

66609-6

66609-6

No. 66609-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

DEANTE M. (d.o.b. 6/12/92),

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY, JUVENILE
DIVISION

The Honorable Chris Washington

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The juvenile court erred in denying Deante's motion to suppress the evidence obtained as the result of an unconstitutional seizure and search.

2. The juvenile court erred in concluding the seizure of Deante and his bag was lawful.

3. The juvenile court erred in concluding the search of Deante's bag was lawful.

4. The juvenile court erred in omitting from the findings, over Deante's objections, the fact that Officer Desmet's seizure of Deante and his bag occurred before Officer Tierney interviewed a witness who said she saw a gun in association with Deante's bag.

5. The juvenile court erred in omitting from the findings the fact that none of the 911 callers had seen a gun.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Supreme Court has unequivocally held that an anonymous 911 caller saying a particular person is carrying a gun is insufficient to justify a police officer's stop of that person. Here, several people called 911 to report that they witnessed an argument or fight among young black men in a Safeway parking lot. Some said no weapons were involved and others said that an

anonymous person who refused to provide a name or speak to authorities had seen one of the young men retrieve a gun from a bag. In response to these tips, officers detained Deante and his friends after they left Safeway and started driving down South Third Street. Did the juvenile court err in concluding the officer's seizure of Deante was constitutional, and in denying the motion to suppress the evidence obtained thereby?

2. The search-incident-to-arrest exception to the warrant requirement applies only where necessary to prevent a suspect from accessing a weapon or destroying evidence before a warrant could be obtained. In this case, police seized Deante and took his backpack away from him. The backpack was 15 feet away from Deante, within the control of the Renton Police Department. Police subsequently arrested and handcuffed Deante, then opened his backpack without a warrant. Did the juvenile court err in concluding the officer's warrantless search of Deante's bag was constitutional, and in denying the motion to suppress the evidence obtained thereby?

C. STATEMENT OF THE CASE

On June 6, 2010, seven people told 911 operators there was a fight in the parking lot of the Safeway store in downtown Renton.

2 RP 13-30;¹ Ex. 11. Although some callers referenced a gun, none of the people who spoke to the operator had actually seen a gun. 2 RP 14, 17, 19, 20, 23, 25, 29-30; Ex. 11. The callers had witnessed an argument, but not the presence or use of weapons. Id. Some callers mentioned that someone else had reported having seen a gun, but the person who allegedly saw a weapon refused to speak with the operator or even provide a name. 2 RP 14; Ex. 11.

Based on these calls, police officers were dispatched to the area and told to look for a group of black males including one in his late teens or early 20's with a medium build wearing a black jacket and jeans and holding a small duffel bag. 1 RP 12-15. The officers were later told that the young men had left Safeway in a car and were driving down Rainier Avenue. 1 RP 14. Officer Christopher Desmet eventually found the group, which included appellant Deante M., on South Third Street. 1 RP 14.

Officer Desmet ordered the group to stop, show their hands, and sit on a curb. 1 RP 19. The officer seized Deante's bag and secured it 15 feet away from the group. 1 RP 19-20. Officer Desmet did not search the bag and did not feel anything unusual

¹ There are two volumes of verbatim reports of proceedings in this case: 1 RP (January 6, 2011), and 2 RP (January 14, 2011 and February 22, 2011).

when he grabbed it. 1 RP 33. But he ensured the bag was no longer in Deante's control and was instead under the control of the Renton Police Department. 1 RP 36-37; CP 41.

In the meantime, Officer Shawn Tierney went to Safeway to interview witnesses. 1 RP 46. Prior to Officer Tierney's arrival at Safeway, Officer Desmet and other colleagues had already detained Deante and his friends. 1 RP 61. Officer Tierney met with witness Gloria Butler, who said she had seen a gun and the bag from which it was retrieved. 1 RP 49.

Officer Tierney then transported Ms. Butler to the location where Officer Desmet had detained Deante and his friends. 1 RP 51. Ms. Butler saw Deante's bag sitting at Officer Desmet's feet and identified it as the one she had seen at Safeway. 1 RP 52. Officer Tierney went to get the bag to bring it closer to Ms. Butler, and when he picked it up he said it felt like the object inside was a gun. 1 RP 54.

