89894-4

Court of Appeals No. 43289-7-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON

Plaintiff/Respondent,

v.

Z.E.,

Defendant/Appellant.

BRIEF OF APPELLANT

Appeal from the Superior Court of Pierce County,
Cause No. 11-8-01174-4
The Honorable Kitty-Ann van Doorninck, Presiding Judge

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I. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Z.E.'s motion to suppress.

2. Error is assigned to "The Undisputed Facts" portion of the Findings and Conclusions on admissibility of evidence CrR 3.6 as follows:

   Page 2, lines 7-9: "At 1646 hours on 2 October 2011 Officers ROSE and CLARK were advised by 911 dispatch that a 911 call had been received from an individual who was identified as Arthur REED."

   Page 2, lines 12-16: "ROSE and CLARK testified that the CAD provided the following information from REED: Someone was in the alley between Madison and Gunnison, on the East side of Snake Lake. The subject was a black male with no shirt wearing black pants, creeping around like he was being chased. The subject was armed with a gun that looked like a 9MM."

3. Error is assigned to the "Findings as to Disputed Facts" portion of the Findings and Conclusions on admissibility of evidence CrR 3.6 as follows:

   Page 14, lines 3-13: Based on the circumstances known to the officers at the time of the contact with the vehicle in which the respondent was riding, the officers reasonably believed one or more occupant of the suspect vehicle was related to a possible assault with a deadly weapon and/or unlawful possession of a firearm, both of which are felony crimes. They further reasonably believed that one or more of the car's occupants were armed or dangerous. The credible facts support the actions of the officers. While officers were not certain the occupants were armed or related to the earlier reports regarding an individual with a gun, a reasonably prudent person with the information available to the officers at the time of the contact would believe that one or more of the suspect's occupants [sic] were related to the 911 reports and were armed and

dangerous. This created a significant officer safety risk and a risk others [sic].

4. Error is assigned to Findings of Fact and Conclusions of Law with regards to Z.E.'s bench trial as follows:

   Finding of Fact VI, page 3 lines 7-9: "At 1646 hours on 2 October 2011 Officers ROSE and CLARK were advised by 911 dispatch that a 911 call had been received from an individual who was identified as Arthur REED."

   Finding of Fact VI, page 3 lines 12-16: " "ROSE and CLARK testified that the CAD provided the following information from REED: Someone was in the alley between Madison and Gunnison, on the East side of Snake Lake. The subject was a black male with no shirt wearing black pants, creeping around like he was being chased. The subject was armed with a gun that looked like a 9MM."

II. ISSUES PRESENTED

1. Did the trial court abuse its discretion in denying Z.E.'s motion to suppress where Z.E. was seized without probable cause? (Assignments of Error Nos. 1, 2, 3, and 4)

2. Did the trial court abuse its discretion in denying Z.E.'s motion to suppress where the facts known to the officers at the time they seized Z.E.'s vehicle were insufficient to support a well founded suspicion, based on objective facts, that the vehicle or occupants were connected to potential or actual criminal activity? (Assignments of Error Nos. 1, 2, 3, and 4)

3. Do the facts introduced at trial support the challenged findings of the trial court? (Assignments of Error Nos. 1, 2, 3, and 4)

4. Are the findings which are supported by the record sufficient to support the trial court's conclusions of law? (Assignments of Error Nos. 1, 2, 3, and 4)

III. STATEMENT OF THE CASE

A. Factual Background

On the afternoon of October 10, 2011, Tacoma police officers Donald Rose and Kristopher Clark were working together and were dispatched to the area of Oakland Park in response to a 911 call reporting that an individual was running through the park with a gun. RP 13, 22-27, 29, 87-91. When the call was broadcast to the officers, a "priority tone" preceded the call, indicating that a weapon was involved. RP 26-28. The initial 911 caller indicated that the person with the gun appeared to be a shirtless 18 or 19 year old black male who was five feet and ten inches tall, 145 pounds, with short dark hair, almost bald, who was seen holding a gun at his side, ducking in and out of houses and cars, and at one point was seen to have the gun in a "ready position" but no shots were heard. RP 31-33, 58, 92-93. When officers Rose and Clark arrived in the area of Oakland Park they immediately looked for the man who was the subject of the 911 call, but did not find anyone matching his description. RP 33, 95.

While officers Rose and Clarke were en route to Oakland Park, another 911 call was placed in which the caller gave a description of an individual the caller claimed had given the gun to the previously reported shirtless black man. RP 33-34, 94-95. The caller described the person who handed the gun to the shirtless man as a black female, 17, medium

height, slim, black jacket, blue jeans, black with blue trimmed shoes. RP 34-35, 61, 94-95. This information was broadcast to the officers via the CAD system. RP 33-34, 61, 94-95.

As the officers approached Oakland Park, they saw two females, one of whom they felt matched the description of the woman described as giving the gun to the shirtless man, except for the fact that the woman who matched the description was not wearing a black jacket but the other woman was. RP 33-35. The officers did not contact the females because the priority at that time was locating the individual who had the gun. RP 35.

While the officers were en route to Oakland Park, the 911 dispatch center received a call where the caller indicated that the man with the gun had gotten into a white car with eight other people. RP 38, 59-60. Officer Rose did not know if this was the same caller as the previous 911 calls or was a second or third caller. RP 38, 68. 911 dispatch later updated the CAD and indicated that the white car was actually a gray two door compact car that was seen heading towards Center and Union, an intersection a few blocks from Oakland Park. RP 40, 61-62. Dispatch also updated the CAD to indicate that the person seen with the gun had gotten into the gray vehicle. RP 40.

Officer Rose knew nothing about the individual or individuals who called 911 other than the fact that they had called 911. RP 62-63. Officer Rose had no information indicating the basis of the caller's or callers' knowledge or the reliability of the caller or callers. RP 63. Officer Rose did not know if the same caller revised the description of the vehicle from white to grey or if the information was revised based on information from a different caller. RP 62. No police investigation corroborated the initial report of a man with a gun at Oakland Park. RP 63.

