

NO. 62874-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

CEDRIC BERRY,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CHARLES MERTEL

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. <u>ISSUE PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. PROCEDURAL FACTS	2
2. SUBSTANTIVE FACTS	2
C. <u>ARGUMENT</u>	5
1. THE OFFICER'S DECISION TO STOP BERRY WAS REASONABLY BASED ON SPECIFIC ARTICULABLE FACTS WHICH, WHEN TAKEN TOGETHER WITH RATIONAL INFERENCES FROM THE FACTS, WARRANTED AN INTRUSION	5
2. BERRY'S RELIANCE ON <u>MARTINEZ</u> AND <u>GATEWOOD</u> IS MISPAID	11
D. <u>CONCLUSION</u>	16

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Terry v. Ohio, 392 U.S. 1,
20 L.Ed.2d 889, 88 S. Ct. 1868 (1968)..... 5, 6, 8

United States v. Cortez, 449 U.S. 411,
66 L. Ed. 2d 21, 629 S. Ct. 690 (1981)..... 7, 8

Washington State:

State v. Bray, 143 Wn. App. 148,
177 P.3d 154 (Div. 3, 2008)..... 12, 14, 15

State v. Gatewood, 163 Wn.2d 534,
182 P.3d 426 (2008)..... 11, 12

State v. Glover, 116 Wn.2d 509,
806 P.2d 760 (1991)..... 5, 8, 12, 13

State v. Henry, 80 Wn.App. 544,
910 P.2d 1290 (1995)..... 11

State v. Kennedy, 107 Wn.2d 1,
726 P.2d 445 (1986)..... 6, 7, 8, 9

State v. Little, 116 Wn.2d 488,
806 P.2d 749 (1991)..... 5, 6, 8, 12, 14

State v. Martinez, 135 Wn. App. 179,
143 P.3d 855 (2006)..... 5, 10, 11, 12, 15

State v. Mendez, 137 Wn.2d 208,
970 P.2d 722 (1999)..... 5

State v. Mercer, 45 Wn. App. 769,
727 P.2d 676 (1986)..... 8

<u>State v. Rice</u> , 59 Wn. App. 23, 795 P.2d 739 (1990).....	6
<u>State v. Samsel</u> , 39 Wn. App. 564, 694 P.2d 670 (1985).....	7, 8
<u>State v. Tarica</u> , 59 Wn. App. 368, 798 P.2d 296 (1990).....	6
<u>State v. White</u> , 97 Wn.2d 92, 640 P.2d 1061 (1982).....	6

Statutes

Washington State:

RCW 9A. 52.080	1
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A. **ISSUES PRESENTED**

To justify an investigatory stop, an officer must be able to "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Terry v. Ohio, 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Here, the facts are as follows: 1) Officer Settle recognized Appellant, hereinafter "Berry," and saw him walking through the breezeway from the Parkway Apartments, 2) Officer Settle knew the apartment complex was known for narcotics related activity and had spoken to the manager within the last month, 3) there were "No Trespassing" and "No Loitering" signs posted at the apartments, 4) Officer Settle believed that Berry was trespassed from the Parkway Apartments, 5) Berry reacted with a nervous look when he saw the officers, 6) Berry claimed he lived at the apartment complex but he was unable to provide an apartment number, and 7) Berry acted as if he was planning to flee while he was speaking to the officers. Has Berry failed to show that Officer Settle lacked reasonable articulable suspicion to stop and investigate him for criminal trespass¹?

¹ RCW 9A.52.080(1) - Criminal Trespass in the Second Degree - (1) A person is guilty of criminal trespass in the second degree if he knowingly enters or remains unlawfully in or

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Berry was charged in King County Superior Court with the crime of Violation of the Uniform Controlled Substances Act (VUCSA), specifically possession of cocaine. CP 1-3. On September 8, 2008, the parties litigated CrR 3.5 and 3.6 motions. The trial court denied Berry's motion to suppress evidence obtained as a result of the stop, concluding that the stop was a lawful Terry stop. Trial took place on September 9th and 10th, 2008 after which the jury found Berry guilty as charged. 3RP 332. On January 8, 2009, the trial court sentenced Berry on this charge. 4RP 1-13.

