

71711-1

71711-1

NO. 71711-1-I

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

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STATE OF WASHINGTON,

Respondent,

v.

SHELLY B. FORD, III,

Appellant.

COURT OF APPEALS  
STATE OF WASHINGTON  
2014 OCT 16 11:11:22  


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BRIEF OF RESPONDENT

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## **I. ISSUES**

1. Do the facts support the trial court's conclusion that the officer had a reasonable, articulable suspicion to justify stopping defendant?

2. Do the facts support the trial court's conclusion that the scope of the stop was reasonably related to the purpose for the stop and was neither more intrusive nor longer than necessary?

## **II. STATEMENT OF THE CASE**

### **A. FACTS OF THE CRIME.**

On January 29, 2012, at approximately 7:27 p.m., Officer Collings was dispatched to a reported disturbance at 2004 Columbia Avenue. The reporting party said Shelly Ford was causing a disturbance and identified Ford as a black male, approximately 32 years old. Officer Collings discovered that there was an arrest warrant for Shelly Bernard Ford, III, a black male born in 1978. The reporting party updated that Ford had just left 2004 Columbia Avenue on foot. CP 48-49; RP<sup>1</sup> 4-10, 14.

Officer Collings arrived in the area of 2004 Columbia Avenue five to ten minutes after the initial report. He observed a black male

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<sup>1</sup> RP designates the continuously paginated Verbatim Report of Proceedings for November 7, 2013, and January 14, 2014. Other Verbatim Reports of Proceedings are indicated by inclusion of the date, e.g., RP (2/20/14).

walking a few blocks northeast of 2004 Columbia Avenue. The suspect ran when he saw Officer Collings' patrol car. Officer Collings activated the emergency lights on his patrol car and ordered the suspect to stop. The suspect stopped and Officer Collings asked him his name. He replied, "Shelly." The suspect continued glancing around. Based on his training and experience Officer Collings suspected that he was looking for an avenue of escape. Officer Collings was alone and it was dark. Concerned that he would run again, Officer Collings ordered the suspect to his knees while they waited for a back-up officer to arrive. CP 49; RP 5-8, 9-13.

When back-up arrived, the suspect's backpack was removed, he was handcuffed, identified as Shelly Bernard Ford, III, and arrested on the confirmed warrant. Ford was searched and placed in the rear seat of the patrol car. When Officer Collings picked up Ford's backpack, a pill bottle fell out. The prescription was not for Ford. Eight pills in the bottle were identified as Oxycodone, a controlled substance. CP 49; RP 8-9, 12.

## **B. PROCEDURAL HISTORY.**

On October 23, 2012, Shelly Bernard Ford, III, defendant, was charged with Possession of a Controlled Substance.

Defendant filed a motion to suppress on October 21, 2013. The State's response was filed on November 6, 2013. The motion was heard on November 7, 2013. CP 51-64; RP 1-20.

The court found that Officer Collings had a reasonable articulable basis for a valid Terry stop of defendant. He had the name, race, gender, and age of the person he was looking for along with the fact that the person was traveling on foot in the area of 2004 Columbia Avenue. Upon contact with defendant Officer Collings was able to confirm the name, race, gender, approximate age, and the facts that the person was on foot a half-mile from 2004 Columbia Avenue. The amount of time between the initial call and the contact was short enough to reasonably believe that the suspect would still be in the area. Activating the emergency lights and command defendant to stop when he started running was a reasonable show of force. Having defendant wait on his knees while the back-up officer came to the location, was reasonable for officer safety. The facts presented showed that the stop lasted for a short period of time. Officer Collings quickly verified defendant's name and confirmed the warrant for defendant's arrest. The length of time for the stop was not unusual. After defendant was placed under arrest the pills spilled out of defendant's backpack and were

observed either in plain view or pursuant to a search incident to arrest. The court's written findings of fact and conclusions of law were entered on December 4, 2013. CP 48-50; RP 19-20.