At some apartments adjacent to the park, officers Rose and Clark contacted an individual who claimed that there had been a large scale fight in the park with multiple people running around and that the people had left in four different vehicles. RP 41, 96. The officers did not get the name or contact information of this person. RP 42. Officer Rose had no knowledge about this person's reliability, had no way of knowing the whether the person was telling the truth or not, and did not use any of the tactics he has been trained in to test the person's credibility. RP 63-65. This person was unable to describe any individuals or any vehicles associated with the purported fight she had witnessed and could not provide the officers with any specific information. RP 65-66.

After failing to locate the person with the gun near Oakland Park, the officers went towards the intersection of Center and Union. RP 41-42.

While travelling towards the intersection of Center and Union, the officers observed the same females they had seen earlier, presumably walking away from the park. RP 42. The women were getting into a car in a parking lot on the southwest corner of the intersection of Union and Center streets. RP 43. The women were getting into a parked four door Honda compact sedan that Officer Rose believed was gray. RP 43, 45. Officer Rose observed two males in the front of the Honda. RP 43-44.

Police think of Oakland Park as a high crime area and think that gangs have fights and gatherings near the park. RP 25-26, 91-92. Officer Rose's first concern upon being dispatched to Oakland Park is that it is a high crime area and the call may be gang related. RP 26. When officer Rose is dispatched to something gang related he expects to find weapons. RP 26. Officer Rose believes gang members have a higher propensity to assault police officers or each other. RP 26.

The officers' focus was the female who matched the description given by the 911 caller. RP 44. Officer Rose believed the one female was the one who handed the shirtless male the gun based entirely on the 911 call. RP 70-71. When officer Rose observed the females getting into the Honda, he was concerned that the female was "very possibly" involved in the "gang activity" and "she may or may not have possessed another weapon." RP 44.

Despite not knowing if the men in the Honda had been involved with the activities reported in the 911 calls, officer Rose was concerned that the two men in the Honda "may or may not have been involved in this fight" and that the men "may have left separately and then gotten back together" at the parking lot where the women were entering the Honda. RP 44. Despite not knowing if the men had been involved in the incidents reported by the 911 callers, the officers believed that "any number of the occupants in the vehicle could [have] be[en] armed." RP 44-45. The officers had this belief despite having no information on whether or not the woman or anyone else in the Honda had another weapon or even had been at the scene of the purported fight in Oakland Park. RP 67, 119.

The officers decided to stop the Honda because it roughly fit the description of the vehicle the shirtless man had reportedly gotten into but mainly because "the female who was possibly involved was getting into it." RP 66. Officer Clark believed he was investigating unlawful possession of a firearm and possibly an assault with a deadly weapon. RP 118. However, when officer Rose approached the vehicle he knew he did not have probable cause to arrest anyone in the vehicle. RP 72.

Officers Rose and Clark called for backup and conducted a felony stop on the Honda. RP 45. Officer Rose and Clark parked their patrol vehicle in a parking lot south of the parking lot where the Honda was

parked and approached the Honda on foot with their handguns out and ready to be used quickly. RP 45-46. Officers Rose and Clark ordered everyone in the Honda to put their hands up, which the occupants of the Honda did. RP 46. Once more officers arrived, the officers ordered the occupants of the Honda to exit the Honda one at a time. RP 46.

Z.E. was the last person ordered out of the Honda. RP 48. Z.E. complied with officer Rose's commends to walk backwards towards officer Rose but did not get onto his knees as quickly as office Rose liked and looked over his shoulder. RP 49-50. In response, officer Rose holstered his weapon, grabbed Z.E.'s right arm, and another officer tased Z.E. RP 51-55, 179.

After Z.E. had been tased and handcuffed, he was arrested for obstructing the officers. RP 55. Z.E. was searched incident to his arrest and officers located a small bag of marijuana and a pill crusher on his person. RP 56, 182, 210-211.

The CAD log indicated that one of the individuals who had called 911 had identified himself as Arthur Reed and another caller had identified herself as Dawn. RP 75-76. However, Officer Rose did not know how many callers there were or who the callers were. RP 78-79.

B. Procedural Background

On October 13, 2011, Z.E. was charged with unlawful possession of a controlled substance - amphetamine, obstructing a law enforcement officer, and unlawful possession of a controlled substance- forty grams or less of marijuana. CP 1-2.

On January 31, 2012, Z.E. filed a motion to suppress all evidence obtained pursuant to the seizure of his vehicle. CP 9-20. On February 3, 2012, Z.E. filed another motion to suppress all evidence obtained pursuant to the seizure of his vehicle. CP 21-52. In these motions to suppress, Z.E. challenged the lawfulness of the seizure of his vehicle on several grounds: (1) the police lacked knowledge of sufficient facts to support a well-founded suspicion that Z.E. or any occupants of his vehicle were connected to potential or actual criminal activity; (2) the seizure of Z.E. exceeded the permissible scope of a *Terry* stop; and (3) Z.E. was arrested without probable cause, rendering all evidence discovered pursuant to his arrest inadmissible. CP 9-52.

On February 10, 2012, the State filed a response to Z.E.'s motion to suppress. CP 53-76.

On February 14, 2012, a combination 3.6 hearing and bench trial began. RP 8.

On February 22, 2012, the State stipulated that the State crime lab analyzed the pill crusher and could not determine the nature of the

substance on it and indicated that the State would not be proceeding on the felony count of drug possession based on the pill cutter. RP 211.

On February 27, 2012, argument on the motion to suppress was heard after the close of testimony. RP 490-529.

On March 1, 2012, the court ruled on Z.E.'s suppression motion. RP 533-539. The trial court denied the motion to suppress. RP 539; CP 88-102.

On March 1, 2012, Z.E. filed a memorandum re: mens rea and insufficiency of mens rea. CP 79-82.

