No. 89999-1

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

SAM NANG YOU,

Petitioner.

PETITION FOR REVIEW

Court of Appeals No. 43738-4-II
Appeal from the Superior Court of Pierce County
Superior Court Cause Number 12-1-00789-8
The Honorable Vicki Hogan, Judge

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I. IDENTITY OF PETITIONER

The Petitioner is SAM NANG YOU, Defendant and Appellant in the case below.

II. COURT OF APPEALS DECISION

Petitioner seeks review of the unpublished opinion of the Court of Appeals, Division II, case number 43738-4, which was filed on February 11, 2014. The Court of Appeals affirmed the conviction entered against Petitioner in the Pierce County Superior Court.

III. ISSUES PRESENTED FOR REVIEW

1. Did the police officer fail to articulate sufficient facts to establish a reasonable suspicion of criminal behavior which could justify a Terry stop of the vehicle, where the officer's only observations were that the vehicle was: in a high crime area late at night; contained several male occupants; and appeared to be circling a neighborhood that was several miles away from a recent drive-by shooting?

2. Where the evidence showed only that Sam You was a passenger in a vehicle owned by the mother of the driver, and that a firearm was located partially tucked under the seat where You was sitting, did State failed to present sufficient evidence to prove beyond a reasonable doubt that You constructively possessed the firearm?

IV. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Sam Nang You with one count of unlawful possession of a firearm (RCW 9.41.040). (CP 1) The trial court

denied You's pretrial motion to suppress. (RP 73; CP 4-5, 6-20, 99-102) A jury convicted You as charged. (RP 220; CP 62) You timely appealed. (CP 103) The Court of Appeals affirmed You's conviction and remanded his case for resentencing.

B. SUBSTANTIVE FACTS

1. *Facts from CrR 3.6 Motion to Suppress*

Puyallup Tribal Police Officer Joey Tracy was on patrol duty in east Tacoma on the night on March 4, 2012. Officer Tracy is part of his department's gang unit, and through his training he knows that Tacoma's eastside has significant gang activity and gang violence. (RP 6-7)

Shortly after 11:00 that night, Tacoma Police requested assistance locating a car believed to have been involved in a just-reported drive-by shooting on the 6400 block of East Portland Street. (RP 5, 7, 8) Tacoma dispatch described the suspect car as a black Pontiac Grand Prix last seen heading northbound on East Portland Street. (RP 8, 10, 27-28)

Officer Tracy testified that he was driving northbound on East Roosevelt Avenue, approaching the intersection with East Fairbanks

Street,[1] when he noticed behind him a blue sedan with its high beams on carrying three occupants. (RP 10) The vehicle did not match the description of the suspect car so Officer Tracy continued to drive north on East Roosevelt. (RP 10, 11, 30-31) As he drove away, he saw the blue vehicle stop at the stop sign, then turn left onto East Fairbanks. (RP 10, 11)

About five minutes later and one mile away, as Officer Tracy was now traveling northbound on East Portland, he saw the blue car again. (RP 10, 12-13) The car turned in front of Officer Tracy from East 35th Street, which is a dead-end street, onto East Portland. (RP 12-13) Officer Tracy thought that it "didn't make sense" that the car turned from a dead end street but still contained three occupants. (RP 13) Officer Tracy followed the blue car for several blocks. The driver did not violate any traffic codes, and Officer Tracy observed no furtive movements within the car, but the driver appeared to be circling back towards East Portland and East 35th. (RP 13-14, 31-32, 36-37)

Officer Tracy testified that often more than one vehicle will be involved in a drive-by shooting. (RP 35-36) Based on that

[1] According to Google Maps, this intersection is about 2.5 miles north of the reported drive-by location.

knowledge, plus the lateness of the hour, the roundabout route the driver appeared to be taking, and the fact that there were multiple occupants in the vehicle, he decided to stop the vehicle and investigate. (RP 14, 33, 35, 42) Officer Tracy testified that, "with the limited information I had, I believed that possibly this vehicle was related to the drive by shooting." (RP 14) At that point in time, the driver and occupants were not free to leave. (RP 40, 41)