On January 14, 2014, an amended information was filed correcting the date of violation. The matter proceeded to bench trial on agreed documentary evidence and defendant was found guilty as charged on January 24, 2014. CP 25-45; RP 23-27.

On February 20, 2014, defendant was sentenced to 45 days confinement and ordered to pay \$600.00 in costs, fees and assessments. Defendant timely appealed. CP 2-24; RP (2/20/14) 1-7.

### **III. ARGUMENT**

#### **A. STANDARD OF REVIEW.**

##### **1. Findings Of Fact And Conclusions Of Law.**

The appellate court reviews a trial court's ruling on a motion to suppress evidence to determine whether substantial evidence supports the trial court's factual findings and whether the factual findings support the trial court's conclusions of law. State v. Winterstein, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009); State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). In testing the sufficiency of the evidence, the reviewing court does not weigh the

persuasiveness of the evidence. Rather, the court must defer to the trier of fact on issues involving conflicting testimony, credibility of witnesses, and the weight and persuasiveness of the evidence. State v. Thomas, 150 Wn.2d 821, 874-875, 83 P.3d 970 (2004); State v. Asaeli, 150 Wn. App. 543, 567, 208 P.3d 1136 (2009). The appellate court reviews only those facts to which error has been assigned. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Unchallenged findings of fact are verities on appeal. State v. Valdez, 167 Wn.2d 761, 767, 224 P.3d 751 (2009); State v. Gaines, 154 Wn.2d 711, 716, 116 P.3d 993 (2005). Here, defendant does not assign error to the trial court's findings of fact.

Conclusions of law in an order pertaining to suppression of evidence are reviewed de novo. State v. Arreola, 176 Wn.2d 284, 291, 290 P.3d 983 (2012); Garvin, 166 Wn.2d at 249. Nonetheless, "[C]onclusions entered by a trial court following a suppression hearing carry great significance for a reviewing court." State v. Collins, 121 Wn.2d 168, 174, 847 P.2d 919 (1993). In making its review, an appellate court may affirm on any grounds supported by the factual record, regardless of whether such grounds were relied upon by the lower court. State v. Avery, 103 Wn. App. 527, 537, 13 P.3d 226 (2007). Here, substantial evidence supports the trial

court's factual findings and those findings support the court's conclusions of law.

## **2. Seizure.**

On review, whether a person has been seized under the Fourth Amendment is a mixed question of law and fact. State v. Armenta, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997); State v. Thorn, 129 Wn.2d 347, 351, 917 P.2d 108 (1996). "The resolution by a trial court of differing accounts of the circumstances surrounding the encounter are factual findings entitled to great deference," but "the ultimate determination of whether those facts constitute a seizure is one of law and is reviewed de novo." Armenta, 134 Wn.2d at 9. An investigative detention constitutes a seizure. Id., at 10. Activating the emergency lights on a patrol car constitutes a display of authority sufficient to convey to a reasonable person that he is not free to leave. State v. Gantt, 163 Wn. App. 133, 141, 257 P.3d 682 (2011). A seizure occurs when an officer commands a person to halt or demands information from the person. State v. Cormier, 100 Wn. App. 457, 460, 997 P.2d 950 (2000). Here, defendant was seized when Officer Collins activated the emergency lights and ordered him to stop. However, the seizure was a reasonable detention for investigation.

### 3. Terry Stop.

A well-founded suspicion that a detainee is engaged in possible criminal activity will support a brief, warrantless investigative stop or seizure, even where the detaining officer lacks probable cause to arrest. Terry v. Ohio, 392 U.S. 1, 21, 25-26, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); State v. Garcia, 125 Wn.2d 239, 242, 883 P.2d 1369 (1994). The officer must be able to point to specific and articulable facts giving rise to a reasonable suspicion that criminal conduct has occurred or is about to occur. State v. Duncan, 146 Wn.2d 166, 171, 43 P.3d 513 (2002); State v. Mendez, 137 Wn.2d 208, 223, 970 P.2d 722 (1999); Terry, 392 U.S. at 21. A reasonable or well-founded suspicion exists if the officer can “point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” Terry, 392 U.S. at 21; Armenta, 134 Wn.2d at 20.