Also on March 1, 2012, the State amended the charges against Z.E. to drop the unlawful possession of amphetamine charge. CP 86-87.

On April 10, 2012, findings of fact and conclusions of law were entered on Z.E.'s motion to suppress. CP 88-102. Also on April 10, 2012, findings of fact and conclusions of law on Z.E.'s bench trial were entered. CP 103-119.

The trial court found Z.E. not guilty of the crime of obstructing a law enforcement officer, but guilty of the crime of unlawful possession of a controlled substance - marijuana. RP 561, 563.

Notice of appeal was timely filed on April 10, 2012. CP 134.

IV. ARGUMENT

1. The trial court erred in denying Z.E.'s motion to suppress.

a. Standard of Review.

A trial court's ruling on a motion to suppress evidence is reviewed to determine (1) whether substantial evidence supports the trial court's factual findings, and (2) whether the factual findings support the trial court's conclusions of law. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). "Evidence is substantial when it is enough 'to persuade a fair-minded person of the truth of the stated premise.'" *Garvin*, 166 Wn.2d at 249, 207 P.3d 1266 (*quoting State v. Reid*, 98 Wn.App. 152, 156, 988 P.2d 1038 (1999)). Unchallenged findings of fact are considered verities on appeal. *State v. Valdez*, 167 Wn.2d 761, 767, 224 P.3d 751 (2009) (*citing State v. Gaines*, 154 Wn.2d 711, 716, 116 P.3d 993 (2005)). The trial court's conclusions of law are reviewed de novo. *Garvin*, 166 Wn.2d at 249, 207 P.3d 1266.

b. The police lacked knowledge of sufficient facts to support a well founded suspicion that Z.E. or any occupants of the vehicle in which Z.E. was a passenger were connected to potential or actual criminal activity.

The Fourth Amendment to the US Constitution provides,

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article 1, § 7 of the Washington Constitution provides "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Warrantless seizures are presumed unconstitutional. Const. art. I, § 7; *State v. Gaddy*, 152 Wn.2d 64, 70, 93 P.3d 872 (2004). "The warrant requirement is especially important under article I, section 7, of the Washington Constitution **as it is the warrant which provides the 'authority of law' referenced therein**." *State v. Ladson*, 138 Wn.2d 343, 350, 979 P.2d 833 (1999) (emphasis added) (*citing City of Seattle v. Mesiani*, 110 Wn.2d 454, 457, 755 P.2d 775 (1988)).

An investigatory detention is a seizure. *State v. Rankin*, 151 Wn.2d 689, 695, 92 P.3d 202 (2004). The State bears the burden of proving that a warrantless stop or seizure falls into one of the few 'jealously and carefully drawn' exceptions to the warrant requirement. *State v. Williams*, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984) (*quoting State v. Houser*, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980)).

> The Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest. Whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person...and the Fourth Amendment requires that the seizure be "reasonable."

State v. Larson, 93 Wn.2d 638, 641, 611 P.2d 771 (1980) (internal citations omitted).

> Probable cause [to arrest] exists where the facts and circumstances within the arresting officer's knowledge and

> of which the officer has reasonably trustworthy information are sufficient to warrant a person of reasonable caution in a belief that an offense has been committed...A bare suspicion of criminal activity, however, will not give an officer probable cause to arrest.

State v. Terrovona, 105 Wn.2d 632, 643, 716 P.2d 295 (1986), *cert. denied*, 499 U.S. 979, 111 S.Ct. 1631, 113 L.Ed.2d 726 (1991).

An exception exists where an officer has a "well-founded suspicion" an individual is engaging in criminal activity. *State v. Glover*, 116 Wn.2d 509, 513, 806 P.2d 760 (1991) (*quoting State v. White*, 97 Wn.2d 92, 105, 640 P.2d 1061 (1982)). When police officers have a "well-founded suspicion not amounting to probable cause" to arrest, they may nonetheless stop a suspected person, identify themselves, and ask that person for identification and an explanation of his or her activities. *Glover*, 116 Wn.2d at 513, 806 P.2d 760. The officer must be able to "'point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.'" *Glover*, 116 Wn.2d at 514 (*quoting Terry v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). Such facts are "judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a [person] of reasonable caution in the belief' that the action taken was appropriate?" *State v. Almanza-Guzman*,

94 Wn.App. 563, 566, 972 P.2d 468 (1999) (quoting *State v. Barber*, 118 Wn.2d 335, 343, 823 P.2d 1068 (1992)).

The officer must have more than innocuous facts or a mere hunch. *State v. Martinez*, 135 Wn.App. 174, 180, 143 P.3d 855 (2006); *State v. O'Cain*, 108 Wn.App. 542, 549, 31 P.3d 733 (2001). The reasonableness of an officer's suspicion is determined from "the totality of the circumstances known by the officer at the inception of the stop." *State v. Carlson*, 130 Wn.App. 589, 593, 123 P.3d 891 (2005), *review denied*, 157 Wn.2d 1020 (2006).

To support an investigative detention, the circumstances must show there is a **substantial possibility** that criminal conduct has occurred or is about to occur. *State v. Mendez*, 137 Wn.2d 208, 223, 970 P.2d 722 (1999), *abrogated on other grounds Brendlin v. California*, 551 U.S. 249, 127 S.Ct. 2400, 168 L.Ed.2d 132 (2007). **The circumstances must be more consistent with criminal conduct than with innocent behavior**. *State v. Pressley*, 64 Wn.App. 591, 596, 825 P.2d 749 (1992).

A reviewing court decides whether reasonable suspicion existed based on an objective view of the known facts. *State v. Mitchell*, 80 Wn.App. 143, 147, 906 P.2d 1013 (1995), *review denied* 129 Wn.2d 1019, 919 P.2d 600 (1996). **The reviewing court does not base its**

determination of reasonable suspicion upon the officer's subjective belief. *Mitchell*, 80 Wn.App. at 147, 906 P.2d 1013.

