State v. Kennedy*, 107 Wn.2d 1, 726 P.2d 445 (1986) supports its conclusion that the stop was justified, but *Kennedy* is distinguishable. In that case, in addition to observing the defendant leave a known drug house, police had reliable information from an informant that the defendant regularly purchased marijuana from the owner of the drug house and that he only went to that particular house to buy drugs. *Id.* at 3. Police also saw the defendant lean forward in his car as if placing something on the front seat.

Here in contrast, a police officer simply saw a person briefly enter a drug house at an early morning hour. We have previously found similar circumstances insufficient justification for a *Terry* stop. In *State v. Gleason*, 70 Wn. App. 13, 851 P.2d 731 (1993), for example, we held that a stop was not justified where the defendant was seen leaving an apartment complex with a history of drug sales. In reversing the trial court’s denial of the suppression motion, we reasoned, “this was the first time the defendant had been seen in the area, the officers did not know what occurred inside the apartment and neither officer saw him involved in the purchase of drugs . . . , there was no evidence Mr. Gleason was acting suspiciously, [and] he was not carrying any unusual objects.” *Id.* at

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18 (citation omitted).

Furthermore, in *State v. Richardson*, 64 Wn. App. 693, 825 P.2d 754 (1992), we held that a person’s presence in a high crime area does not give rise to a reasonable suspicion to stop him. In *Richardson*, the defendant was observed walking at 2:30 a.m. in an area known for its high drug activity in the company of a person suspected of drug dealing. *Id.* We held that the stop was improper, noting that at the time of the stop, the officer “knew only that Mr. Richardson was in a high crime area, late at night, walking near someone the officer suspected of ‘running drugs’. He had not heard any conversation between the men and *had not seen any suspicious activity between them.*” *Id.* at 697 (emphasis added).

The majority acknowledges *Richardson*, but finds our case distinguishable because it was “Mr. Doughty’s own suspicious behavior” that supported the officer’s suspicion. Majority at 5. But what is the suspicious activity here? Officer Bishop did not observe any activities inside the house, see Mr. Doughty make contact with anyone, see him with unusual objects, or overhear any conversation. Based on our own precedent, the circumstances here do not rise to the level of articulable suspicion necessary to justify an investigatory stop. Accordingly, I would reverse the judgment of the trial court.

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Schultheis, C.J.