Deante was immediately arrested and handcuffed after Officer Tierney felt the bag. 1 RP 69, 74. The officers then opened and searched the bag, finding a revolver. 1 RP 58-59, 79. After Deante had been informed of his rights, Officer Paul Summers

interrogated him and Deante admitted the gun was his and that he had bought it on the street for \$75. 1 RP 105.

Deante was charged in juvenile court with one count of unlawful possession of a firearm in the second degree. CP 1. He moved to suppress the gun and post-arrest statements on the basis they were obtained pursuant to an unlawful seizure and search. CP 13-22. At the suppression hearing, recordings of the 911 calls were played and Officers Desmet and Tierney testified as described above.

Deante argued that the officers' seizure of him and his bag was unlawful because the 911 callers' tips were not reliable and did not create reasonable suspicion that Deante committed a crime. In particular, none of the callers had seen a gun, but at best reported hearsay statements of another person who allegedly saw a gun but refused to speak to the operator or provide a name. The court ruled that the seizure was proper because Officer Tierney spoke to a witness who saw the gun being removed from a bag. 2 RP 71. Deante pointed out that this witness was not interviewed until after the seizure occurred, and therefore the information she provided could not be used post hoc to justify the seizure. 2 RP 72. Deante also argued that even if the seizure were proper, the warrantless

search of the bag was unconstitutional because the search-incident-to-arrest exception does not apply unless necessary for officer safety or to prevent the destruction of evidence. The court nevertheless denied the motion to suppress, and found Deante guilty as charged. 2 RP 72-76.

At the later hearing on the proposed findings and conclusions, Deante again emphasized that none of the 911 callers had seen a gun, and that witness Gloria Butler did not tell Officer Tierney she had seen a gun until after Officer Desmet had already seized Deante. 2 RP 110. The court and prosecutor implied that the order of events was not relevant, and did not clarify the findings as requested by Deante's attorney. 2 RP 111-122.

D. ARGUMENT

THE EVIDENCE SHOULD HAVE BEEN SUPPRESSED
BECAUSE IT WAS OBTAINED PURSUANT TO AN
UNLAWFUL SEIZURE AND SEARCH.

The conviction in this case should be reversed for two independent reasons. First, the seizure of Deante and his bag was unconstitutional because the officers lacked reasonable suspicion that Deante was committing a crime. The informants' tips did not create reasonable suspicion because none of the 911 callers witnessed criminal activity.

Second, even if the seizure had been proper, the subsequent search of the bag was unconstitutional because it was performed without a warrant. The search-incident-to-arrest exception does not apply unless the suspect is within reaching distance of the object to be searched and could remove a weapon or destroy evidence before a warrant could be obtained. Because the bag was in the custody of the Renton Police Department, no exigency justified searching it without a warrant.

For each of these independent reasons, the conviction should be reversed and the case remanded with instructions to suppress the evidence.

1. Under both the state and federal constitutions, the Terry stop is an exception to the warrant requirement, and as such must be jealously and carefully drawn. Article I, section 7 of the Washington Constitution prohibits government invasion of private affairs absent authority of law. Const. art. I, § 7. The Fourth Amendment prohibits unreasonable searches and seizures. U.S. Const. amend. IV.

Under both the federal and state constitutions, warrantless searches and seizures are unreasonable per se unless an exception applies. State v. Loewen, 97 Wn.2d 562, 565, 647 P.2d

489 (1982); State v. Lennon, 94 Wn. App. 573, 579, 976 P.2d 121 (1999). One narrow exception to the warrant requirement is the Terry stop. See Terry v. Ohio, 392 U.S. 1, 21, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968). Under Terry, an officer may briefly detain a person if the officer harbors a reasonable suspicion, based on specific articulable facts, that the individual is engaging in criminal activity. Id.

As an exception to the warrant requirement, the Terry stop must be narrowly construed and “jealously and carefully drawn.” State v. Martinez, 135 Wn. App. 174, 179, 143 P.3d 855 (2006). When the “reasonable suspicion” standard is not strictly enforced, the exception swallows the rule and “the risk of arbitrary and abusive police practices exceeds tolerable limits.” Brown v. Texas, 443 U.S. 47, 52, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979).