If the initial stop was unlawful, the subsequent search and fruits of that search are inadmissible as fruits of the poisonous tree. *State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986), *citing Wong Sun v. United States*, 371 U.S. 471, 9 L.Ed.2d 441 83 S.Ct. 407 (1963).

Here, the only facts known to officer Rose and Clark at the time the police stopped Z.E.'s vehicle and ordered the occupants out at gunpoint was that there had been reports of a shirtless black man carrying what appeared to be a 9mm handgun and that individuals were reporting that there had recently been a fight in the area and multiple shirtless participants had left the area in four different vehicles, but that the person with the gun had gotten into a white car containing eight other people. RP 22-27, 29, 31-35, 38, 40, 58-63, 68, 87-95.

Contrary to the trial court's "Undisputed Facts" in relation to Z.E.'s motion to suppress and the findings of fact in relation to the bench trial, officer's Rose and Clark ***did not know*** that one of the individuals who had called 911 and provided information had been identified as Arthur Reed. In fact, both officer Rose and Officer Clark testified that at the time of the seizure of Z.E.'s vehicle and its occupants, the officers knew nothing about the identity, reliability, or basis of knowledge of the

caller providing information to 911 dispatch, or even if there was more than one caller. RP 62-63. Further, no police investigation corroborated the initial report of a man with a gun at Oakland Park. RP 63.

Officers Rose and Clark did speak with a person outside of apartments located near Oakland Park who told the officers that there had just been a fight and that there were multiple shirtless individuals involved and that the people involved had left in several different vehicles. RP 41, 96. However, the officers did not get the name or contact information of this person, officer Rose had no knowledge about this person's reliability, had no way of knowing the whether the person was telling the truth or not, and did not use any of the tactics he has been trained in to test the person's credibility. RP 42, 63-65. Further, this person was unable to describe any individuals or any vehicles associated with the purported fight she had witnessed and could not provide the officers with any specific information. RP 65-66.

i. The facts known to officers Rose and Clark were insufficient to support an objectively reasonable belief that Z.E.'s vehicle was involved in criminal activity since all information known by the officers was provided by informants about whom the officers knew nothing.

Suspicion sufficient to conduct a *Terry* stop ***cannot*** be based on an informant's tip alone **unless the tip possesses sufficient "indicia of**

reliability." *State v. Sieler*, 95 Wn.2d 43, 47, 621 P.2d 1272 (1980) (emphasis added). "Indicia of reliability" requires: (1) knowledge that the source of the information is reliable, **and** (2) a sufficient factual basis for the informant's tip or corroboration by independent police observation. *Campbell v. Department of Licensing*, 31 Wn.App. 833, 835, 644 P.2d 1219 (1982) (emphasis added).

> It is difficult to conceive of a tip more 'completely lacking in indicia of reliability' than one provided by a completely anonymous and unidentifiable informer, containing no more than a conclusionary assertion that a certain individual is engaged in criminal activity. While the police may have a duty to investigate tips which sound reasonable, (1) absent circumstances suggesting the informant's reliability, or some corroborative observation which suggests either (2) the presence of criminal activity or (3) that the informer's information was obtained in a reliable fashion, a forcible stop based solely upon such information is not permissible.

State v. Lesnick, 84 Wn.2d 940, 944, 530 P.2d 243, *cert. denied* 423 U.S. 891, 96 S.Ct. 187, 46 L.Ed.2d 122 (1975).

In *Lesnick*, an anonymous telephone informant told police that a van was carrying illegal gambling devices. He did not indicate how he reached this conclusion but did describe the van and report its license number. The police quickly located a van fitting the description provided by the informant, but some of the numerals of the license number had been transposed. The police followed the van for a short distance, and

although they had observed no criminal activity, the police pulled the van over. Gambling devices were in plain view after the stop. *Lesnick*, 84 Wn.2d at 941-42, 530 P.2d 243.

The *Lesnick* court held that the anonymous informant's accurate description of the vehicle was "not such corroboration or indicia of reliability" which would provide the police with a well-founded suspicion to justify an investigatory detention, and held that the seizure and search of the van were unconstitutional. *Lesnick*, 84 Wn.2d at 943, 530 P.2d 243.

In *Sieler*, a parent picking up his child from school observed what he thought was a drug sale in another car in the parking lot. The parent informed the school secretary by telephone of his conclusion, described the other car, reported its license number, apparently gave her his telephone number, and left.

The secretary called the police and officers were quickly informed by radio that a drug transaction had possibly occurred in the school parking lot in a black-over-gold Dodge with a certain license number. No details of the transaction were given. While proceeding to the high school, one of the officers radioed for information on how the sale was discovered and asked if the informant had been identified. The officers were simply told that a named person had concluded a drug transaction had occurred, but that he was not available. The officers knew nothing

about the informant beyond his name, nor why he concluded a drug transaction had occurred. One officer, by radio, attempted to obtain a description of the suspects, but apparently none was available. In the officer's words, "all we had to go on was the vehicle description."

The school vice-principal had talked to the occupants of the car a few minutes before the officers' arrival. He identified two girls as students. The defendants were not students. The four were playing cards. The vice-principal informed the officers before they went over to the car containing the defendants that he had not observed any contraband, nor even anything unusual or suspicious.

The car fit the description given by the informant, except one letter of the license number was incorrect. The driver was approached by one officer and the front passenger was approached by another officer. While talking to the driver, an officer smelled the faint odor of stale burnt marijuana. The officer examined the driver's identification, and asked him to enter his police car for questioning. After the driver had exited, the officer who contacted the front passenger saw three pills of "speed" on the driver's seat which he had been unable to observe prior to the driver's departure from the car. The officer picked up the pills, and immediately after he did so, the passenger handed the officer a film container containing speed. Both defendants were arrested and confessed.

Pre-trial, both defendants moved to suppress the pills and the confessions, but the motion was denied. Both defendants were found guilty of delivering amphetamines and the Court of Appeals affirmed their convictions. The defendants appealed to the Washington Supreme Court arguing, inter *alia*, the tip provided by the parent did not justify investigatory detention and questioning of the defendants, since it did not provide the police with a well-founded suspicion of criminal activity by the defendants.

