

NO. 67077-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

S.P.,

Appellant.

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

The Honorable Helen Halpert, Judge

BRIEF OF APPELLANT

ANDREW P. ZINNER
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2011 DEC 30 PM 4:21

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issue Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	6
THE INVESTIGATIVE DETENTION WAS NOT SUPPORTED BY A REASONABLE AND ARTICULABLE SUSPICION OF CRIMINAL ACTIVITY.	6
D. <u>CONCLUSION</u>	12

TABLE OF AUHTORITIES

Page

WASHINGTON CASES

<u>State v. Armenta</u> 134 Wn.2d 1, 948 P.2d 1280 (1997).....	10, 11
<u>State v. Day</u> 161 Wn.2d 889, 168 P.3d 1265 (2007).....	7
<u>State v. Doughty</u> 170 Wn.2d 57, 239 P.3d 573 (2010).....	7, 8
<u>State v. Duncan</u> 146 Wn.2d 166, 43 P.3d 513 (2002).....	7, 11
<u>State v. Gaddy</u> 152 Wn.2d 64, 93 P.3d 872 (2004).....	8
<u>State v. Garvin</u> 166 Wn.2d 242, 207 F.3d 1266 (2009).....	7
<u>State v. Jones</u> 146 Wn.2d 328, 45 P.3d 1062 (2002).....	6
<u>State v. Ladson</u> 138 Wn.2d 343, 979 P.2d 833 (1999).....	7
<u>State v. Parker</u> 139 Wn.2d 486, 987 P.2d 73 (1999).....	6
<u>State v. Rankin</u> 151 Wn.2d 689, 92 P.3d 202 (2004).....	6
<u>State v. Tijerina</u> 61 Wn. App. 626, 811 P.2d 241 (1991) <u>review denied</u> , 118 Wn.2d 1007 (1991).....	11

TABLE OF AUTHORITIES (CONT'D)

Page

FEDERAL CASES

Terry v. Ohio

392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).....7, 9, 11

RULES, STATUTES AND OTHER AUTHORITIES

U.S. Const. Amend. IV.....6

Wash. Article I, § 76

A. ASSIGNMENTS OF ERROR

1. The trial court erred by denying Shaquille V. Polk's motion to suppress evidence. CP 27 (Conclusion of Law VI, appendix attached).

2. The trial court erred by concluding the hand-to-hand exchange police observed "warranted further investigation" and justified an investigative detention. CP 25-26 (Conclusion of Law I (a)).

Issue Pertaining to Assignments of Error

Officers observed nothing more than a brief hand-to-hand exchange between Polk, seated in the passenger seat of a van parked in a high-crime area, and an individual outside the van. The officers did not see what was exchanged. As the officers approached on their bicycles, the individual involved in the exchange neither attempted to flee nor made movements suggesting he was trying to conceal or get rid of anything. Did the officers' observations support a reasonable suspicion of criminal activity, which was required to justify the resulting investigative detention?

B. STATEMENT OF THE CASE

Kent Police Department officers Majack and Buck were on their bicycles patrolling in what they called a "high-crime area" next to a gas station/convenience store when they observed a van illegally parked in a

space reserved for a disabled person. RP 13-14, 32. Several people were near the van, one of whom appeared to quickly exchange something with someone through the passenger-side window. RP 14-15, 32-33. The officers suspected a drug transaction, but neither of them saw money or items being passed. RP 14, 16, 24-25, 34, 45-46.

The officers rode up to the van. Majack contacted the driver, while Buck rode up next to the passenger, Shaquille V. Polk. RP 16-17, 34-35. A group of three people, including the man who had been involved in the exchange, were sitting on a curb in front of the van. The officers commanded the driver and Polk to show their hands. RP 19, 35. The driver immediately responded, but Polk reached down as if to hide or grab something. RP 19-20, 35-36. Because it was dark outside and the officers could not see hands, they opened the doors and pulled the occupants out of the van for safety purposes. RP 20, 28-29, 36-37, 51.

Buck immediately handcuffed Polk and patted him down for weapons. RP 37-38. Sticking out of Polk's pants pocket was a small baggie. The part that was sticking out was a large bulge that was green in color. RP 38. Thinking it was marijuana, Buck pulled the baggie out and saw two green pills inside. RP 38-39. According to Buck, they looked

like prescription pills. He told Polk "it was against the law to possess prescription medication not in a prescription bottle." RP 39.