The Terry exception must be limited to those situations in which there is a “substantial possibility” that a crime has been committed and that the individual detained is the offender. Martinez, 135 Wn. App. at 180; 4 Wayne R. LaFave, Search and Seizure § 9.5(b) at 489 (4th ed. 2004). “[A] hunch does not rise to the level of a reasonable, articulable suspicion.” State v. O’Cain, 108 Wn. App. 542, 548, 31 P.3d 733 (2001). “Innocuous facts do

not justify a stop.” Martinez, 135 Wn. App. at 180; State v. Armenta, 134 Wn.2d 1, 13, 948 P.2d 1280 (1997). “Race or color alone is not a sufficient basis for making an investigatory stop.” State v. Almanza-Guzman, 94 Wn. App. 563, 567, 972 P.2d 468 (1999).

The Terry exception is more narrowly construed under our state constitution than under the Fourth Amendment. See State v. Gatewood, 163 Wn.2d 534, 539, 182 P.3d 426 (2008). The State bears the burden of proving the legality of a warrantless seizure by clear and convincing evidence. State v. Garvin, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009). An appellate court reviews the constitutionality of a warrantless stop de novo. Martinez, 135 Wn. App. at 179.

2. Where a Terry stop is based on an informant’s tip, the State must prove the informant and information provided are reliable. Although the Terry case involved a stop based on the personal observations of police officers, in some circumstances an informant’s tip may create the required reasonable suspicion. Adams v. Williams, 407 U.S. 143, 146-47, 32 L.Ed.2d 612, 92 S.Ct. 1921 (1972). This occurs only if the tip exhibits sufficient indicia of reliability. Alabama v. White, 496 U.S. 325, 326-27, 110 S.Ct.

2412, 110 L.Ed.2d 301 (1990); State v. Sieler, 95 Wn.2d 43, 47, 621 P.2d 1272 (1980). “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. State v. Jones, 85 Wn. App. 797, 799-800, 934 P.2d 1224 (1997) (citing Sieler, 95 Wn.2d at 47-49). In other words, under article I, section 7, the State must prove that both “(1) the informant is reliable, and (2) the informant’s tip is reliable.” State v. Hart, 66 Wn. App. 1, 8, 830 P.2d 696 (1992) (citing Sieler, 95 Wn.2d at 48) (emphasis in original).

3. The Terry stop was unconstitutional because none of the 911 callers saw a gun or witnessed a crime; they were reporting hearsay allegations of a person who refused to provide a name or speak directly to the authorities. The officers’ seizure of Deante and his bag were unconstitutional because the tips alleging illegal gun possession lacked sufficient indicia of reliability.

This Court’s decision in Hopkins controls. State v. Hopkins, 128 Wn. App. 855, 862, 117 P.3d 377 (2005). There, an informant called 911 twice and reported that a young black male was carrying a gun. Id. at 858. The caller reported that the individual was wearing a dark shirt and tan pants and carrying both a green

backpack and a black backpack. The informant reported that the suspect was located in a particular phone booth. Dispatch relayed the message to police officers, whose car computer displayed the informant's name and telephone number. The officers went to the phone booth in question, saw a young man matching the informant's description, performed a Terry stop, and discovered a gun. Id. at 859.

This Court reversed the trial court's order denying suppression of the gun, and held that the State failed to prove the reliability of the informant. Id. at 864. Although the officers were given the informant's name and phone number, "the informant's name was meaningless to the officers." Id. at 863. As an independent basis for suppression, the court held that not only did the State fail to prove the reliability of the informant, it also failed to prove the reliability of the information provided. Id. This was so because even though the informant stated he observed a person who looked like a minor "with what appeared to be a gun," the caller did not actually know the age of the person with a gun, and gun ownership on its own is not a crime. Id. Thus, the tip did not create reasonable suspicion of criminal behavior. Id.