The Washington Supreme Court held that the trial court erred in denying the motion to suppress the pills and confessions, finding that the facts of the case were insufficient to satisfy the three *Lesnick* criteria to establish the credibility of an informant's tip:

The *Sieler* court held that the first *Lesnick* factor, "circumstances suggesting the informant's reliability," could not be met because,

> the facts of [*Sieler*] indicate reliability no more than those of *Lesnick*. To distinguish *Lesnick*, the Court of Appeals relied upon the fact that the informant had given his name to the school secretary. We are not persuaded by this attempted distinction. **The reliability of an anonymous telephone informant is not significantly different from the reliability of a named but unknown telephone informant**. Such an informant could easily fabricate an alias, and thereby remain, like an anonymous informant, unidentifiable.
>
> Even assuming that an unknown but named telephone informant was adequately reliable, thereby distinguishing

> this case from *Lesnick*, **this reliability by itself generally does not justify an investigatory detention**. Although there is some authority to the contrary, **the State generally should not be allowed to detain and question an individual based on a reliable informant's tip which is merely a bare conclusion unsupported by a sufficient factual basis which is disclosed to the police prior to the detention**. Some underlying factual justification for the informant's conclusion must be revealed so that an assessment of the probable accuracy of the informant's conclusion can be made. **It simply "makes no sense to require some 'indicia of reliability' that the informer is personally reliable but nothing at all concerning the source of his information ..."** This additional requirement helps prevent investigatory detentions made on the basis of a tip provided by an honest informant who misconstrued innocent conduct. It also reduces such detentions when an informant, who has given accurate information in the past, decides to fabricate an allegation of criminal activity.
>
> **Even if the reliability of the informant had been established in this case, the detention and questioning of defendants was unconstitutional.** ***The police conducted an investigatory detention based upon an informant's bare conclusion unsupported by any factual foundation known to the police.***

Sieler, 95 Wn.2d at 48-49, 621 P.2d 1272 (internal citations omitted) (emphasis added).

The *Sieler* court also held that the facts of that case did not satisfy the second *Lesnick*, criterion, independent police observation of activity which suggests criminal activity: "The State clearly cannot satisfy *Lesnick's* second criterion. After arriving at the scene, the police proceeded almost immediately to the car containing the defendants. Prior

to their approach to the car, they did not observe any conduct which tended to corroborate the informant's tip that criminal activity was present." *Sieler*, 95 Wn.2d at 49, 621 P.2d 1272.

Finally, the *Sieler* court held that the facts of the case also did not meet the third *Lesnick* criterion, independent police observation of facts that suggest that the informant's information was obtained in a reliable fashion: "Nor can the State satisfy *Lesnick*'s third criterion. As we held in that case, police observation of a vehicle which substantially conforms to the description given by an unknown informant does not constitute sufficient corroboration to indicate that the informant obtained his information in a reliable fashion." *Sieler*, 95 Wn.2d at 49-50, 621 P.2d 1272.

Officers Rose and Clark both testified that they knew nothing about the caller or callers who gave information to 911 dispatch and that they knew nothing about the veracity or the identity of the individual they spoke without outside the apartments near Oakland Park. RP 42, 62-65. Thus, as far as officer Clark and Rose knew, the individual or individuals were unknown anonymous informants. The tips from the anonymous informants in this case provide even less of a basis to stop Z.E.'s vehicle than the tips in *Seiler* and *Lesnick* provided to the police to stop the vehicles in those cases. The description of the vehicle containing the

person with the gun, a white car containing nine people, did not match the description of Z.E.'s vehicle, a gray two door car containing at first two but then four people.

As in *Sieler*, the officers in this case conducted an investigatory stop based on nothing more than an unknown informant's bare conclusion that criminal activity had occurred and which was unsupported by any factual foundation known to the police. The tips of the informants were a legally insufficient basis for the officers to stop and sieze Z.E. and the other occupants of the Honda.

ii. The officers failed to conduct sufficient investigation to establish that any crime had actually occurred, much less that the Honda or anybody inside the Honda was connected to any criminal activity.

As discussed above, the facts known by the officers regarding the Honda came entirely from unknown anonymous informants and no independent police investigation had confirmed anything reported. Also as discussed above, the tips to the police did not have sufficient indicia of reliability to support an objectively reasonable belief that the Honda or its occupants were involved in any criminal activity or that any criminal activity had even actually occurred. The police had uncovered no evidence which corroborated the reports of a large brawl taking place in Oakland Park or that anyone was in the vicinity of the park carrying a gun

or handing a gun to another person. Even if the officers had established that someone had been carrying a gun, carrying a gun is not a crime.

Contrary to the challenged "Findings as to Disputed Facts" set forth above, the facts known to the officers were insufficient to support a reasonable belief that one or more occupant of the suspect vehicle was related to a possible assault with a deadly weapon and/or unlawful possession of a firearm. The trial court correctly acknowledged that the "officers were not certain the occupants were armed or related to the earlier reports regarding an individual with a gun." CP 101.

A reasonably prudent person with the information available to the officers at the time of the contact would have ***no reason*** to believe that one or more of the occupants of the Honda had engaged in criminal activity or that any criminal activity had even occurred. Beyond the bare conclusions of the unknown informants, the officers knew nothing that would support an inference that any criminal activity had occurred.

iii. <u>The facts known to officers Rose and Clark were insufficient to support an objectively reasonable belief that the occupants of Z.E.'s vehicle were involved in criminal activity since all information known by the officers was provided by informants about whom the officers knew nothing.</u>

The officers testified that they stopped Z.E.'s Honda because it roughly fit the description of the vehicle the shirtless man had reportedly

gotten into but mainly because "the female who was possibly involved was getting into it." RP 66. Officer Clark believed he was investigating unlawful possession of a firearm and possibly an assault with a deadly weapon. RP 118. However, when officer Rose approached the vehicle he knew he did not have probable cause to arrest anyone in the vehicle. RP 72.