Officer Tracy approached the driver, Azias Ross, who was anxiously waiting with his license and registration paperwork. (RP 14-15; CP 2) Even though Ross had committed no traffic infractions but was still being pulled over by the police, Officer Tracy thought it was "odd" that Ross was "agitated." (RP 15) According to Officer Tracy, Ross was chatty and seemed to be trying to distract the officer. (RP 15)

Officer Tracy noticed that Ross had the number "44" tattooed on his arm, which Tracy understood to be a gang-related symbol. (RP 15) The passengers were also wearing red, which is the color associated with one of the east Tacoma gangs. (RP 15) Officer Tracy was concerned that the occupants might have weapons, so he asked Ross to exit the car in order to conduct a pat-down. (RP 19) Ross was not armed, so Officer Tracy walked around to the

passenger side of the car and asked the two passengers to exit the car for a weapons frisk. (RP 19-20, 21) When the front passenger, Sam You, exited the car, Officer Tracy noticed the butt of a gun poking out from under the seat. (RP 22-23) The weapon was blocked from going completely under the seat by an empty plastic bottle, and the butt was also partially covered by some sort of Kleenex or tissue paper. (RP 23-24) Officer Tracy placed the three men under arrest and obtained a search warrant for the car. (RP 24) Officers found another weapon and ammunition in the car. (RP 25)

2. *Facts from Trial*

Officer Tracy's trial testimony was essentially consistent with his suppression motion testimony. (RP 111-164) At trial, he also testified that the blue car was registered to Ross' mother. (RP 153, 164) A firearms expert testified that the gun found under the passenger seat was operational and capable of being fired. (RP 168-69) You also stipulated that he has a prior felony conviction and is therefore unable to possess a firearm. (RP 172; CP 57-58)

V. ARGUMENT & AUTHORITIES

The issues raised by You's petition should be addressed by this Court because the Court of Appeals' decision conflicts with settled case law of the Court of Appeals, this Court and of the United

State's Supreme Court. RAP 13.4(b)(1) and (2).

A. YOU'S MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED BECAUSE OFFICER TRACY FAILED TO ARTICULATE SUFFICIENT FACTS TO ESTABLISH A REASONABLE SUSPICION OF CRIMINAL BEHAVIOR WHICH COULD JUSTIFY A TERRY STOP.

Generally, a warrantless search is unreasonable under both our Federal and State constitutions, unless the search falls within one or more specific exceptions to the warrant requirement. U.S. Const. Amd. IV; Wash. Const. art. I, § 7 State v. Ross, 141 Wn.2d 304, 312, 4 P.3d 130 (2000). The State has the burden of proving that a warrant exception applies. State v. Vrieling, 144 Wn.2d 489, 492, 28 P.3d 762 (2001); State v. Ladson, 138 Wn.2d 343, 349–50, 979 P.2d 833 (1999). One exception to the warrant requirement is that an officer may briefly detain a vehicle's driver for investigation if the circumstances satisfy the "reasonable suspicion" standard under Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). State v. Mendez, 137 Wn.2d 208, 220, 970 P.2d 722 (1999).

The State must show by clear and convincing evidence that the Terry stop was justified. State v. Garvin, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009). A Terry stop requires a well-founded suspicion that the defendant engaged in criminal conduct. Terry, 392 U.S. at 21; Garvin, 166 Wn.2d at 250. "[I]n justifying the particular

intrusion the police 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, 392 U.S. at 21.

"The circumstances must suggest a substantial possibility that the particular person has committed a specific crime or is about to do so." State v. Martinez, 135 Wn. App. 174, 180, 143 P.3d 855 (2006) (citing State v. Garcia, 125 Wn.2d 239, 242, 883 P.2d 1369 (1994)). But an important safeguard to individual liberty in Terry stop analysis is the principle that the circumstances justifying a Terry stop must be more consistent with criminal conduct than with innocent conduct. State v. Pressley, 64 Wn. App. 591, 596, 825 P.2d 749 (1992); State v. Thierry, 60 Wn. App. 445, 448, 803 P.2d 844 (1991).