Here, as in Hopkins, the informants' names were meaningless to the officers. But more importantly, the informants did not see a gun. If the tip in Hopkins was insufficient to support the warrantless seizure despite the fact that the 911 caller directly observed a gun, then the tips here were certainly insufficient to support a warrantless seizure because the 911 callers did not observe a gun, but only an argument. Some callers relayed information from another person, who refused to give his or her name, who allegedly had seen a gun. But the callers themselves witnessed only an argument, and engaging in an argument is not a crime. The callers' tips were insufficient to support a stop under Hopkins.

Hopkins also reiterates the rule that information gathered after a seizure cannot be used to justify the seizure post hoc. Id. at 865; accord Florida v. J.L., 529 U.S. 266, 271, 120 S.Ct. 1375, 146 L.Ed.2d 254 (2000). In Hopkins, the trial court erred in considering a statement the defendant made after the stop to justify the stop. Id. Here, the trial court erred in justifying the stop based on the statement Gloria Butler made after the stop. 1 RP 61; 2 RP 71-72. Gloria Butler was the only witness who saw a gun and spoke to authorities, but it was undisputed that Officer Tierney interviewed

her at Safeway after – or at best, at the same time that – Officer Desmet seized Deante on South Third Street. Thus, the information provided by Gloria Butler cannot be used to justify the stop.²

Vandover also mandates reversal and suppression. There, an anonymous telephone informant reported that “a man in a gold colored Maverick was brandishing a sawed-off shotgun in front of a restaurant in downtown Port Angeles.” State v. Vandover, 63 Wn. App. 754, 755, 822 P.2d 784 (1992). Officers were dispatched to the scene and they stopped a car that matched the description. They found a gun and drugs as a result of the stop. Id. at 756. This Court reversed the trial court’s denial of a suppression motion because there “was no indication on the record whether the anonymous informant in the case was an eyewitness to the event described.” Id. at 759.

Not only was there no apparent basis for the informant’s knowledge, there were no other indicia of reliability. The police officers made no corroborative observations pointing to the existence of criminal activity.

² Under Hopkins it is doubtful Ms. Butler’s statements would be sufficient to justify the stop even if they had been made prior to the stop. But they clearly cannot be used to justify the stop post hoc.

Id. The same is true here. Here, in fact, we know the informants were not eyewitnesses, but only reported hearsay from someone who refused to speak to authorities or provide a name. And as in Vandover, the police did not make any independent observations of criminal activity. Accordingly, under Vandover, the stop of Deante was unconstitutional.

Even under the Fourth Amendment, which is less protective than article I, section 7, this stop was improper. See J.L., 529 U.S. 266. The facts of J.L., like the facts of Hopkins, are extremely similar to this case. In J.L., an anonymous caller told the police that a young black man standing at a particular bus stop and wearing a plaid shirt was carrying a gun. Id. at 268. Police officers went to the bus stop, saw a man with a plaid shirt, seized him and found a gun. Id. The man was a juvenile and was charged with unlawful possession of a firearm. Id. at 269.

The Supreme Court ruled the evidence should have been suppressed. The Court unequivocally held that an anonymous tip that a particular person is carrying a gun is insufficient to justify a police officer's stop of that person. Id. at 268. But that is exactly what happened in Deante's case. Although the 911 callers gave their names, they were only relaying information from an

anonymous witness who allegedly observed a young black man with a gun. The ensuing stop of Deante therefore violated the Fourth Amendment. J.L., 529 U.S. at 268.

In sum, under both the Fourth Amendment and article I, section 7, the seizure of Deante and his bag was unconstitutional. The Court should reverse and remand with instructions to suppress the gun and the statements obtained as a result of the improper stop. Gatewood, 163 Wn.2d at 542. This Court need not reach the alternative argument below.

4. Even if the seizure had been proper, the search of the bag was unconstitutional because it was performed without a warrant and the search-incident-to-arrest exception did not apply. After Deante was arrested and handcuffed, the officers opened his bag and found a revolver. 1 RP 58-59, 79. They did so without a warrant. The State argued, and the trial court ruled, that the search-incident-to-arrest exception applied. CP 43. But that exception applies only where the suspect could retrieve a weapon or destroy evidence before a warrant could be obtained. State v. Patton, 167 Wn.2d 379, 384, 219 P.3d 651 (2009); State v. Buelna Valdez, 167 Wn.2d 761, 777, 224 P.3d 751 (2009); State v. Byrd, ___ Wn. App. ___ P.3d ___, 2011 WL 2802918 (No. 29056-5-III,

filed July 19, 2011). In this case, the bag was in the control of the Renton Police Department, and Deante could not have accessed it to retrieve a weapon or destroy evidence. 1 RP 36-37; CP 41. Accordingly, the Constitution required the officers to obtain a warrant prior to the search. Because they did not do so, the evidence should have been suppressed.