As discussed above with regards to the information about Z.E.'s Honda, the anonymous informants tips contained insufficient indicia of reliability to support an objectively reasonable belief that the woman seen getting into Z.E.'s vehicle had been involved in any criminal activity or that any criminal activity had actually occurred. Thus, under *Sieler*, the tips were an insufficient basis to support the stop of the Honda and the seizure of its occupants.

The facts known to police were insufficient to support an objectively reasonable suspicion, well-founded in the facts known to the officers, that Z.E.'s vehicle or anyone in Z.E.'s vehicle was connected to potential or actual criminal activity. The circumstances known to the officers were far more consistent with innocent behavior than with criminal activity. Indeed, office Rose even testified that carrying a gun is not per se illegal. RP 57. The only behavior of the women and the Honda directly observed by the officers was that the women walked down the

street and got into the Honda while it was parked in a parking lot. This can hardly be described as behavior consistent with criminal activity.

The officers' belief that the women they had observed were involved in criminal activity and, indeed, the officers' belief that any criminal activity had occurred at all comes entirely from the officers' unfounded hunch that the brawl had actually occurred and a man had actually been handed a gun by the women because Oakland Park was a high crime area that also had a high instance of gang activity. Despite the fact that no caller or person contacted by the police indicated that the incidents being reported were gang related and no facts discovered during the brief police investigation suggested gang involvement, at trial the officers and the prosecutor repeatedly linked their belief that any criminal activity had actually occurred to the assertion that Oakland Park was a high crime area that had gang violence and that this was, therefore, a gang-related incident. RP 25-26, 28, 41, 44, 72, 91-92, 169, 186-190, 227, 507-508, and 513-514. Not only did the facts known to the officers not support the conclusion that the purported events being investigated were gang related, the facts known to the officers did not support the conclusion that the purported events *ever actually occurred.*

The only **facts** of which the officers were aware were completely innocuous. The officers' belief that the seizure of Z.E.'s vehicle and its

occupants was justified was nothing more than a subjective belief based on the unconfirmed statements of unknown informants whose reliability was unknown to the officers combined with the officers hunch that the events described were gang related. The facts known to the officers were insufficient to have supported an objectively reasonable belief that Z.E.'s vehicle, the occupants of his vehicle, or the woman seen getting into Z.E.'s vehicle were involved in any criminal activity. The stop and seizure of Z.E.'s vehicle and its occupants was, therefore, unlawful.

c. The seizure of Z.E.'s vehicle and its occupants exceeded the permissible scope of a Terry stop.

In denying Z.E.'s motion to suppress, without citation to authority, the trial court found that,

> The Terry detention was lawful and based on a reasonable belief that one or more of the suspect vehicle's occupants were armed and had committed one or more felonies involv. F/A [sic] presenting a potentially life-threatening situation for the officers. The use of drawn firearms by the officers did not amount to an arrest of the subjects in the vehicle...Furthermore, the scope of the detention was reasonable in light of all the circumstances.

Conclusions of Law on Admissibility of Evidence CrR 3.6, CP 101.

As stated above, the trial court's conclusions of law on a motion to suppress are reviewed de novo. *Garvin*, 166 Wn.2d at 249, 207 P.3d 1266.

Police officers may conduct brief investigative stops based on less evidence than is needed for probable cause to make an arrest. *State v.*

Acrey, 148 Wn.2d 738, 746-47, 64 P.3d 594 (2003) (*citing State v. Glover*, 116 Wn.2d 509, 513, 806 P.2d 760 (1991)). But a *Terry* stop must be "limited in scope and duration to fulfilling the investigative purpose of the stop." *Acrey*, 148 Wn.2d at 747 (*citing State v. Williams*, 102 Wn.2d 733, 739-41, 689 P.2d 1065 (1984)). If, however, the investigation confirms the officer's initial suspicions, the scope and duration of the stop may be extended. *Acrey*, 148 Wn.2d at 747 (*citing Williams*, 102 Wn.2d at 739-40). In determining whether the investigative stop was reasonable, appellate courts consider the totality of the circumstances, including the officer's training and experience, the location of the stop, the conduct of the person detained, the purpose of the stop, the degree of physical intrusion on the defendant's liberty, and the length of the detention. *Acrey*, 148 Wn.2d at 747.

Here, the police did more than temporarily detain Z.E. and the other occupants of the Honda in order to investigate whether or not they was involved in criminal activity. Instead, the police performed a full felony high-risk stop and arrested Z.E. and the other occupants of the vehicle at gunpoint immediately upon contacting them. This was far more than was necessary to fulfill any investigative purpose of the stop. This was a full custodial arrest.

A person is "seized" under the Fourth Amendment where, "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. *State v. Armenta*, 134

Wn.2d 1, 10, 948 P.2d 1280 (1997), *quoting United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497 (1980); *State v. Young*, 135 Wn.2d 498, 509-10, 957 P.2d 681 (1998) (A person is under arrest for constitutional purposes when, by means of physical force or a show of authority, his freedom of movement is restrained), *citing United States v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980).

> "[W]henever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Terry v. Ohio*, 392 U.S. 1, 16, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). We recently affirmed the following rule stemming from *Terry*: "'A person is "seized" within the meaning of the Fourth Amendment only when, by means of physical force or a show of authority, his freedom of movement is restrained.... There is a "seizure" when, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'"

Mendez, 137 Wn.2d at 222, 970 P.2d 722.

Here, the police approached Z.E.'s Honda with their weapons drawn, ordered the occupants of the vehicle to put their hands up, made the occupants of the vehicle keep their hands up for two or three minutes, and then, once more backup officers had arrived, ordered the occupants of the vehicle to exit the vehicle one at a time, walk backwards towards the officers, kneel, and be handcuffed. RP 45-47. A reasonable person who was in the position of any of the occupants of Z.E.'s vehicle would not have felt free to leave. Therefore, the occupants of the Honda were

arrested for constitutional purposes when the officers ordered them to put their hands up.