The reviewing court examines the reasonableness of an officer's suspicion under the totality of the circumstances known to the officer at the time of the initial detention, taking into account an officer's training and experience and the conduct of the person detained when determining the reasonableness of the stop. State

v. Glover, 116 Wn.2d 509, 514, 806 P.2d 760 (1991). This includes information given the officer, observations the officer makes, and inferences and deductions drawn from his or her training and experience. United States v. Cortez, 449 U.S. 411, 417-418, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981). Other factors that may be considered in the context of determining whether a stop was reasonable include the purpose of the stop, the amount of physical intrusion upon the suspect's liberty, and the length of time the suspect is detained. State v. Williams, 102 Wn.2d 733, 740, 689 P.2d 1065 (1984); State v. Samsel, 39 Wn. App. 564, 572, 694 P.2d 670 (1985). Some limited on-scene questioning will always be inherent in a Terry stop. An officer "may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions." Berkemer v. McCarty, 468 U.S. 420, 439, 104 S.Ct 3138, 82 L.Ed.2d 317 (1984).

A police officer, in the discharge of his routine law enforcement duties prior to having probable cause to believe that a person he seeks to question has committed a crime for which an arrest may be made, may detain and question that suspect concerning his knowledge of the commission of a crime, including one in process of being committed or about to be committed, without the detention or questioning being considered an arrest and without the necessity of the

police officer first giving the person questioned Miranda warnings.

State v. Sykes, 27 Wn. App. 111, 114, 615 P.2d 1345 (1980); State v. Sinclair, 11 Wn. App. 523, 528, 523 P.2d 1209 (1974). The suspect may be temporarily detained pending the results of a police radio check. Sykes, 27 Wn. App. at 115. Information obtained during such a detention may be considered in determining whether probable cause exists to make an arrest or to conduct a search. Sinclair, 11 Wn. App. at 530.

The suspicion must be individualized. Brown v. Texas, 443 U.S. 47, 51, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979); State v. Thompson, 93 Wn.2d 838, 841, 613 P.2d 525 (1980). Circumstances must be more consistent with criminal than innocent conduct, but the officer need not have a specific crime in mind, for “reasonableness is measured not by exactitudes but by probabilities.” State v. Mercer, 45 Wn. App. 769, 774, 727 P.2d 676 (1986). While an inchoate hunch cannot justify a stop, circumstances that appear innocuous to the average person may appear incriminating to a police officer in light of past experience. Samsel, 39 Wn. App. at 570. Although each separate act or circumstance may be innocent if considered separately, taken

together, they may warrant further investigation. United States v. Sokolow, 490 U.S. 1, 9, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989). The Court recognized that in some circumstances, wholly lawful conduct might justify the suspicion that criminal activity may be afoot. Sokolow, 490 U.S. at 9. A reviewing court gives due weight to the deductions drawn by officers with specialized training, knowledge, and experience in law enforcement, whose inferences and deductions may elude an untrained person. United States v. Arvizu, 534 U.S. 266, 273, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002).

The lawfulness of a Terry stop is reviewed as a mixed question of law and fact. State v. Hansen, 99 Wn. App. 575, 577, 994 P.2d 855, review denied, 141 Wn.2d 1022 (2000). The reviewing court gives great deference to a trial court's resolution of factual accounts of the circumstances surrounding the encounter. State v. Hill, 123 Wn.2d 641, 646-647, 870 P.2d 313 (1994). The ultimate question of whether those facts constitute an unlawful seizure is an issue of law reviewed de novo. Armenta, 134 Wn.2d at 9; Thorn, 129 Wn.2d at 351. The burden of proof is on the State to show that a particular search or seizure falls within the Terry exception. State v. Duncan, 146 Wn.2d 166, 172, 43 P.3d 513 (2002). Here, defendant's seizure falls within the Terry exception.

