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No. 62734-1-I

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

CITY OF BOTHELL,
Respondent,

v.

ROBERT WALLACE,
Appellant.

ON APPEAL FROM KING COUNTY SUPERIOR COURT

OPENING BRIEF OF RESPONDENT

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COURT OF APPEALS
STATE OF WASHINGTON
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ORIGINAL

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether suspicion that a misdemeanor was committed outside the presence of the officer permits the officer to investigate for a crime when the officer could not have made an arrest for the misdemeanor.
2. Whether the investigation of Mr. Wallace was lawful under *Terry* when the reporting party's tip was reliable.
3. Whether the stop was objectively reasonable and a sufficient nexus existed between the crime and the place searched when there was reasonable suspicion to investigate criminal activity and that evidence of criminal activity would be found in the vehicle.
4. Whether the *Terry* stop was not excessive in scope when the police canine performed a drug sniff on the vehicle.

B. STATEMENT OF THE CASE

A. Procedural History

On June 14, 2007, a forfeiture hearing was held under authority of RCW 69.50.505. After hearing testimony and considering evidence, the hearing examiner, John W. Rusden, determined that the seized property was subject to civil forfeiture.

Mr. Wallace timely appealed to King County Superior Court to determine if the stop and detention was lawful. The court upheld the forfeiture and Mr. Wallace timely appealed to this court for review.

B. Statement of Facts

On April 7, 2006 at 0923 hours, Bothell Police Officer Glen Chissus was dispatched to a narcotics complaint at the Kinko's store in the City of Bothell. The reporting party (RP) advised dispatch that a male and female were inside the store and that one of them had dropped a narcotics pipe. (RP 16-17). Upon receiving the dispatch, Officer Chissus began to drive toward the location.

At the time of the call, the two people were still in the store. The RP had provided her name and contact information, as well as the fact that she was an employee of the Kinko's store. (RP 16:11-17). Officer Chissus requested that dispatch obtain a description of the pipe, so he could confirm that it was, in fact, illegal drug paraphernalia. Officer Chissus learned that the pipe was a "long, yellow hose with a glass tube at the end that looks like it was burnt." (RP 17:16-19). As this information was being relayed to Officer Chissus, he was still en-route to the call location. Officer Chissus noted that the description of the item was consistent with what he knows to be illegal drug paraphernalia, specifically a pipe used to smoke or ingest methamphetamine, based on his training and experience. (RP 19:17-20).

Shortly after this, dispatch relayed to Officer Chissus that the subjects were leaving the Kinko's store in a vehicle. Dispatch obtained a

description of the vehicle (a white Mercedes Benz) as well a license plate number (532TOP). Dispatch further provided a description of the two people involved. The male was described as being six feet tall, having a mullet hairdo, and wearing a jeans jacket and jeans. The female was described as being 5'7", with black hair, wearing pajama bottoms. (RP 18-19).

Officer Chissus arrived in the general area, and began to look for the vehicle. He observed the vehicle coming toward him, noting that the license plate matched the one previously provided by dispatch; he was driving westbound and the Mercedes was driving eastbound. Officer Chissus immediately executed a u-turn and placed his patrol car behind the Mercedes, with three to five cars between his car and the Mercedes. (RP 21-22).

Shortly thereafter, the Mercedes pulled into a retail parking lot across the street from the Kinko's store, and Officer Chissus was able to get directly behind it. Officer Chissus notes that while there were no longer any cars in between he and the Mercedes, it was approximately 200 feet in front of him in the parking lot. (RP 22:13-22).

The Mercedes pulled into and parked in the forward most spot of a double parking stall. (RP 45). After a momentary flash of his emergency lights, Officer Chissus parked his patrol car directly behind the Mercedes

and exited his vehicle to investigate the original narcotics complaint. (RP23).

As Officer Chissus approached, the male driver, later identified as Robert Wallace, had already exited the vehicle. Officer Chissus noted that the male matched the original description provided to him via dispatch. Officer Chissus asked Mr. Wallace to place his hands on the roof of the car while he contacted the female passenger. (RP 24:19-24).

When Officer Chissus began his contact with the female passenger, later identified as Bobbi De-Anne Mosier, he noted that she also matched the description previously provided to him via dispatch. (RP 25).

Officer Chissus began to explain the recent complaint from Kinko's and inquired as to whether they had been in the store. Ms. Mosier relayed that she and Mr. Wallace had been at the Kinko's store, but indicated she had not dropped the pipe inside the store. (RP 26:7-12). Ms. Mosier did admit that she was a narcotics user. (RP 26:15-16).