In determining whether a detention falls within the proper scope of an investigatory stop, courts consider three factors: (1) the purpose of the stop; (2) the amount of physical intrusion on the defendant's liberty; and (3) the length of time the defendant is detained. *State v. Williams*, 102 Wn.2d 733, 740, 689 P.2d 1065 (1984). None of these three criterion are met here.

i. The purpose of the stop.

The officers testified at trial that they had no knowledge of facts linking the men in Z.E.'s vehicle to any of the activities reported in the 911 calls and did not know if the men had even been at the scene of the purported brawl in Oakland Park. RP 44-45, 67, 119.

> [T]he detention was not related to an investigation focused on petitioner. Such relationship is essential. A citizen's right to be free of governmental interference with his movement means, at a minimum, that when such interference must occur, it be brief and related directly to inquiries concerning the suspect. Very few, if any, exigent circumstances justify police intrusion on a citizen's privacy without the police immediately ascertaining the suspect's identity, purpose for being in the area, and possible involvement in a crime.

Williams, 102 Wn.2d at 740-41, 689 P.2d 1065.

The investigation clearly was not related to or focused on Z.E.

ii. Amount of physical intrusion.

As stated above, upon being contacted by the police, Z.E. was immediately held at gunpoint and was taken into full custody a short time later.

No hard and fast rule governs the display of weapons in an investigatory stop: "Rather, the court must look at the nature of the crime under investigation, the degree of suspicion, the location of the stop, the time of day and the reaction of the suspect to the police, all of which bear on the issue of reasonableness." *State v. Belieu*, 112 Wn.2d 587, 600, 773 P.2d 46 (1989). Drawn guns and handcuffs are generally permissible only when the police have a legitimate fear of danger. *Williams*, 102 Wn.2d at 740 n. 2 (*citing United States v. White*, 648 F.2d 29 (D.C.Cir.1981) (drawn guns permissible when approaching car with three people in it who police believed were armed)).

Here, the police did not have a legitimate fear of danger. The officers testified that they had no information that any of the occupants of the Honda were armed. RP 67, 119. The closest the officers came to stating any facts suggesting that the occupants of the vehicle might be armed was their testimony that the female observed by the officers "may or may not" have had another weapon and that "any number of the occupants in the vehicle could [have] be[en] armed." RP 44-45, 72. The officers were not aware of any facts which would support the inference that their safety or the safety of anyone else was in jeopardy.

Here, the deputies had no reason to suspect that Z.E. or the other occupants of the Honda were dangerous, except their claim that the call "may have been gang related" and that gang members have a higher propensity to assault police. RP 26. There is nothing about the location of the stop or the time of day (Sunday afternoon in the parking lot of a flower shop during daylight hours, RP 135, 243) that warranted the use of weapons, and neither Z.E. nor any other occupant of the vehicle reacted furtively or threateningly to the police. RP 161-162. The police had no legitimate fear that they were in danger. The stop was not a limited intrusion and the use of guns was unjustified and excessive.

iii. Length of detention.

As stated above, the officers failed to articulate any particular facts to establish an objectively reasonable belief that Z.E. or any other occupant of the Honda was armed and dangerous or connected with any criminal activity. Despite this, the officers still detained Z.E. and the other occupants of the Honda first at gunpoint and then in handcuffs.

The stop of Mr. Escalante was unlawful since it far exceeded the permissible scope of a *Terry* stop. All evidence discovered pursuant to the stop should have been suppressed.

d. Z.E. was arrested without probable cause, rendering all evidence discovered pursuant to his arrest inadmissible.

> The Fourth Amendment, made applicable to the states by way of the Fourteenth Amendment, guarantees the right of

> the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures...[S]eizures must be supported by probable cause whether or not formal arrest or search by way of warrant has been made. Although there are exceptions that authorize seizure on lesser cause, these are narrowly drawn and carefully circumscribed.

State v. Hudson, 124 Wn.2d 107, 112, 874 P.2d 160 (1994) (internal citations omitted).

As stated above, a person is "seized" under the Fourth Amendment where, "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Armenta*, 134 Wn.2d at 10, 948 P.2d 1280 (1997), quoting *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497 (1980). A person is under arrest for constitutional purposes when, by means of physical force or a show of authority, his freedom of movement is restrained. *State v. Young*, 135 Wn.2d 498, 509-10, 957 P.2d 681 (1998), *citing United States v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980)).

> Probable cause [to arrest] exists where the facts and circumstances within the arresting officer's knowledge and of which the officer has reasonably trustworthy information are sufficient to warrant a person of reasonable caution in a belief that an offense has been committed...**A bare suspicion of criminal activity, however, will not give an officer probable cause to arrest**.

State v. Terrovona, 105 Wn.2d 632, 643, 716 P.2d 295 (1986), *cert. denied*, 499 U.S. 979, 111 S.Ct. 1631, 113 L.Ed.2d 726 (1991) (emphasis added).

> Evidence obtained directly or indirectly through exploitation of an unconstitutional police action must be suppressed, unless the secondary evidence is sufficiently attenuated from the illegality as to dissipate the taint.

Wong Sun v. United States, 371 U.S. 471, 491, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

> When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and **must be suppressed**. *State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986). Under article I, section 7, **suppression is constitutionally required**. *State v. White*, 97 Wn.2d 92, 110–12, 640 P.2d 1061 (1982); *State v. Boland*, 115 Wn.2d 571, 582–83, 800 P.2d 1112 (1990). We affirm this rule today, noting **our constitutionally mandated exclusionary rule "saves article 1, section 7 from becoming a meaningless promise**." Sanford E. Pitler, The Origin and Development of Washington's Independent Exclusionary Rule: Constitutional Right and Constitutionally Compelled Remedy, 61 Wn. L.Rev. 459, 508 (1986). Exclusion provides a remedy for the citizen in question and saves the integrity of the judiciary by not tainting our proceedings by illegally obtained evidence. *State v. Crawley*, 61 Wn.App. 29, 34–35, 808 P.2d 773 (1991).