Buck directed Polk to sit down on the curb. RP 21, 39, 51-52. He did not tell Polk he was under arrest. RP 40, 53-54. Buck said Polk was in fact under arrest, however, because he was handcuffed and not free to leave once the pills were found. Buck testified he did not search Polk incident to the arrest at that point because there were other people around and he wanted to assist Majack. RP 41, 53-56.

Meanwhile, Majack had been on the other side of the van with the driver. Buck went over to help her, and after receiving the driver's consent, searched the van. Finding nothing on the driver or in the van, the officers released the driver and he left. RP 20-21, 39-40.

By now about five minutes had elapsed, and Buck returned to Polk. RP 21, 40, 56. He searched him and found seven baggies of marijuana in an inside coat pocket. Buck then informed Polk he was under arrest for possession of the pills and the marijuana. RP 21-22, 40-44, 52-54.

The State charged Polk, a juvenile, with possession of less than 40 grams of marijuana. CP 1. Polk moved to suppress the marijuana. CP 4-11. Polk's friend, Jalisa Jackson, and Polk testified they were walking to a friend's house with another friend, Amber, when they stopped at the

convenience store for change. RP 60, 70. The store clerk refused their request and as they left the store, they saw an acquaintance drive up in a van and park. RP 60-62, 70-72. Polk hopped into the van to see if the driver could give him change. RP 62-63, 72. Jackson and Amber sat on a curb near the van. RP 62-63.

Jackson's friend, Taha, then came up and met with Polk at the opened passenger side window of the van. RP 62-63, 65, 72, 75. Taha tried to persuade Polk to buy him a cigar and tried to give him change, but Polk told him he could not. RP 71-73.

Meanwhile, Majack and Buck rode up, approached Polk's side of the van, and repeatedly commanded Polk and the driver to show their hands. RP 62-65, 73-75. Polk said before he had a chance to comply, Buck snatched him out of the van and handcuffed him. RP 73-76. Polk said he did not hold his hands down, as the officers testified. RP 74. Buck ordered Polk to sit on the curb and then went to speak with the driver. RP 76-77. When Buck returned he searched Polk and found marijuana in an inside jacket pocket. RP 78-79.

Polk argued the officers did not have a reasonable, articulable suspicion sufficient to support their investigative detention of him. CP 6-8; RP 85-91. He also asserted the frisk was unlawful because Buck did

not reasonably believe Polk was armed and dangerous and exceeded the permissible scope of a frisk. CP 9-10; RP 91-93. Finally, the search of the inside coat pocket was not incident to arrest because Buck had not yet formally arrested Polk. CP 10; RP 93-94.

The trial court disagreed with Polk's arguments. The court concluded the officer's observation of the exchange and the location in a high-crime area gave rise to a reasonable suspicion that warranted further investigation. CP 25-26; RP 94-95. The court also concluded the continued detention, removal from the van, and frisk were justified by the officers' safety concerns after Polk refused to show his hands and made furtive movements while inside the vehicle. CP 26-27; RP 95-96. The Court further concluded Buck lawfully seized the baggie with pills inside because it appeared to be contraband. CP 27; RP 95-96. Finally, the court concluded Buck arrested Polk when he found the pills and notified Polk it was illegal to possess them without a prescription. The search of the jacket pocket and seizure of the marijuana was thus lawfully incident to arrest. CP 27; RP 96.

Concluding the marijuana was admissible, the trial court found Polk guilty as charged. CP 19-22; RP 96-97. The court imposed a

standard range disposition of four months community supervision and 30 hours of community service. CP 31-36; RP 107.

C. ARGUMENT

THE INVESTIGATIVE DETENTION WAS NOT SUPPORTED BY A REASONABLE AND ARTICULABLE SUSPICION OF CRIMINAL ACTIVITY.

Article I, section 7 of the Washington Constitution provides "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." Unlike the Fourth Amendment, which precludes only "unreasonable" searches and seizures without a warrant, article I, section 7 prohibits any disturbance of an individual's private affairs "without authority of law," whether reasonable or unreasonable in the Fourth Amendment context. State v. Valdez, 167 Wn.2d 761, 771-72, 224 P.3d 751 (2009).