About this time, Officer Potts of the Bothell Police Department arrived at the scene. Officer Chissus requested that Officer Potts go across the street to the Kinko's store and contact the witnesses and obtain the drug paraphernalia. (RP 27-28)

Officer Potts contacted the Kinko's employee and another witness and learned that the witness, Gretchen Winters, had stepped outside the

door of the business to smoke a cigarette. During this time a Mercedes Benz parked in front of the store, and the occupants, Ms. Mosier and Mr. Wallace, entered the store. They were the only people who entered the store after Ms. Winters had stepped outside. As Ms. Winters re-entered the store, she immediately noticed the narcotics pipe on the floor inside the doorway. Ms. Winters was positive that the pipe was not there when she exited the store. (RP 6-7).

Ms. Winters picked the pipe up off the floor and proceeded to the customer service area. As she was doing so, Ms. Mosier spontaneously stated, "Oh my God, is that mine?" Ms. Winters relayed this information to the Kinko's employee, Shannon May, who immediately phoned 911 and requested that police respond. (RP 8). Officer Potts immediately relayed this information to Officer Chissus. (RP 28). Officer Potts also noted that the pipe fit the original description and that based on his training and experience, he believed it to be a drug pipe, or narcotics device. (RP 5:16-24) Shortly thereafter, Officer Potts collected the drug pipe and delivered it to Officer Chissus. (RP 29).

After his conversation with Ms. Mosier, Officer Chissus contacted Mr. Wallace. Mr. Wallace immediately handed Officer Chissus a card, which appeared to offer instructions as to what one should do if contacted by law enforcement. To clarify Mr. Wallace's intent, Officer Chissus

asked, "Does this mean you want a lawyer?" Mr. Wallace indicated he did not want a lawyer at that time. (RP 33:14-24).

Officer Chissus began to question Mr. Wallace as to whether he had been involved with the incident at Kinko's. Mr. Wallace also denied being involved. Mr. Wallace implied that he had used "all" types of narcotics in the past, but stated that he no longer uses them. Mr. Wallace stated that he did not know much about Ms. Mosier and that he was just transporting her to different places. (RP 34). It was about this time that Officer Potts returned to the scene with the drug paraphernalia. (RP 34). The original contact with Mr. Wallace and Ms. Mosier had begun about 10 minutes prior. (RP 11).

At this point, approximately 10 minutes have passed since the inception of the contact. Two officers have confirmed that the reported object is indeed illegal drug paraphernalia, possession of which is a misdemeanor. Neither Mr. Wallace, nor Ms. Mosier have admitted to any knowledge regarding the crime of possession of drug paraphernalia. Both parties have admitted to drug use. (RP 36). Mr. Wallace declined a voluntary search of his vehicle and requested an attorney. (RP 37:4).

Officer Chissus then requested that Officer Lobe and his police narcotics canine Charlie, respond to the scene. Officer Lobe and Charlie arrive approximately 10 minutes later. Charlie was immediately deployed

and alerted on the vehicle. (RP 37). The vehicle was seized, impounded, and a search warrant was obtained. (RP 37).

Neither Mr. Wallace nor Ms. Mosier were arrested at the scene. Both Mr. Wallace and Ms. Mosier were advised that they were free to leave prior to Officer Lobe and canine Charlie arriving at the scene. (RP 36-37, 47:14-23).

C. ARGUMENT

1. SUSPICION THAT A MISDEMEANOR WAS COMMITTED OUTSIDE THE PRESENCE OF AN OFFICER PERMITS THE OFFICER TO INVESTIGATE FOR A CRIME EVEN THOUGH THE OFFICER COULD NOT HAVE MADE AN ARREST FOR THE MISDEMEANOR.

To make a valid Terry stop, the police must have specific and articulable facts which, taken to together with rational inferences from those facts, reasonably warrant that intrusion. *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L.Ed.2d 889 (1968); *State v. Ladson*, 138 Wn.2d 343, 350, 979 P.2d 833 (1999). When evaluating the merits of such a stop, a court examines the totality of circumstances available to the officer. *State v. Lee*, 147 Wn. App. 912, 199 P.3d 445 (2008); *State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 760 (1991); *State v. Mercer*, 45 Wn. App. 769, 774, 727 P.2d 676 (1986) (courts take into account an officer's training and experience when determining the reasonableness of Terry stop). The circumstances available to the officer include, but are not limited to,