2. SUBSTANTIVE FACTS²

On December 20, 2007, Officers Settle and Nelson were on routine bicycle patrol when they came into contact with Berry as he was coming out of the Parkway Apartment complex. 1RP 23, 24, 41. The apartment complex has a couple of signs which indicate no trespassing and one sign that indicates no loitering posted. RP 54.

upon premises of another under circumstances not constituting criminal trespass in the first degree.

² The facts are taken from the Findings of Fact and Conclusions of Law (attached as Appendix A) and the report of proceedings of September 8, 2008, hereinafter referred to as 1RP, conducted by the Hon. Charles Mertel, King County Superior Court.

Berry reacted to the officers with very nervous behavior and a surprised look on his face. 1RP 24. Officer Settle believed that Berry was trespassed from that particular apartment complex (at 7401 Rainier Ave. S.) and the apartment complex across the street because both he and other officers had recently had contact with Berry for drug related offenses, and the police computer showed that he was trespassed from those locations. 1RP 25. Ultimately, Officer Settle was mistaken as Berry was actually trespassed from an apartment complex up the street with an address of 7404 Rainier Ave. South. 1RP 43. Officer Settle also believed that Berry was on Dept. of Corrections supervision. 1RP 25. Officer Settle had recently (within the month) spoken with the apartment manager regarding a large problem with people selling drugs and loitering at the Parkway Apartments. 1RP 26. Officer Settle asked Berry if he lived there (to rule out if he had recently moved there), and Berry replied that he did live there but he wasn't really sure what his apartment number was. Id. As Berry was speaking with the officers, Officer Settle noted that he continued to act nervous, was not exactly paying attention to what the officer was saying, was looking around, was shifting his eyes, and appeared to be thinking about fleeing or running from the contact. 1RP 28. The officers ran Berry's

name through the radio so that the dispatcher could give them Berry's trespass information and to check if he had any warrants. 1RP 30-31. Because of Berry's nervous behavior, Officer Settle asked him to sit down on a nearby step while they received that information. Id. While they were waiting, they observed Berry throw an object over his shoulder, which turned out to be a small plastic baggie containing suspected crack cocaine. 1RP 31-32. At that point, they arrested Berry for VUCSA possession of cocaine. 1RP 32.

Berry testified that he was playing video games with his friend Howard, a resident of the Parkway Apartments, when he became thirsty and left to go to the store. 1RP 66-67. He was walking through the apartments when the police stopped him. 1RP 67. Berry explained he was playing video games with a friend, and as they were talking, Howard walked by and went inside the building. 1RP 70-71. Howard never came back outside to talk with Berry or the police. See 1RP 72-73. Berry testified that they were waiting outside the apartment complex when the police accused him of throwing something over his shoulder. 1RP 73. Berry claims that he never threw anything over his shoulder. 1RP 73.

C. **ARGUMENT**

Analysis under the Fourth Amendment to the United States Constitution and Article 1, Section 7 of the Washington State Constitution is indistinguishable: each requires that an investigatory stop be reasonable. See State v. Glover, 116 Wn.2d 509, 806 P.2d 760 (1991); State v. Little, 116 Wn.2d 488, 806 P.2d 749 (1991). Berry claims that Judge Mertel erred when he concluded that the officers had specific, articulable suspicion to make a Terry stop valid. Berry also challenges Judge Mertel's Findings of Fact 7 and 9. See Appendix A. Findings of Fact are reviewed under the Substantial Evidence Standard, which requires that the evidence be sufficient to persuade a fair-minded, rational person of the truth of the finding. State v. Mendez, 137 Wn.2d 208, 970 P.2d 722 (1999). Whether a warrantless Terry stop passes constitutional muster is a question of law and is reviewed de novo. State v. Martinez, 135 Wn. App. at 179, 143 P.3d 855 (2006).

1. THE OFFICER'S DECISION TO STOP BERRY WAS REASONABLY BASED ON SPECIFIC ARTICULABLE FACTS WHICH, WHEN TAKEN TOGETHER WITH RATIONAL INFERENCES FROM THE FACTS, WARRANTED AN INTRUSION.

The Washington State Supreme Court adopted the rationale set forth in Terry v. Ohio, 392 U.S. 1, 20 L.Ed.2d 889, 88 S. Ct.