A warrantless search is per se unconstitutional under article I, section 7 unless it falls within an exception to the warrant requirement. State v. Rankin, 151 Wn.2d 689, 695, 92 P.3d 202 (2004). "Exceptions to the warrant requirement are limited and narrowly drawn." State v. Parker, 139 Wn.2d 486, 496, 987 P.2d 73 (1999). The State always carries the "heavy burden" of proving a warrantless search is justified. State v. Jones, 146 Wn.2d 328, 335, 45 P.3d 1062 (2002); State v. Ladson, 138 Wn.2d

343, 350, 979 P.2d 833 (1999). The showing must be by clear and convincing evidence. State v. Doughty, 170 Wn.2d 57, 62, 239 P.3d 573 (2010).

One exception to the warrant requirement permits police officers to briefly stop and detain a person they reasonably suspect is engaged in criminal conduct. State v. Day, 161 Wn.2d 889, 895, 168 P.3d 1265 (2007). There must be a substantial possibility of criminal activity. State v. Duncan, 146 Wn.2d 166, 179, 43 P.3d 513 (2002). This is commonly referred to as a "Terry stop." Day, 161 Wn.2d 895.¹ The facts justifying a Terry stop must be more consistent with criminal than with innocent conduct. State v. Pressley, 64 Wn. App. 591, 596, 825 P.2d 749 (1992).

During the stop, an officer may briefly frisk the suspect for weapons if she reasonably believes her safety or that of others is at risk. State v. Garvin, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009). A valid Terry stop occurs only if: "(1) the initial stop is legitimate, (2) a reasonable safety concern exists to justify the protective frisk for weapons, and (3) the scope of the frisk is limited to the protective purposes." Garvin, 166 Wn.2d at 250.

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

Whether the trial court's findings of fact regarding an order denying suppression of evidence support its conclusions of law is a legal question this Court reviews de novo. State v. Gaddy, 152 Wn.2d 64, 70, 93 P.3d 872 (2004).

In Polk's case, the trial court concluded officers Majack and Buck had a reasonable suspicion of criminal activity that warranted Polk's temporary detention for further investigation once they observed an exchange between Polk and a person who approached the passenger side of the van, which was parked in a high-crime area. CP 25-26; RP 94.

The trial court's conclusion lacks legal support. First, presence in a high-crime area, even late at night, does not alone justify an investigative detention. State v. Doughty 170 Wn.2d at 62.

Second, adding the exchange did not make the officers' suspicion reasonable. Pressley is instructive on this point. There the officer observed Pressley and another girl "huddling" in an area well known to the police for narcotics transactions. Pressley, 64 Wn. App. at 593-94, 597. The girl was intently looking at something in Pressley's hand that could have been a narcotic such as crack cocaine. The officer had observed drug transactions where the seller and buyer examined the drugs before the transaction was completed and believed he was witnessing a drug deal.

Pressley, 64 Wn. App. at 593-94. When the officer approached, Pressley exclaimed, "Oh [s]hit" and she and her companion walked off in different directions. Id. at 594.

Even taking the officer's training and experience into account, this Court concluded the conduct the officer observed before his approach was insufficient to support a Terry stop because it was "susceptible to a number of innocent explanations." Id. at 597. In holding the girls' behavior after the officer approached them gave rise to a reasonable suspicion, this Court stated: "Had their behavior after they saw [the officer] but before he stopped Pressley not been entirely consistent with an incipient drug deal, there would not have been a sufficient basis for a valid Terry stop." Id. at 597. Even then, the articulated grounds for suspicion "hover[ed] near the line between sufficient and insufficient grounds for a Terry stop." Id.

As in Pressley, the brief hand-to-hand exchange between Polk and Taha, without additional suspicious behavior, was susceptible to a number of innocent explanations, including the one given by Polk. Notably, Buck said that after the exchange, Taha returned to the curb where the others were sitting. RP 33-34. Majack testified as she contacted the driver, she saw a female and two males, including Taha, sitting on the curb near the van. RP 16. One of those females, Jackson, was in a position to see the

officers ride by, look toward the van, and "just c[o]me straight at us." RP 62. It is reasonable to infer, therefore, that Taha also saw the police observing them before riding up. Yet Taha made no attempt to leave or to slough anything as Majack and Buck cycled toward the group.