information furnished by an identified citizen informant. *Adams v. Williams*, 407 U.S. 143, 147, 92 S. Ct. 1921, 32 L.Ed.2d 612 (1972); *State v. Conner*, 58 Wn. App. 90, 96, 791 P.2d 261, *review denied*, 115 Wn.2d 1020 (1990); *State v. Randall*, 73 Wn. App. 225, 227, 868 P.2d 207 (1994) (the factual basis for an investigatory stop need not arise out of the officer's personal observations, but may be supplied by information acquired from another person). It is constitutionally permissible for police officers to perform investigative stops and detentions for the legitimate purposes of crime prevention and crime detection. *State v. Kennedy*, 107 Wn.2d 1, 5-6, 726 P.2d 445 (1986). Because such stops and detentions are significantly less intrusive than arrests, there is no requirement of probable cause. *Id.* at 6. Rather, the relevant inquiry is whether the officer had an articulable suspicion that a crime had occurred or was about to occur. *Id.* Even in situations where conduct is consistent with noncriminal activity, an officer endowed with a well-founded suspicion of criminal conduct has authority to stop and detain a suspect. *Id.*

In *Adams v. Williams*, 407 U.S. 143, 145, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1978), the United States Supreme Court held that it was constitutional for law enforcement officers to approach suspects based upon a reasonable suspicion of criminal activity. *Id.* The Supreme Court of Washington has developed a similar standard for determining the

constitutionality of investigative stops and detentions. *See State v. Sieler*, 95 Wn.2d 43, 47, 621 P.2d 1272 (1980). Consistent with federal law, Washington law enforcement officers have authority to detain suspects where there exists a reasonable suspicion of criminal activity. *Id.* at 46.

In *State v. Wheeler*, our Supreme Court put forward three factors to be considered in determining whether an intrusion on an individual is permissible under *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968). The factors are (1) the purpose of the stop, (2) the amount of physical intrusion upon the suspect's liberty, and (3) the length of time the suspect is detained. *State v. Wheeler*, 108 Wn.2d 230, 737 P.2d 1005 (1987).

In *Wheeler*, police officers were given a description of an individual associated with a possible burglary is in progress. They are then told that the suspects are running from the scene. They locate the defendant, who is out of breath, and matches the description of the suspect. The officers detain *Williams* for a period of five to ten minutes, and ask him no questions other than his name. The officers handcuff him and frisk him, ultimately placing him in the back of their patrol car and take him to the scene of the now confirmed burglary, for an in-field identification. *Id.* at 232-233.

The Court specifically holds that the degree of intrusion, while significant, was permissible and not excessive under *Terry*. The Court also specifically holds that frisking and handcuffing the defendant was not impermissibly intrusive. “Such actions are standard, and we believe appropriate procedures...when a suspect is confined to a police car.” *Id.* at 235.

Finally, the court determined that requesting the defendant to identify himself was also permissible conduct on the part of the police officers. “Given the circumstances of the case, we do not think it was unreasonable for the officers to ask no more questions of the defendant other than his name, to inform him of the purpose of the stop, to handcuff him for their own safety and security, and to transport him to the site of the reported crime. The scope of the *Terry* stop was not exceeded; neither the Fourth Amendment nor Const. Art. 1, §7 was violated; there was no error.” *Wheeler* at 237.

Here, both of the subjects were tied to the crime of possession of drug paraphernalia. This crime is a misdemeanor under *BMC 9.11.010*, which states: It is unlawful for any person to possess drug paraphernalia, as defined in *RCW 69.50.102*. A person who violates this section shall be guilty of a misdemeanor. A misdemeanor is punishable by a maximum of 90 days in jail and a \$1000 fine. *RCW 9A.02.010*.

RCW 69.50.102 provides a lengthy description of a variety of items of unlawful drug paraphernalia, including, in pertinent part:

- (a) As used in this chapter, "drug paraphernalia" means all equipment, products, and materials of any kind which are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance. It includes, but is not limited to: (12) Objects used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing marihuana, cocaine, hashish, or hashish oil into the human body, such as:
- (i) Metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;

RCW 69.50.102.

In addition to the definitions provided, the law also directs us to look toward the context in which the paraphernalia was found.

- (b) In determining whether an object is drug paraphernalia under this section, a court or other authority should consider, in addition to all other logically relevant factors, the following:
- (1) Statements by an owner or by anyone in control of the object concerning its use;
 - (2) Prior convictions, if any, of an owner, or of anyone in control of the object, under any state or federal law relating to any controlled substance;
 - (3) The proximity of the object, in time and space, to a direct violation of this chapter;
 - (4) The proximity of the object to controlled substances;
 - (5) The existence of any residue of controlled substances on the object;

- (6) Direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object, to deliver it to persons whom he knows, or should reasonably know, intend to use the object to facilitate a violation of this chapter; the innocence of an owner, or of anyone in control of the object, as to a direct violation of this chapter shall not prevent a finding that the object is intended or designed for use as drug paraphernalia;

RCW 69.50.102.