1868 (1968), when examining the validity of an investigatory stop. State v. Kennedy, 107 Wn.2d 1, 726 P.2d 445 (1986). Under this rationale, an investigatory stop is lawful if the officer possesses “specific articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” Terry, 392 U.S. at 21. It follows, then, that it is permissible for officers to stop a suspected person and request the person produce identification and an explanation of his or her activities, as long as the officer’s “well-founded suspicion” meets the Terry rationale. Little, supra, quoting State v. White, 97 Wn.2d 92, 105, 640 P.2d 1061 (1982).

In analyzing the validity of an investigatory stop, the court conducts a two-part inquiry: “(1) whether the initial detention was justified, and (2) whether the detention was reasonably related in scope to the reason for the detention.” State v. Tarica, 59 Wn. App. 368, 375, 798 P.2d 296 (1990). This analysis requires the court to “Balance the interest of society in enforcing the laws against the individual’s right to protection against unreasonable searches and seizures.” State v. Rice, 59 Wn. App. 23, 26, 795 P.2d 739 (1990). Here, the officers were patrolling near the Parkway Apartments because there was managerial concern that there were drug

dealers and loiterers trespassing onto the property. 1RP 26. The officers spotted Berry, a person known to the officers at the time to be trespassed from the Parkway Apartments, walking through the breezeway of the apartments. 1RP 24-26. Officer Settle also testified that he believed Berry, a person with a history of drug-related offenses involving that particular apartment complex, may have had involvement with drugs. See 1RP 25-26. Clearly the initial detention of Berry was both justified and reasonably related in scope for the reason for that detention; to investigate a possible criminal trespass.

Additionally, in evaluating an investigatory stop, a court should take into consideration an officer's experience. "Circumstances which may appear innocuous to the average person may appear incriminating to a police officer in light of past experience. The officer is not required to ignore that experience." State v. Samsel, 39 Wn. App. 564, 570, 694 P.2d 670 (1985); See also United States v. Cortez, 449 U.S. 411, 66 L. Ed. 2d 21, 629 S. Ct. 690 (1981). For instance, in Kennedy, the court relied heavily on the fact that the police officer had 20 years of experience, including 100 drug investigations, in reaching the conclusion that the officer's stop of the defendant was reasonable. See 107 Wn.2d

1. The Kennedy court's inquiry focused on whether the facts known to the officer, in light of his training and experience, were such that there was a substantial possibility that criminal activity had occurred or was about to occur. *Id.* at 8.

When an individual's activity is consistent with criminal activity, although also consistent with noncriminal activity, it may justify a brief detention. Kennedy, 107 Wn.2d at 6; State v. Mercer, 45 Wn. App. 769, 727 P.2d 676 (1986). An officer need not have information amounting to probable cause that the suspect is engaged in criminal activity. Terry, 392 U.S. at 25-26; Little, 116 Wn.2d at 495. A reviewing court must evaluate the reasonableness of an investigatory stop in view of the totality of the circumstances and the officer's training and experience. Glover, 116 Wn.2d at 514, (citing Cortez, 449 U.S. at 418; Mercer, 45 Wn. App. at 774; Samsel, 39 Wn. App. at 570-71). Furthermore, while an officer must have articulable reasons for investigating, she need not be able to indicate the specific crime being investigated in order for a stop to be legitimate. Mercer, 45 Wn. App. at 775. Similarly, "crime prevention and crime detection are legitimate purposes for investigative stops or detentions . . . courts have not required the

crime suspected or under investigation to be a felony or serious offense . . ." Kennedy, 107 Wn.2d at 6.

Here, the defendant, known by the officers as a drug offender, was seen by the Officers exiting a building located at 7401 Rainier Ave S.; an apartment complex that had previous complaints of drug activity from the management. See Appendix A (Findings of Fact, hereinafter cited to as "FF"), FF 2, 4, 5. The officers specifically knew the defendant had been involved in narcotics activity at that specific location previously and believed he had been trespassed from the property. FF 5. When the officers saw the defendant and saw the defendant spot them, the defendant's eyes became large and he acted in a nervous or surprised manner. FF 6. Additionally, the officers knew the defendant to be on Department of Corrections supervision. FF 5. Thus, any violation of law would make him in violation of conditions of release. Therefore, the officers reasonably believed the defendant to be in violation of DOC conditions. At that time the officers decided to contact the defendant to investigate. When the officers inquired as to where the defendant was coming from, he indicated he lived in the complex. FF 9. He was not able to provide an apartment number. 1RP 26. The defendant began acting very

nervous and was glancing back and forth. FF 11. At that point, due to the defendant's behavior, he was asked to sit on some steps while the officers ran the defendant's name over the radio. FF 12. When the defendant was seen tossing a bag of cocaine over his shoulder, the officers arrested him for possession of cocaine. FF 16 - 18.