Further, despite testifying he makes about five or six stops a night for drug- and alcohol-related crimes where the van was parked, Buck did not say he recognized the van. Nor did the officers check the license plate number to see if the van was associated with any criminal activity. Absent such evidence suggesting a guilty conscience or link to drug-related or even criminal activity, the behavior the officers observed was no more consistent with criminal than innocent activity. The observed conduct was thus too innocuous to support a reasonable suspicion of criminal activity.

Innocuous facts contribute little to the "reasonable suspicion" calculus. See State v. Armenta, 134 Wn.2d 1, 5, 13, 948 P.2d 1280 (1997) (possession of four bundles of currency totaling a purported \$4,000, as well as accused's inability to produce a pay stub despite a claim he had just cashed a paycheck for work on a ranch he could not name, not "inherently suspicious" for purposes of determining whether reasonable suspicion supported detention); State v. Tijerina, 61 Wn. App. 626, 629, 811 P.2d 241 (1991) (presence of motel-sized bars of soap in car driven by

Hispanics was "innocuous" and did not give rise to a reasonable suspicion of criminal activity to justify a Terry stop, even though the arresting officer testified Hispanics were known to engage in drug trafficking in area motels), review denied, 118 Wn.2d 1007 (1991).

For these reasons, the trial court erred in concluding the officers' initial detention of Polk was supported by a reasonable articulable suspicion. The evidence resulting from the unconstitutional detention must be suppressed. See Duncan, 146 Wn.2d at 176 ("The exclusionary rule mandates the suppression of evidence gathered through unconstitutional means."). Without the seized evidence, the state cannot sustain the charge. This Court should therefore reverse the trial court's denial of Polk's motion to suppress, reverse the conviction, and remand for dismissal with prejudice. Armenta, 134 Wn.2d at 17-18.

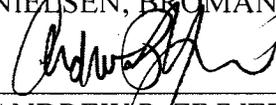
D. CONCLUSION

For the reasons stated above, this Court should reverse Polk's conviction and remand for dismissal with prejudice.

DATED this 30 day of December, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



ANDREW P. ZINNER

WSBA No. 18631

Office ID No. 91051

Attorneys for Appellant

APPENDIX

1
2
3
4
5
6
7
8
9
10
11
12
13
14

FILED
KING COUNTY, WASHINGTON
OCT 08 2010
SUPERIOR COURT CLERK
BY HEIDI L. STEWART
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY
JUVENILE DIVISION

STATE OF WASHINGTON,)	
)	
)	Plaintiff,
)	No. 10-8-01438-3
)	
vs.)	
)	FINDINGS OF FACT AND
SHAQUILE V. POLK,)	CONCLUSIONS OF LAW
D.O.B. 03/31/1993)	PURSUANT TO CrR 3.6
)	
)	Respondent.
)	
)	

THE ABOVE-ENTITLED CAUSE having come on for a suppression motion pursuant to CrR 3.6 and trial before the Honorable Judge Halpert; the State of Washington having been represented by Deputy Assistant Attorney Brandi Archer; the respondent appearing in person and having been represented by his attorney, Amy Bowles; the court having heard sworn testimony and arguments of counsel, and having received exhibits, now makes and enters the following findings of fact and conclusions of law.

FINDINGS OF FACT

I.

The following events took place within King County, Washington:

- On February 14, 2010 Kent Police Officers Buck and Majack were on bicycle patrol in the downtown area of Kent, Washington. During this patrol, they rode by the Chevron Station, located at 634 Central Avenue North.