The City agrees with the appellant that Officer Chissus could not have arrested Mr. Wallace for the crime of possession of drug paraphernalia. However, the mere fact that there could not have been an arrest does not preclude Officer Chissus from continuing and then elevating his investigation into this offense for which jail is a possibility. Despite the fact that possessing drug paraphernalia is not excepted by the misdemeanor presence rule, officers may still detain and investigate this crime for potential prosecution even if it did not occur in his or her presence.

In *State v. Duncan*, 146 Wn.2d 166, 43 P.3rd 513 (2002), the court made a specific distinction between an infraction and a crime, noting that a Terry detention requires that a person has committed or is about to commit a **crime**. *Duncan*, citing *Terry*, 392 U.S. at 21, 88 S.Ct. 1868 (*emphasis theirs*). The court stated, “For a seizure to be legitimate, it must either be (a) based on a reasonable suspicion of criminal activity, in

accordance with Terry principles, or (b) a proper detention to issue a notice of civil infraction. *Duncan* at 173. They held the stop to be invalid because it was based on a non-traffic civil infraction which had occurred outside the presence of the officers. *Id* at 174-176.

Duncan specifically addresses the misdemeanor presence rule noting, “[A] police officer, even with probable cause, may not arrest a person for a misdemeanor committed outside the presence of the officer, unless the officer has a warrant.” *Duncan*, quoting *State v. Hornaday*, 105 Wn.2d 120, 123, 713 P.2d 71 (1986). The court does not say that the officer may not detain and investigate, just that the officer may not arrest when investigating lesser crimes. *Id.* at 177.

The court specifically focuses on the word “crime” which must be used when conducting a *Terry* analysis of a detention. While the court declined to extend *Terry* to include all civil infractions, it did discuss the application of *Terry* to various types of criminal conduct. For there to be a permissible detention, the officer must have a reasonable and articulable suspicion of a substantial possibility that a **crime** has occurred or is about to occur. *Duncan*, citing *State v. Kennedy*, 107 Wn.2d 1, 726 P.2d 445 (1986), (emphasis theirs).

Certain misdemeanors must occur in an officer’s presence before that officer may make a custodial arrest. *RCW 10.31.100*. It follows then,

that when a misdemeanor is not committed in the officer's presence, that he or she may not make an arrest. Nothing states or implies that the investigation of that crime should fall under anything other than a *Terry* analysis.

In fact, there is a specific court rule to address this potential. *CrRLJ 2.1(a)* requires that in this situation the criminal process be initiated by complaint. This complaint requires certain information which includes, among other things, the identifying information of the suspect, the statute violated, the pertinent facts, and the signature of the prosecutor. *CrRLJ 2.1(a)*.

Note that this statute must be read in conjunction with *CrRLJ 2.1(b)*, which addresses the means to initiate a criminal process if the suspect could have been arrested. The fact that both sections of the rule exist bolster the City's argument that despite that fact that the subjects in the case at hand could not have been arrested, there was still a means to initiate a criminal process against them after the completion of Officer Chissus' investigation.

The practical effect of not allowing an officer to investigate a crime which occurred outside of his presence, which is not excepted by RCW 10.31.100 would be to decriminalize that conduct, e.g, RCW 9A.84.030, disorderly conduct; RCW 9A.88.110, patronizing a prostitute; RCW

9A.84.040, false reporting, to name only a small portion. Frequently officers are called upon to investigate crimes that have already occurred. There is simply no case law whatsoever to support the Mr. Wallace's proposition; while there is an abundance of case law allowing an officer to detain a subject within the confines a *Terry* stop as it relates to a crime.

2. THE INVESTIGATION OF MR. WALLACE WAS LAWFUL UNDER TERRY BECAUSE THE REPORTING PARTY'S TIP WAS RELIABLE.

In evaluating an informant's basis of knowledge and reliability, Washington has adopted the two-prong *Aguilar~Spinelli* test. *Spinelli v. United States*, 303 U.S. 410 89 S. Ct. 584, 21 L.Ed.2d 637 (1969); *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L.Ed.2d 723 (1964). In Washington, the two prongs of the *Aguilar~Spinelli* test have been an important part in evaluation an informant's tips and establishing the necessary probable cause required under Art. I. § 7 of this State's constitution. *State v. Jackson*, 102 Wn.2d 432, 688 P.2d 136 (1984); *State v. Northness*, 20 Wn. App. 551, 582 P.2d 546 (1978) (the two-prong *Aguilar~Spinelli* test can be less stringent in the case of a named informant than in that of an anonymous or professional informant).