Ladson, 138 Wn.2d at 359-360, 979 P.2d 833 (emphasis added).

The State exclusionary rule under Article 1, § 7 serves a different purpose than does the Federal exclusionary rule under the Fourth Amendment:

> The federal exclusionary rule is a judicially-created prophylactic measure designed to deter police misconduct. It applies only when the benefits of its deterrent effect outweigh the cost to society of impairment to the truth-seeking function of criminal trials. In contrast, the state exclusionary rule is constitutionally mandated, exists primarily to vindicate personal privacy rights, and strictly requires the exclusion of evidence obtained by unlawful governmental intrusions.

State v. Chenoweth, 160 Wn.2d 454, 472 n. 14, 158 P.3d 595 (2007). Thus, unlike the Federal exclusionary rule, the exclusionary rule in Washington is *mandatory* and *requires* the suppression of all unlawfully discovered evidence.

Here, Z.E. was under arrest for Fourth Amendment purposes when the police ordered him at gunpoint to exit his vehicle. However, the police arrested Z.E. without knowledge of sufficient facts to support a reasonable belief that Mr. Escalante was involved with criminal activity. At best, the officers had a bare suspicion, based upon the uncorroborated information provided by anonymous informants, that Z.E. or the woman seen entering his car might be involved in criminal activity. As discussed above, this information was insufficient to conduct even a *Terry* investigative stop, much less the full custodial arrest which actually happened.

Z.E.'s arrest was an unconstitutional arrest made without probable cause. Accordingly, under at least article 1 § 7 if not the Fourth amendment as well, all evidence discovered pursuant to his arrest, including the marijuana, should have been suppressed by the trial court.

e. Substantial evidence did not support the challenged findings of fact for both Z.E.'s motion to suppress and the bench trial.

As argued above, Contrary to the trial court's "Undisputed Facts" in relation to Z.E.'s motion to suppress and the findings of fact in relation to the bench trial, officers Rose and Clark ***did not know*** that one of the individuals who had called 911 and provided information had been identified as Arthur Reed. In fact, both officer Rose and Officer Clark testified that at the time of the seizure of Z.E.'s vehicle and its occupants, the officers knew nothing about the identity, reliability, or basis of knowledge of the caller providing information to 911 dispatch, or even if there was more than one caller. RP 62-63.

Also as argued above, contrary to the challenged "Findings as to Disputed Facts" set forth above, the facts known to the officers were insufficient to support a reasonable belief that one or more occupant of the suspect vehicle was related to a possible assault with a deadly weapon and/or unlawful possession of a firearm. The facts introduced at the trial did not support the trial courts conclusions that the officers reasonably believed that one or more occupant of the vehicle was related to the alleged and unsubstantiated assault with a deadly weapon or unlawful possession of a firearm, the officers reasonably believed that one or more of the occupants of the Honda were armed or dangerous, that the facts supported the actions of the officers, that a reasonably prudent person with the information available to the officers would have believed that one or

more of the occupants of the Honda were related to the 911 reports and were armed and dangerous, or that this created a significant officer safety risk and a risk to others. The officers themselves testified that they had knowledge of no facts indicating that anyone in the Honda was armed or was even involved in the reported incidents at Oakland Park. RP 67, 72, 119.

The facts introduced at trial do not support the trial court's findings of fact on both the motion to suppress and the bench trial.

f. The findings of fact did not support the trial court's conclusions of law regarding the lawfulness of the officers' actions and the lawfulness of the seizure of Z.E.

As discussed above, in denying Z.E.'s motion to suppress, without citation to authority, the trial court found that,

> The Terry detention was lawful and based on a reasonable belief that one or more of the suspect vehicle's occupants were armed and had committed one or more felonies involv. F/A [sic] presenting a potentially life-threatening situation for the officers. The use of drawn firearms by the officers did not amount to an arrest of the subjects in the vehicle...Furthermore, the scope of the detention was reasonable in light of all the circumstances.

Conclusions of Law on Admissibility of Evidence CrR 3.6, CP 101.

However, as argued above, the stop of Z.E. and the Honda in which he was a passenger exceeded the permissible scope of a lawful *Terry* stop and constituted a full custodial arrest made without the

requisite probable cause. Further, even if the stop is considered a *Terry* stop, the facts known to the officers were insufficient to support an objectively reasonable belief that any occupant of the Honda was involved in any criminal activity or prsented any threat to the officers or anyone else.

The findings of fact which are supported by the evidence do not support the trial court's conclusions of law that the seizure of Z.E. was lawful and, therefore, that the marijuana was lawfully discovered. The trial court should have granted Z.E.'s motion to suppress and excluded all evidence of the marijuana.

2. This court should vacate Z.E.'s conviction for unlawful possession of marijuana and remand for a new trial at which evidence of the marijuana is suppressed.

The remedy for an error in an evidentiary ruling is to remand for a new trial and suppress the inadmissible evidence. *See State v. Floreck*, 111 Wn.App. 135, 143, 43 P.3d 1264 (2002).

VI. CONCLUSION

For the reasons stated above, this court should vacate Z.E.'s conviction for unlawful possession of a controlled substance and remand for a new trial at which all evidence of the marijuana is suppressed.

DATED this 24th day of September, 2012.

Respectfully submitted,

/s/
Sheri Arnold, WSBA No. 18760
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned certifies that on September 24, 2012, she delivered by e-mail to the Pierce County Prosecutor's Office, pcpatcecf@co.pierce.wa.us Tacoma, Washington 98402, and by United States Mail to appellant, Z.E., c/o Linda Escalante, 6207 South Ferdinand, Tacoma, Washington 98409, true and correct copies of this Brief. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on September 24, 2012.

/s/
Norma Kinter