As the initial contact did not restrain the defendant in any way, it can be categorized as a social contact, or at most a Terry Stop, based on a reasonable suspicion that the defendant was committing a criminal trespass violation and was in violation of DOC conditions. The contact was lawful and limited in scope. When the defendant began glancing around as if he was looking for some type of escape, the officers asked him to sit on some stairs for their own safety and so that they could check on the defendant's status. This brief detention was within the scope of this lawful Terry stop and was justified based on the defendant's actions. Further when the officers observed the defendant throw a bag of narcotics, their arrest of him was based on probable cause.

2. BERRY'S RELIANCE ON MARTINEZ and GATEWOOD IS MISPLACED.

Certainly, innocuous facts do not justify a stop. State v. Martinez, 135 Wn. App. at 180. In that case, Martinez, a man unknown to officers, was seen in a high crime area with a high recent incidence of vehicle prowls, walking in the shadows where several cars were parked. Id. at 177. He acknowledged that he did not live in the apartment complex, he was asked to sit on a utility box, and when patted down, the officer found a container containing methamphetamine. Id. at 178. Martinez argued that the officer did not have "particularized suspicion" necessary to stop him. The court agreed, ruling that "there must be some suspicion of a particular crime or a particular person, and some connection between the two. Id. at 182. The court then reversed the conviction. Id.

In addition, "startled reactions to seeing the police do not amount to reasonable suspicion." State v. Gatewood, 163 Wn.2d 534, 540, 182 P.3d 426 (2008) (citing State v. Henry, 80 Wn.App. 544, 552, 910 P.2d 1290 (1995)). In Gatewood, police stopped the defendant because he had a "wide-eyed" expression upon seeing the police drive by a bus shelter where he was sitting, he made a motion that led the officer to believe he was sloughing drugs, and he left the bus shelter and crossed the street mid-block. The

Washington Supreme Court determined that these facts alone do not support a Terry stop.

Neither Martinez nor Gatewood are analogous to the facts at hand. First, unlike the defendant in Martinez, Berry was particularly known to the officers as a person who had previous contacts with them. This is something he admitted during his testimony when he claimed that the officers stop him every time they see him. 1RP 84. Furthermore, Officer Settle testified that he believed Berry was trespassed from that specific apartment complex. 1RP 25. Therefore, he was not a stranger to the officers who happened to be seen in the shadows in a high crime neighborhood. Instead, he was a man who was known by sight as a man who was not supposed to be on the property of the Parkway Apartments. Second, unlike the defendant in Gatewood, Berry's shocked or nervous reaction was not the only reason the officers stopped him. As mentioned above he was on the private property of the Parkway Apartments (not on public property such as a bus stop), and he was recognized as a person who was likely criminally trespassing on that private property. Again, Berry was not a stranger to the officers who may or may not have been committing a crime like Gatewood.

Instead, these particular facts are more analogous to State v. Glover, 116 Wn.2d 509, 806 P.2d 760 (1991), State v. Little, 116 Wn.2d 488, 806 P.2d 749 (1991), and State v. Bray, 143 Wn. App. 148, 177 P.3d 154 (2008). In each of these three cases, the defendants were stopped for an investigation of criminal trespass.

In Glover, officers were on routine patrol at an apartment complex known for high gang and drug activity. Glover, 116 Wn.2d at 511. The police had an agreement with the management of that apartment complex that they would stop individuals observed on the grounds who were not recognized as residents and then investigate those individuals for criminal trespass. Id. at 512. Glover walked out of an apartment building, saw the officers, and turned and walked away. Id. Both officers testified that they did not recognize Glover as a resident. Id. When questioned, Glover claimed that he did live at the apartment complex. Id. at 513. Whether he was a resident was never determined. Id. at 520. Officers found cocaine in a plastic bag protruding from Glover's closed right hand. Id. The Supreme Court of Washington noted that the apartments had a history of gang and drug activity, containing "no Trespassing or Loitering" signs, and had an armed guard at the entrance. Id. at 515. The Court affirmed the

defendant's conviction, and ruled that the arresting officers had substantial evidence to justify a Terry stop and also had reasonable grounds to believe that the defendant was committing the crimes of criminal trespass and drug possession. Id. at 516.