In this case, the police officer conducted a *Terry* stop of the defendant's vehicle, which was based upon information provided to him by two independent witnesses. Since a police officer does not need

probable cause but only a well-founded suspicion based upon objective facts to stop the defendant's vehicle, the analysis begins by applying the *Aguilar~Spinelli* test. To satisfy the first prong of the *Aguilar~Spinelli* test, courts require that the informant have a basis of knowledge of the facts surrounding the crime that is being reported. *State v. Stock*, 44 Wn. App. 467, 722 P.2d 1330 (1986).

In this case, an identified employee calls 911 to report that two people have left what appears to her to be drug paraphernalia in her store. The reporting party has been informed by an identified and known customer that two people have dropped a drug pipe. She has collected the drug paraphernalia and describes it to the dispatcher. She describes both of the suspects, including their gender and each of their physical descriptions. She further provides a description of the car they are driving and the license plate number. This more than satisfies the first prong of the *Aguilar~Spinelli* test.

The second prong of the *Aguilar~Spinelli* test addresses the reliability of the informant. Courts have drawn a clear distinction between a professional informant and a citizen informant and have relaxed the necessary showing of reliability regarding the latter. *State v. Singleton*, 9 Wn. App. 327, 511 P.2d 1396 (1973). When a police officer makes a determination of reliability, he may justifiably assume that the ordinary

citizen may be more reliable than one who supplies information on a regular basis. *United States v. Harris*, 403 U.S. 573, 29 L.Ed.2d 723, 91 S. Ct.2075 (1971); *See also State v. Conner*, 58 Wn. App. 90, 791 P.2d 261 (1990) (“We hold that a citizen informant reporting a crime can be inherently reliable for purpose of a Terry stop”); *State v. Lesnick*, 10 Wn. App. 281, 285, 518 P.2d 199 (1973), *aff’d* Wn.2d 940, 944, 530 P.2d 243, *cert. denied*, 423 U.S. 891, 96 S. Ct.187, 46 L.Ed.2d 122 (1975) (One requisite indicia of reliability is that the informer’s information was obtained in a reliable fashion).

Further, when an officer is making this evaluation, one key element of importance is whether the informant is willing to be identified. *State v. Chatmon*, 9 Wn. App. 741, 515 P.2d 530 (1973). In this case, the citizen witness-informants both voluntarily initiated contact with the police through a single 911 call. Both detailed an account of the incident. Further, each witness was willing to give witness statements after the investigation concluded. In addition, the witness’ information was obtained in a reliable fashion since both witnesses were in the Kinko’s store, as an employee and customer, when they observed Mr. Wallace and Ms. Mosier. Under these facts, the officer was able to determine that the witnesses were both credible and reliable.

Courts will find that a Terry stop is improper and that the defendant was unreasonable seized if the officer relies upon mere conclusions that lack a factual basis. *Campbell v. Department of Licensing*, 31 Wn. App. 833, 644 P.2d 1219 (1982). For example, in *Campbell*, the lack of either a factual basis for the tip or independent police corroboration caused the court in *Campbell* to suppress the evidence seized in the stop of the defendant's vehicle. In that case, a passing motorist yelled to a state trooper that a drunk driver in a certain described vehicle was southbound on the highway. The trooper made a U-turn, spotted the defendant's vehicle, followed it for a while, but observed nothing abnormal. Nevertheless, he stopped the defendant and found that the defendant appeared to be under the influence. The court held that the tip itself was conclusory, making it impossible to assess its accuracy.

In this case, the informants made more than a mere conclusory statement that the object left behind was a drug pipe. The informants communicated not only their belief that the item was a drug pipe, but also described it to Officer Chissus who concurred that the discarded item was what the informants believed. Note, also, that Officer Chissus obtained this verbal description prior to making his contact with Mr. Wallace and Ms. Mosier. That the item was a drug pipe is the only interpretation a reasonable person would surmise, and based on the officer's training,

experience, and the circumstances surrounding the incident, the officer deduced the witness statements to mean the only reasonable and logical explanation: an item of illegal drug paraphernalia had been dropped by one of the occupants of the Mercedes Benz.

In cases where the courts have upheld that witness communications provided a sufficient basis for an officer to have a well-founded articulable suspicion of criminal activity, courts have generally relied on the facts surrounding the communication, what was said, and the objective belief of the police officer. *State v. Anderson*, 51 Wn. App. 775, 755 P.2d 191 (1988); *State v. Franklin*, 41 Wn. App. 409, 704 P.2d 666 (1985) (informant notifies police officer that a man in the bathroom has a gun); *State v. Kennedy*, 107 Wn.2d 1, 726 P.2d 445 (1986) (crime prevention and detection are valid purposes for investigative stops and detentions); *State v. Conner*, 58 Wn. App. 90, 791 P.2d 261 (1990) (“Probable cause for warrantless arrest exists if facts and circumstances within arresting officer’s knowledge, and of which he has reasonably trustworthy information, are sufficient to permit a person of reasonable caution to believe that offense had been or is being committed.”).