This Court's decision in Byrd is on point. There, a police officer stopped the car in which the defendant was riding, ordered her out of the car, removed the purse from her lap, and placed it on the ground outside the car. Byrd, slip op. at 2. He arrested the suspect, handcuffed her, and put her in a patrol car. Id. The officer then searched the defendant's purse without a warrant and found methamphetamine. Id.

This Court affirmed the trial court's ruling suppressing the drugs. The Court noted that an old Washington Supreme Court case endorsing the warrantless search of a fanny pack incident to arrest was based on New York v. Belton,³ which was abrogated by Arizona v. Gant.⁴ Slip Op. at 3-4 (citing State v. Smith, 119 Wn.2d 675, 678, 835 P.2d 1025 (1992)). Gant reaffirmed Chimel, which held that the scope of a warrantless search incident to arrest is

³ 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981).

⁴ ___ U.S. ___, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009).

limited to the arrestee's person and the area within his or her immediate control. Byrd, slip op. at 5 (citing Gant, 129 S.Ct. at 1716; Chimel v. California, 395 U.S. 752, 763, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969)). "If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does to apply." Byrd at 5 (citing Gant, 129 S.Ct. at 1716).

Here, as in Byrd, there was no possibility that the arrestee (Deante) could reach into the area that law enforcement officers sought to search (his bag). Thus, as in Byrd, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply.

Although Byrd was decided on Fourth Amendment grounds, it is worth noting that article I, section 7 is even more protective of the right to be free from warrantless searches. See, e.g., Buelna Valdez, 167 Wn.2d at 772.

The [search-incident-to-arrest] exception began as a narrow rule intended solely to protect against frustration of the arrest itself or destruction of evidence by the arrestee. This was the scope of the exception when Const. art. 1, § 7 was adopted.

State v. Ringer, 100 Wn.2d 686, 698, 674 P.2d 1240 (1983). Thus, in Washington, “the search incident to arrest exception must be narrowly applied, consistent with its common law origins allowing an arresting officer to search the person arrested and the area within his immediate control.” Patton, 167 Wn.2d at 390 (citing Ringer, 167 Wn.2d at 699). Under article I, section 7, the warrantless search of Deante’s bag was unconstitutional because the bag was not within Deante’s control but was 15 feet away from him and in the control of the Renton Police Department.

In sum, the juvenile court erred in concluding the warrantless search of the bag was proper, and in denying the motion to suppress the gun and statements obtained as a result of the search. This Court should reverse.

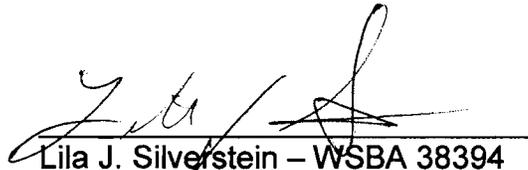
5. The remedy is reversal and suppression. The remedy for a violation of the Fourth Amendment and article I, section 7, is suppression of the fruits of the improper search or seizure. State v. White, 97 Wn.2d 92, 110-12, 640 P.2d 1061 (1982); Gatewood, 163 Wn.2d at 542. In this case, both the initial seizure of Deante and the subsequent search of the bag were unconstitutional. Each of these violations independently requires reversal of the conviction and suppression of the evidence.

E. CONCLUSION

Because the evidence against Deante was obtained as a result of an unconstitutional seizure and search, the evidence should have been suppressed, and the conviction must be reversed.

DATED this 9th day of August, 2011.

Respectfully submitted,


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Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 66609-6-I
v.)	
)	
DEANTE R. M.,)	
)	
Juvenile Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 9TH DAY OF AUGUST, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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