In Little, officers were similarly on routine patrol at an apartment complex known for high drug and gang activity. Little, 116 Wn. 2d. 488. The three defendants (Little, Hayden, and Davis) were loitering in various groups at the apartment complex, and when officers approached, all of the defendants fled. Id. at 496. There were numerous "No Trespassing or Loitering" signs posted throughout the complex. Id. at 490. In the Little case, the officers were dispatched to a report of a group of loitering juveniles. Id. at 496. In the Hayden / Davis case, the officer did not recognize either defendants Hayden or Davis as residents. Id. at 498. The Washington Supreme Court ruled that the officers possessed sufficient suspicion to believe that appellants were involved in a criminal trespass of the apartment complex to justify an investigatory stop. Id. at 497-8.

Finally, in Bray, officers were on routine patrol behind a storage area compound due to a high incidence of recent burglaries in the immediate area. Bray, 143 Wn.App. 148 at 150. Officers saw

Bray inside the fenced storage compound at 2:30am driving his minivan slowly with the lights off. Id. He was recognized by officers as the man who was contacted on two separate occasions near the storage compound. Id. Officers suspected he was prowling. Id. The Third Division Washington Court of Appeals ruled that Martinez was easily distinguishable because the officer knew Bray from previous contacts in the area of the storage units, the officer knew of recent burglaries within 1000 feet of the facility, police saw Bray drive his van slowly at night with the lights off, he was looking at the doors of various storage units, he wore gloves and camouflage clothing, and he appeared to be prowling. These facts easily supported the reasonable suspicion of criminal activity necessary to justify a Terry stop.

Berry is similarly situated to the defendants in Glover, Little, and Bray. He was seen in an apartment complex with "No Trespassing" and "No Loitering" signs where there is a managerial concern for drug activity. Officers had discussed these concerns with the manager of apartment complex and were present to help deter further criminal trespass and narcotic activity. Washington case law is clear that under similar circumstances, officers may possess sufficient suspicion to believe that a person who is not a

known resident of an apartment complex may be trespassing. Thus, approaching such a person to investigate whether he or she has a legitimate reason for being on private property is permissible and not outside the scope of a Terry stop. Furthermore, like the defendant in Bray, Berry was recognized by the officer in the same location he was stopped before. As discussed supra, officers may rely on their training and experience when evaluating an investigatory stop. It is inconsequential that Officer Settle was initially wrong about the particular address which Berry was trespassed from. The circumstances known to Officer Settle at the time enabled him to act in a reasonable way, and any other reasonable officer would also have stopped and investigated Berry. Given the totality of the circumstances, Officers Settle and Nelson did not exceed the scope of a permissible Terry stop in this case.

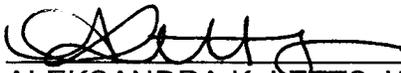
D. CONCLUSION

For the foregoing reasons Berry fails to show that the officers lacked reasonable articulable suspicion that the crime of criminal trespass was being committed on December 20, 2007. Therefore, the State respectfully requests that this court affirm Berry's conviction.

DATED this 18th day of September, 2009.

RESPECTFULLY submitted,

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APPENDIX A

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KING COUNTY
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SEATTLE, WA

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)
)
) Plaintiff,)
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 vs.)
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 CEDRIC LAMAR BERRY,)
)
) Defendant.)
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No. 08-1-00718-5 SEA
WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW
PURSUANT TO CrR 3.5 AND CrR 3.6
MOTION TO SUPPRESS

A hearing on the defense motion to suppress evidence including the defendant's statement(s) was held on September 8, 2008 before the Honorable Judge Mertel. The court informed the defendant that:

(1) he may, but need not, testify at the hearing on the circumstances surrounding the statement; (2) if he does testify at the hearing, he will be subject to cross examination with respect to the circumstances surrounding the statement and with respect to his credibility; (3) if he does testify at the hearing, he does not by so testifying waive his right to remain silent during the trial; and (4) if he does testify at the hearing, neither this fact nor his testimony at the hearing shall be mentioned to the jury unless he testifies concerning the statement at trial. After being so advised, the defendant testified at the hearing.