For example, in *Anderson*, the defendant was charged with driving while intoxicated. The trial court dismissed the charge on the basis that the arresting officer made an unlawful stop. The Superior court (affirmed by

the Appellate Court) found the officer did have articulable suspicion that the defendant's operation of her vehicle posed a danger to herself and others.

In *Anderson*, the witness-informant passed the trooper on the roadway and made a gesture "like a snake...going back and forth." The trooper turned around and followed the defendant. The trooper observed the defendant for a one-quarter mile but only witnessed the defendant weave within her own lane. The trooper pulled her over, regardless, and subsequently arrested her for driving under the influence. The Appellate Court reasoned that the witness' gestures were equivalent to verbal communication and that basis alone provided enough indicia of reliability that gave rise to a well-founded articulable suspicion that the trooper's suspicion was sufficient to warrant an investigatory stop.

Likewise in this case, the informants' statements provided Officer Chissus with the well-founded, articulable suspicion necessary to conduct a Terry stop. Similar to *Anderson*, the witnesses in this case provided statements and descriptions to the police officer. This account formed the basis for Officer Chissus to objectively determine that the criminal activity had occurred or was about to occur. Furthermore, this provided the basis for the officer to articulate his suspicions.

3. THE STOP WAS OBJECTIVELY REASONABLE BECAUSE OFFICER CHISSUS HAD A REASONABLE SUSPICION TO INVESTIGATE FOR CRIMINAL ACTIVITY AND THERE WAS A SUFFICIENT NEXUS BETWEEN THE CRIMINAL ACTIVITY AND THE PLACE SEARCHED.

When determining whether a given stop is pretextual, courts should consider the totality of the circumstances, including both the subjective intent of the officer and the objective reasonableness of the officer's behavior. *State v. Ladson*, 138 Wn.2d 343, 979 P.2d 833 (1999).

The stop initiated by Officer Chissus was not pretextual but instead a valid investigation into possible criminal activity. The officer's conduct satisfies both prongs of the test required by *Ladson*. First, one of the reasons behind the Officer's subjective intent was to determine whether Mr. Wallace was DUI after hearing that they had driven from the Kinko's after dropping a pipe on the ground. Due to the traffic on the road and Mr. Wallace pulling into and stopping in a parking lot shortly after Officer Chissus began following him, Officer Chissus was unable to determine whether Mr. Wallace was DUI based on his driving. Second, Officer Chissus testified that "I wasn't behind the vehicle long enough to know if their driving was affected, if there was actual narcotics use, whether this was a DUI situation. A couple different things I was looking at." It was objectively reasonable for Officer Chissus, charged with protecting the public, to initiate the stop at that time rather than allow a potentially

intoxicated individual to return to the road while he went to Kinko's to confirm the pipe was used for illegal drugs.

The officer had lawful authority to make the stop at that time. Although Officer Chissus could not have arrested the occupants of the vehicle for the pipe alone, DUI and possession of illegal drugs are both arrestable offenses. During his questioning of Mr. Wallace and Ms. Mosier, Officer Chissus' suspicion was further aroused by the fact that both admitted to prior drug use and Ms. Mosier being "less than truthful." This was not a general investigation based on unfounded suspicion but a specific investigation based on the unique circumstances of this case. Officer Chissus' decision to stop and investigate was objectively reasonable.

A reasonable nexus is established as a matter of law when a sufficient basis in fact permits the conclusion that evidence of illegal activity will likely be found at the place to be searched. *State v. Thein*, 138 Wn.2d 133, 977 P.2d 582 (1999). Existence of probable cause is to be evaluated on a case by case basis. *Id.* at 149. "The facts stated, the inference to be drawn, and the specificity required must fall within the ambit of reasonableness." *Id.* (quoting *State v. Helmka*, 86 Wn.2d at 93, 542 P.3d 115 (1975)).

Here, Officer Chissus was responding to the Kinko's when he was told by dispatch the suspects had left in a vehicle. While en-route, Officer Chissus saw the vehicle and executed a u-turn to get behind the suspect vehicle. At this time, Officer Chissus did not know if Mr. Wallace was DUI. Due to the fact that three to five vehicles were between Officer Chissus and Mr. Wallace's vehicle on the road and Mr. Wallace shortly thereafter pulled into a parking lot and parked, Officer Chissus did not have time to determine whether Mr. Wallace was driving erratically and possibly DUI. Officer Chissus then pulled into the parking lot and initiated the stop at issue here.