- 1 2. As Officers Buck and Majack rode by the Chevron Station, they saw a white van
2 parked along the side of the Chevron Station. As the Officers observed this van,
3 they saw a juvenile, later identified as Ta'a Fornai, approach this van and make
4 some type of exchange.
- 5 3. This area was known to Officers Buck and Majack as a high crime area with lots
6 of drug activity. Due to this, the Officers believed what they had just seen
7 warranted further investigation.
- 8 4. Officer Majack approached the driver's side of the van and Officer Buck
9 approached the passenger side, where the Respondent was seated. Officer Buck
10 ordered the Respondent to place his hands where he could see them and the
11 Respondent did not comply and show his hands, instead he was making furtive
12 movements inside the van.
- 13 5. The Respondent failed to comply with Officer Buck's directive to show his hands,
14 which led to officer safety concerns. Officer Buck opened the passenger side
15 door and saw the Respondent with his right hand behind the passenger seat and
16 his left hand between the driver and passenger seats.
- 17 6. Officer Buck removed the Respondent from the van, and because he could not see
18 what the Respondent had been reaching for, he detained him in handcuffs and
19 frisked him for weapons.
- 20 7. While frisking the Respondent for weapons, Officer Buck saw in plain view a
21 plastic baggie with a greenish bulge hanging out of the coin pocket of the
22 Respondent's jeans. Officer Buck believed this to be a "dime bag" of marijuana
23 and removed it from the Respondent's pocket.

1 passenger side of the van and a person who approached the van. This exchange
2 warranted further investigation and it was reasonable under Terry v. Ohio for the
3 officers to approach the van and temporarily detain the Respondent to conduct
4 further investigation.

5 II.

6 The Court further denies Respondent's motion to suppress and dismiss based on the
7 detention of the Respondent:

- 8 a. The Court finds that the Respondent was detained once he was removed from the
9 vehicle. However, Officer Buck was reasonable, under both Terry v. Ohio and
10 State v. Mendez, in removing the Respondent from the vehicle based on officer
11 safety considerations. The Respondent was told to show his hands and he did not
12 comply with the request. The Respondent was making furtive movements inside
13 the van and this warranted further investigation.
- 14 b. The Court finds Officer Buck credible in stating that he ordered the Respondent to
15 show his hands several times and he did not comply.
- 16 c. The Court does not find credible that the Respondent did not have time to show
17 his hands prior to being removed from the van.

18 III.

19 The Court further denies Respondent's motion to suppress and dismiss based on the frisk
20 of the Respondent:

- 21 a. The Court finds it was reasonable for Officer Buck to place the Respondent in
22 handcuffs and frisk him after his removal from the van. The furtive movements
23 of the Respondent justified the frisk of the respondent for officer safety.

IV.

1 The Court further denies Respondent's motion to suppress and dismiss based on Officer
2 Buck's exceeding the scope of the frisk by reaching into the pocket of Respondent's jeans:

- 3 a. The Court finds that during Officer Buck's frisk of the Respondent a baggie was
4 hanging out of the pocket of Respondent's jeans in plain view. This baggie
5 appeared to have a greenish budge. It was reasonable for Officer Buck to further
6 remove this baggie as it appeared to be contraband.

7 V.

8 The Court further denies Respondent's motion to suppress and dismiss based on the
9 search of the Respondent:

- 10 a. The Court finds that the Respondent was under arrest at the time of the search.
11 Officer Buck had previously found prescription pills on the respondent and told
12 him that it was illegal to possess such pills without a prescription. At this time
13 the Respondent was in handcuffs and was not free to leave. Thus the Respondent
14 was clearly under arrest and the search of the Respondent, which discovered
15 seven baggies of marijuana in his jacket pocket, was reasonable as a search
16 incident to arrest.

17 VI.

The respondent's motion to suppress evidence is denied.

18 VII.

19 In addition to the above written findings and conclusions, the Court incorporates by
20 reference its oral findings and conclusions.
21
22
23

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

DONE IN OPEN COURT this 0 day of ^{Oct}~~September~~, 2010.

2 h. Hager
JUDGE

Presented by:

Deborah L. Pahr #41755
Deputy Prosecuting Attorney

Respondent

Amor Bailes
Attorney for Respondent 33541

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 67077-8-1
)	
SHAQUILE POLK,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30TH DAY OF DECEMBER, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] KING COUNTY PROS/APPELLATE UNIT SUPERVISOR
W554 KING COUNTY COURTHOUSE
516 THIRD AVENUE
SEATTLE, WA 98104

- [X] SHAQUILE POLK
23913 111TH PLACE SE, #B2
KENT, WA 98036

SIGNED IN SEATTLE WASHINGTON THE 30TH DAY OF DECEMBER, 2011.

x *Patrick Mayovsky*