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON CrR 3.5 MOTION TO
SUPPRESS THE DEFENDANT'S STATEMENT(S) - 1

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1 After considering the evidence submitted by the parties and hearing argument, to wit: the
2 testimony of Officer Michael Settle from Seattle Police Department and the testimony of the
3 defendant, Cedric Lamar Berry, as well as the pretrial exhibits, the court enters the following
4 findings of fact and conclusions of law as required by CrR 3.5 and 3.6.

5
6 FINDINGS OF FACT

7 I.

8 The following events took place within Seattle, Washington:

- 9 1) On December 20, 2007, Seattle Police Officers Michael Settle and Richard Nelson were on
10 bicycle patrol during second shift in the area of Rainier Ave South and Fontanelle Street in
11 Seattle.
12 2) On that date the officers viewed Cedric Lamar Berry, the defendant walking on the breezeway
13 or walkway from the Parkway Apartments located at 7401 Rainier Ave S, Seattle.
14 3) At that time Officer Settle knew the defendant from prior narcotics related contacts in that
15 ~~apartment building and the one across the street area.~~
16 4) Given Officer Settle's prior work in that neighborhood and prior contacts with the apartment
17 manager, one of which occurred with in a month of December 20, 2007, he was aware that this
18 location was one known for narcotics related activity and that management was concerned about
19 that activity and about people hanging out at the building who they were not supposed to be
20 there.
21 5) Having had prior contacts with the defendant and having run his name on the officer's
22 computer system on prior contacts, Officer Settle believed the defendant had been trespassed
23 from 7401 Rainier Ave S and that he was on active supervision with the Department of
Corrections.
6) When Officer Settle observed the defendant notice the presence of the two officers, the
defendant's eyes became wide and he had a nervous or surprised look on his face.
7) Officer Settle and Nelson decided at that point to contact the defendant to investigate whether
or not the defendant was involved in criminal activity, specifically criminal trespass.
8) Upon initial approach the officers were on their bicycles and were dressed in full uniform but
had no weapons drawn on the defendant and the defendant was not restrained in any way.
9) The officers approached the defendant outside the Parkway Apartments and engaged him in
conversation and asked him if he lived in the building. The defendant answered yes.
10) The officers then asked the defendant which apartment he had come from to which the
defendant replied I'm not sure.
11) At that point the defendant appeared to become more nervous and was glancing back and
forth and appeared to not be focused or paying attention to the officers' questions.
12) Officer Settle, believing based on his training and experience that the defendant may be
looking for an opportunity to flee and having his suspicions about criminal activity heightened

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON CrR 3.5 MOTION TO
SUPPRESS THE DEFENDANT'S STATEMENT(S) - 2

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- 1 by the defendant's answers, directed the defendant to sit on some steps leading up to the breezeway of the Parkway apartments.
- 2 13) The officers did this for their safety and so that they would have more reaction time if the defendant attempted to flee.
- 3 14) While the defendant was seated on the steps the Officers called into dispatch via their radios to check on the status of the defendant and specifically requested information about trespass
- 4 orders pertaining to him.
- 5 15) Dispatch indicated that the defendant did not have warrants and that he had been trespassed from 7440 Rainier Ave S, Seattle.
- 6 16) While the Officers were making the radio request Officer Settle was facing the defendant and observed him toss ~~a small plastic baggie~~ ^{an object} over his shoulder.
- 7 17) Officer Settle then retrieved the object that the defendant had tossed from the surface of the breezeway behind the defendant.
- 8 18) Based on Officer Settle's training and experience, he believed the ~~baggie contained~~ ^{object was a small plastic} crack cocaine and the officers placed the defendant under arrest by placing him in handcuffs.
- 9 19) At that point Officer Settle read the defendant his Miranda rights for his department issued MIR card and the defendant indicated that he understood his rights.
- 10 20) No threats or promises were made to the defendant at any time and the defendant spontaneously said to the officers "sorry I should have told you about that".
- 11 21) Officer Settle then asked the defendant where he had gotten the drugs from and the defendant pointed to his pant leg cuff and said "in there"
- 12 22) When Officer Settle asked from your pant cuff the defendant answered yes.
- 13 23) The defendant, via his testimony explained that he understood he did not have to speak with the police officers and that he could request an attorney before questioning would take place if he wanted one. The defendant also testified that he chose to speak with the officers after being read his Miranda rights on December 20, 2007.