Based on the description of the pipe and Officer Chissus' training and experience, a sufficient basis in fact existed to believe that the vehicle would contain illegal drugs and that the occupants may be under the influence. It was reasonable for Officer Chissus to initiate the stop based on the information he had for the simple reason that, based on the facts here, Officer Chissus did not have time to assess whether the driver was DUI while on the road. Furthermore, based on his training and experience it was reasonable for Officer Chissus to believe that illegal drugs would be found in the vehicle based on the description of the pipe dropped at Kinko's. In fact, Officer Chissus would have been derelict in his duty as a public servant had he *not* initiated the stop without knowing whether the

driver was under the influence. In addition, Officer Chissus indicated that Ms. Mosier appeared less than truthful in her responses to questioning, suggesting to Officer Chissus, again based on his training and experience, that there were illegal drugs in the vehicle.

Based on the facts available to Officer Chissus it was reasonable for him to infer that evidence of illegal activity was present in the vehicle. Mr. Wallace and Ms. Mosier had been seen by a reliable witness at Kinko's, where Ms. Mosier dropped a pipe on the ground. They subsequently left the Kinko's in the vehicle in question. It would be absurd for Officer Chissus to pass by the vehicle on the road, go to Kinko's and confirm the pipe was used for illegal drugs then go back and attempt to find the vehicle.. A sufficient nexus existed between the criminal activity and the item to be seized. Officer Chissus was working with a sufficient basis in fact in which to conclude evidence of illegal activity would be found within the vehicle.

4. THE TERRY STOP DID NOT EXCEED THE SCOPE OF A VALID INVESTIAGTIVE STOP.

A stop for a traffic infraction can be extended when an officer has articulable facts from which the officer could reasonably suspect criminal activity. *State v. Tijerina*, 61 Wn. App. 626, 811 P.2d 241 (1991); *State v. Lemus*, 103 Wn. App. 94, 11 P.3d 326 (2000). The continued detention

must be limited to the length of time needed to investigate the increasingly suspicious circumstances. *State v. Gonzales*, 46 Wn. App. 388, 731 P.2d 1101 (1986).

In this case, the police officer conducted a Terry stop of the defendant's vehicle, not a traffic stop, but the analysis is still the same. Officer Chissus is allowed to investigate the original crime. In fact, because neither party admitted the paraphernalia was theirs, Officer Chissus had a right to investigate and detain either party, as each person had equal access to the paraphernalia. *State v. Morgan*, 78 Wn. App. 208, 896 P.2d 731 (1995).

Under *Terry*, a detention must be brief and not in excess of a reasonable time. *State v. Flores-Moreno*, 72 Wn. App. 733, 866 P.2d 648 (1994), citing *United States v. Sharpe*, 470 U.S. 675, 105 S.Ct. 1568, 84 L.Ed.2d 605 (1985). The scope of a permissible *Terry* stop will vary depending upon the facts of the case. The question is whether the detention was reasonably related in scope to the original circumstances. *State v. Williams*, 102 Wn.2d 733, 738, 689 P.2d 1065 (1984). Further, the scope and duration of the detention may be extended if the investigation confirms the officer's suspicions. *State v. Acrey*, 148 Wn.2d 738, 747, 64 P.3d 594 (2003).

Here, the original detention was to investigate the crime of possession of drug paraphernalia, specifically a pipe used to ingest crack cocaine or methamphetamine. While the paraphernalia crime may be a misdemeanor, the possession of either of the drugs the pipe would be used to ingest, are both felonies. Officer Chissus began to question each suspect about the incident and both admitted to drug use but neither claimed the pipe. To further his investigation, Officer Chissus requested a drug detecting dog respond to his location. This extended the investigation by only ten minutes. Recently, the courts upheld an investigative detention that lasted at least 30 minutes, noting that there is no hard and fast rule with respect to a detention, and that since the defendant's explanation did nothing to dispel their original suspicion, the 30 minute detention was permissible. *State v. Bray*, 143 Wn. App. 148, 177 P.3d 154 (2008).

After the drug detecting police canine, Charlie, alerted to the vehicle, Officer Chissus had a right to seize and impound the vehicle. "When an officer has probable cause to believe that a car contains contraband or evidence of a crime, he or she may seize and hold the car for the time reasonable needed to obtain a search warrant and conduct the subsequent search" *State v. Huff*, 64 Wn. App. 641, 653, 826 P.2d 698, *review denied*, 119 Wn.2d 1007, 833 P.2d 387 (1992).