**B. THE RECORD SUPPORTS THE TRIAL COURT'S FINDING THAT OFFICER COLLINGS HAD A REASONABLE SUSPICION TO JUSTIFY STOPPING DEFENDANT.**

Officer Collings was dispatched to 2004 Columbia Avenue on a report that Shelly Ford was at the residence causing a disturbance. Ford was described him as a black male about 32 years old. A records check showed a valid arrest warrant for Shelly Bernard Ford, III, black male born in 1978. While Officer Collings was en route, dispatch advised that Ford had left the residence on foot. Officer Collings arrived in the area five to ten minutes after the initial report and observed a black male walking a few blocks northeast of 2004 Columbia Avenue. The person ran when he saw Officer Collings' patrol car. Officer Collings activated the emergency lights on his patrol car and ordered the person to stop. When he stopped Officer Collings asked him his name and he replied, "Shelly." CP 48-49; RP 5-8, 9-12.

Prior to contacting defendant, Officer Collings had information that Shelly Ford, a black male, approximately 32 years old, was on foot in the area of 2004 Columbia Avenue and that there was an arrest warrant for Shelly Ford, a black male born in 1978. Thus, Officer Collings had information regarding the name, race, age, gender, mode of travel, and approximate location of the

person he was looking for. Officer Collings' observation of an individual matching those descriptions corroborated the reported information. Even a merely conclusory tip can support a stop if corroborated by some police observation. State v. Sieler, 95 Wn.2d 43, 49 n.1, 621 P.2d 1272 (1980). Officer Collings had reasonable suspicion that the person he observed was Shelly Ford who had a warrant for his arrest. Defendant's unprovoked flight upon seeing the police increased the suspicion. Evasive behavior is a pertinent factor in determining reasonable suspicion. Illinois v. Wardlow, 528 U.S. 119, 124, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000). While flight alone does not justify a Terry stop, flight in the presence of a police officer is a circumstance that may be considered along with other factors. State v. Little, 116 Wn.2d 488, 504, 806 P.2d 749 (1991); State v. Sweet, 44 Wn. App. 226, 230–231, 721 P.2d 560, review denied, 107 Wn.2d 1001 (1986). Based on defendant's flight it was reasonable to activate the emergency lights and order defendant to stop. The trial court correctly determined that Officer Collings had reasonable suspicion to justify stopping defendant.

**C. THE RECORD SUPPORTS THE TRIAL COURT'S FINDING THAT THE SCOPE OF THE STOP WAS REASONABLY RELATED TO THE PURPOSE AND WAS NEITHER MORE INTRUSIVE NOR LONGER THAN NECESSARY.**

The permissible scope of an investigatory stop is determined by (1) the purpose of the stop, (2) the amount of intrusion on the suspect's liberty, and (3) the length of the detention. State v. Wheeler, 108 Wn.2d 230, 235, 737 P.2d 1005 (1987); State v. Williams, 102 Wn.2d 733, 740, 689 P.2d 1065 (1984). The degree of intrusion must also be appropriate to the type of crime under investigation and to the probable dangerousness of the suspect. Id. The scope of an investigatory stop may be expanded if the stop itself confirms existing suspicions or arouses further suspicion. State v. Acrey, 148 Wn.2d 738, 747, 64 P.3d 594 (2003); State v. Smith, 115 Wn.2d 775, 785, 801 P.2d 975 (1990); State v. Guzman-Cuellar, 47 Wn. App. 326, 332, 734 P.2d 966 (1987). Here, the purpose of the stop was to ascertain whether the person Officer Collings saw walking was Shelly Ford. When Officer Collings contacted him, defendant said his name was Shelly. CP 49; RP 8, 13. This information confirmed the officer's suspicions that he was the subject of the warrant.