14 And having made those Findings of Fact, the Court also now enters the following:

15 CONCLUSIONS OF LAW

16 II.

- 17 1. The above-entitled court has jurisdiction of the subject matter and of the defendant, Cedric Lamar Berry, in the above-entitled cause.

18 III.

- 19 2. The Court finds that although but the State and Federal Constitutions prohibit seizures absent a warrant, Terry v. Ohio and the corresponding Washington state cases that follow carve out an exception to this rule for Terry stops based on reasonable articulable suspicion of criminal activity and that the facts of this case fall within that exception. The courts finding that this was a lawful Terry Stop that was both reasonable and did not exceed its reasonable scope is based on totality of the following circumstances

- 20 a. The officers knew this area to be one of narcotics activity and had prior
- 21 complaints about narcotics and trespassing activity related to narcotics at the
- 22 exact location the defendant was seen leaving

23 WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW ON CrR 3.5 MOTION TO SUPPRESS THE DEFENDANT'S STATEMENT(S) - 3

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- b. The officers knew the defendant from prior contacts and knew that he had been involved in narcotics activity in the neighborhood
- c. The officers reasonably believed the defendant was on probation or supervision with the Department of Corrections
- d. The officers reasonably believed the defendant had been trespassed from the 7401 Rainier Ave S- the Parkway Apartments at the time they made initial contact with him even though it turned out that he had been trespassed from the apartment building located at 7440 Rainier Ave S
- e. The officers observed the defendant widen his eyes and exhibit a surprised look when the defendant noticed the officers' presence. Although the court finds that this factor would not have been sufficient to justify the stop on its own, the court finds that this factor contributed to its totality of the circumstances analysis.
- f. Once the officers engaged the defendant in conversation and the defendant indicated he did not know which apartment he was in and began acting more nervous by glancing back and forth, the officer's suspicion of criminal activity was reasonably heightened and justified the officer's request for the defendant to sit on some stairs.
- g. While the defendant was sitting on the stairs and the officers were awaiting radio information regarding the defendant's trespass orders, and warrant and probation status, Officer Settle observed the defendant toss a baggie of suspected crack cocaine and the defendant was arrested.

- 3. The Court finds that the arrest of the defendant was lawful because it was based on probable cause after the officers observed the defendant toss a baggie of suspected crack cocaine.
- 4. The Court finds that the statements made by the defendant prior to his arrest are admissible as the defendant was not entitled to Miranda because he was not in custody or in circumstances akin to custody even though a lawful Terry Stop was going on. The defendant was not in any physical restraints at that time and was speaking with the officers while the three were standing in a parking lot. No threats or promises were made to the defendant. Based on the testimony of Officer Settle and the defendant, Cedric Berry, the defendant spoke with the officers voluntarily.
- 5. The Court finds that the statements made by the defendant after he was arrested are admissible because they were made pursuant to a knowing, intelligent and voluntary waiver of Miranda based on the testimony of Officer Settle and the defendant, Cedric Berry.
- 6. Based on the above facts and conclusions the court denies the defense motion to suppress under CrR 3.6 and finds all statements made by the defendant during the encounter with Officers Settle and Nelson admissible under CrR 3.5.

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON CrR 3.5 MOTION TO
SUPPRESS THE DEFENDANT'S STATEMENT(S) - 4

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IV.

- 7. In addition to the above written findings and conclusions, the court incorporates by reference, without limitation, its oral findings of fact and conclusions of law as stated on the record.
- 8. The Court's ruling should be entered in accordance with Conclusion of Law III.

DONE IN OPEN COURT this 12th day of November, 2008



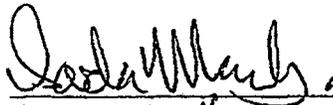
 JUDGE CHARLES W. MERTEL

Presented by:



 Samantha Kanner, WSBA #36943
 Deputy Prosecuting Attorney

Received by:



 Sacha Marley # 32047
 Attorney for Defendant

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Mindy M. Ater, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. CEDRIC BERRY, Cause No. 62874-7-1, in the Court of Appeals, Division I, for the State of Washington.

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


Name Aleksandra K. Letts
Done in Seattle, Washington

9/18/09
Date Sept. 18, 2009

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COURT OF APPELLATE DIVISION
STATE OF WASHINGTON