The scope of the original detention was based on Officer Chissus' reasonable suspicion that a crime had occurred. Upon his investigation of that crime, his suspicions were increased regarding the individuals possible possession of the original drug pipe and the possibility of other evidence inside the car. The elevation of the investigation was reasonably related in scope to the original detention. The length of the detention was also reasonable, lasting between only ten and twenty minutes. In fact, even after Mr. Wallace and Ms. Mosier were told they were free to leave, they did not do so.

A variety of courts have routinely held that the application of a drug detecting canine to an item or place where there is no reasonable expectation of privacy is not a search. The genesis of this holding originated in *State v. Place*, where the U.S. Supreme Court ruled that a canine sniff is not a search within the meaning of the Fourth Amendment. There, the Court ruled that the application of a trained narcotics dog to detained luggage was not a search. *State v. Place*, 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983).

Thus far, in Washington, courts have held that a canine sniff is not a search as long as it does not unreasonably intrude into a person's private affairs. "As long as the canine sniffs the object from an area where the defendant does not have a reasonable expectation of privacy, and the

canine sniff is minimally intrusive, then no search has occurred.” *State v. Boyce*, 44 Wn. App. 724, 730, 723 P.2d 28 (1986).

The focus in each canine sniff case is where the sniff occurred. In fact, in a long line of cases, canine applications were permitted time after time. *See, e.g., State v. Stanphill*, 53 Wn. App 623, 769 P.2d 861 (1989) (canine sniff of package of post office was not a search); *State v. Boyce*, 44 Wn. App. 724, 723 P.2d 28 (1986) (canine sniff of safety deposit box in bank not a search); *State v. Wolohan*, 23 Wn. App. 813, 598 P.2d 421 (1979) (canine sniff of parcel in bus terminal not a search, review denied, 93 Wn.2d 1008 (1980).

Even more on point is *State v. Mitchell*, 145 Wn. App. 1071, 186 P.3d 1071 (2008). There, while police were investigating an assault and robbery, they discovered what appeared to be marijuana in the victim’s car. After observing the suspected marijuana, police called for a drug detecting canine to be brought to the scene. The dog alerted on the vehicle and a search warrant was obtained. *Id.* Both the limited detention to wait for the drug detecting canine and the actual application of the canine were considered a lawful part of a police investigation. *Id.* at 4.

The U.S. Supreme Court also addressed canine sniffs in *Illinois v. Caballes*, 543 W.S. 405, 125 S.Ct. 834 (2005). There the court held that the application of a drug detecting canine during a lawful traffic stop did

not constitute a search under the Fourth Amendment to the U.S. Constitution. *Caballes* at 409.

“A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment.” *Id.* at 410. This is because possession of contraband “comprises no legitimate privacy interest, “and is not a privacy interest that society is prepared to deem as reasonable. *Caballes* at 408-409, quoting *U.S. v. Jacobson*, 466 U.S. 109, 123, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984).

Washington courts have acknowledged that a dog sniff may constitute a search if the location of the sniff or the object being sniffed were subject to a greater constitutional protection. *State v. Young*, 123 Wn.2d 173, 867 P.2d 593 (1994) citing *Stanphill*, 53 Wn. App. at 630-631, 769 P.2d 861; *Boyce*, 44 Wn. App. at 729, 723 P.2d 28; *Wolohan*, 23 Wn. App at 820 n.5, 598 P.2d 421. Mr. Wallace voluntarily drove his vehicle and exposed it to the public. He has no legitimate privacy interest in illegal contraband or narcotics.

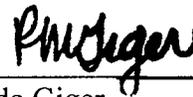
D. CONCLUSION

For the foregoing reasons, Officer Chissus had the authority to initiate this stop under *Terry*; the information provided was by a reliable

witness under the *Aguilar-Spinelli* test; the stop was objectively reasonable and there was sufficient nexus between the crime and the place searched; and the stop did not exceed the scope of a proper investigation. The Superior Court ruling should be affirmed.

This brief is respectfully submitted on July 14, 2009.

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IN THE COURT OF APPEALS, DIVISION I OF THE STATE OF WASHINGTON

4	City of Bothell,)	
5)	
6	Respondent,)	Declaration of Mailing
7	vs.)	
8	Robert Wallace,)	
9	Appellant.)	

I, G. H. Tipple, declare under penalty of perjury of the laws of the State of Washington that on July 14, 2009, I deposited in the U.S. Mail, postage pre-paid, the enclosed copy of City's Opening Brief of Respondent in the above-referenced case, to:

Jeffrey Steinborn
3161 Elliott Ave Ste 340
Seattle, WA 98121-1015

DATED this 14th day of July, 2009, at Bothell, Washington.

JOSEPH BECK
Bothell City Attorney

G.H. Tipple
G.H. Tipple
Legal Assistant

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