Further, defendant ran when he saw Officer Collings' patrol car and continued glancing around when Officer Collings contacted him. Officer Collings was alone and it was dark. Based on his training and experience Officer Collings suspected that defendant was looking for an avenue of escape. Concerned that defendant would run again, he ordered defendant to his knees. CP 49; RP 7-8, 11-12. An officer need not be absolutely certain that his safety is in danger. "The test is whether a reasonably prudent person in those circumstances would be warranted in the belief that someone's safety was in danger." State v. Bailey, 109 Wn. App. 1, 5, 34 P.3d 239 (2000). Courts are reluctant to substitute their judgment for that of police officers in the field. A founded suspicion from which the court can determine that the action was not arbitrary and harassing is all that is necessary. State v. Duncan, 146 Wn.2d 166, 175, 43 P.3d 513 (2002); Collins, 121 Wn.2d at 173-174. Here, having defendant kneel on the ground was a reasonable intrusion on the defendant's liberty for officer safety and did not violate the scope of the stop.

Additionally, the scope of the Terry stop was limited in duration. United States v. Place, 462 U.S. 696, 709-710, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983); State v. Lund, 70 Wn. App. 437, 446,

853 P.2d 1379 (1993). Ninety minutes is too long. Place, 462 U.S. at 709–710; Lund, 70 Wn. App. at 446. Under certain circumstances 20 minutes is not. United States v. Sharpe, 470 U.S. 675, 687, 105 S.Ct. 1568, 84 L.Ed.2d 605 (1985); Lund, 70 Wn. App. at 446. Only a few minutes elapsed from when Officer Collings stopped defendant to when the backing officer arrived, the warrant was confirmed, and defendant was placed under arrest. CP 49; RP 8, 10, 12-13. The duration of the stop was not too long. In the present case, the scope of the stop was reasonably related to the purpose, not more intrusive than necessary, and lasted no longer than needed.

#### **IV. CONCLUSION**

For the reasons stated above, the appeal should be denied and defendant's conviction affirmed.

Respectfully submitted on October 14, 2014.

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October 14, 2014

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**Re: STATE v. SHELLY B. FORD, III  
COURT OF APPEALS NO. 71711-1-I**

Dear Mr. Johnson:

The respondent's brief does not contain any counter-assignments of error. Accordingly, the State is withdrawing its cross-appeal.

Sincerely yours,

JOHN J. JUHL, #18951  
Deputy Prosecuting Attorney

COURT OF APPEALS  
 STATE OF WASHINGTON  
 2014 OCT 16 10:11:22

cc: Washington Appellate Project  
Appellant's attorney

I, the undersigned, being a duly qualified and sworn  
attorney for the defendant that  
I am the author of this document.  
I declare under penalty of perjury under the laws of the  
State of Washington that this is true.  
Snohomish County Prosecutor's Office  
15<sup>th</sup> of Oct, 2014

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

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COURT OF APPEALS  
STATE OF WASHINGTON  
KJ

THE STATE OF WASHINGTON,  
  
Respondent,  
  
v.  
  
SHELLY B. FORD, III.,  
  
Appellant.

No. 71711-1-I

AFFIDAVIT OF MAILING

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 15<sup>th</sup> day of October, 2014, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

THE COURT OF APPEALS - DIVISION I  
ONE UNION SQUARE BUILDING  
600 UNIVERSITY STREET  
SEATTLE, WA 98101-4170

WASHINGTON APPELLATE PROJECT  
1511 THIRD AVENUE, SUITE 701  
SEATTLE, WA 98101

containing an original and one copy to the Court of Appeals, and one copy to the attorney for the appellant of the following documents in the above-referenced cause:

BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 15<sup>th</sup> day of October, 2014.

A handwritten signature in black ink, appearing to read "Diane K. Kremenich", written over a horizontal line. The signature is cursive and extends to the right of the line.

DIANE K. KREMENICH  
Legal Assistant/Appeals Unit