"A person's presence in a high-crime area at a 'late hour' does not, by itself, give rise to a reasonable suspicion to detain that person." State v. Doughty, 170 Wn.2d 57, 62, 239 P.3d 573 (2010) (citing State v. Ellwood, 52 Wn. App. 70, 74, 757 P.2d 547 (1988)). "Similarly, a person's 'mere proximity to others independently suspected of criminal activity does not justify the stop.'" Doughty, 170 Wn.2d at 62 (quoting State v. Thompson, 93 Wn.2d 838, 841, 613 P.2d 525 (1980)). And "a hunch alone" does not warrant police

intrusion into people's everyday lives. Doughty, 170 Wn.2d at 63.

For example, in Doughty, the defendant was stopped "for the suspicion of drug activity" and subsequently arrested for driving with a suspended license. 170 Wn.2d at 60. Doughty challenged his seizure and arrest at trial. 170 Wn.2d at 61. The facts relied upon by the State to support Doughty's seizure included: (1) that Doughty was seen leaving a house that law enforcement had identified as a drug house; (2) there had been recent complaints from neighbors; (3) Doughty visited the house at 3:20 a.m.; and (4) his visit lasted less than two minutes. 170 Wn.2d at 62. Doughty's challenge to this seizure was rejected by the trial court, but on appeal this Court reversed, stating:

> These facts fall short of the reasonable and articulable suspicion required to justify an investigative seizure under both the Fourth Amendment and article I, section 7. Police may not seize a person who visits a location—even a suspected drug house—merely because the person was there at 3:20 a.m. for only two minutes.
>
> The Terry–stop threshold was created to stop police from this very brand of interference with people's everyday lives.

170 Wn.2d at 62-63.

Other cases where vehicle stops conducted on suspicion of gang activity were affirmed are distinguishable from the current case.

For example, in State v. Moreno, 173 Wn. App. 479, 294 P.3d 812 (2013), police received multiple reports of gunfire in an area claimed as turf by the Sureño gang. Sureño's are known to wear the color blue. A few moments later, about one block away from where the gunfire had been reported, a Yakima Police Sergeant saw a car leaving an alley faster than usual given the poor state of the alleyway. The Sergeant was struck by the fact that one of the passengers was wearing a red shirt. Red is the color claimed by a rival gang, the Norteños, and the Sergeant knew that people did not usually wear red in a Sureño neighborhood. 173 Wn. App. at 484.

Based on the nature of the neighborhood, the proximity to the crime, the speed of the car, the late hour, the type of crime reported, and the red shirt, the Sergeant thought that "this car is somehow involved or . . . they can tell me more about what's happened." The Sergeant stopped the car and detained its occupants. Moreno, 173 Wn. App. at 484-85. After further investigation, a search warrant was obtained and the car searched. 173 Wn. App. at 486-87. Police found several firearms and other incriminating evidence in the trunk of the car. 173 Wn. App. at 487.

The State charged Moreno with first degree assault and unlawful possession of a firearm. Moreno moved to suppress all of

the evidence found in the trunk, arguing that the stop was based on nothing more than a hunch. Moreno, 173 Wn. App. at 487. The trial court denied the motion and Division Three affirmed, finding that "[g[iven all", it was reasonable to stop the car. 173 Wn. App. at 487.

In Thierry, which the trial court here relied upon in reaching its decision in this case (RP 73), Pierce Transit security officers observed Thierry and a passenger driving slowly past the 10th and Commerce transit stop in downtown Tacoma, which is a high crime area with a high incidence of gang activity, drug traffic, and violence. 60 Wn. App. at 446-47. Despite the forty-degree weather, Thierry had the windows rolled down, and the radio was playing loud enough to draw the attention of people in the area. 60 Wn. App. at 447. Thierry and the passenger were both slouched down in the front seat of the car. Thierry drove into a parking lot on Commerce adjacent to the transit area, made no attempt to park, and then stopped instead of exiting when he arrived back at the entrance. 60 Wn. App. at 447.

Because this activity fit the Tacoma Police Department's profile of drive-by shootings, the officers approached the car. Thierry, 60 Wn. App. at 447. As they came closer, Thierry immediately turned down his radio, and one of the officers saw a two-foot-long wooden bat on the floor of the car at Thierry's feet. He also

noticed that the passenger was making furtive hand motions. As an officer walked to the driver's side of the car, he immediately saw a cocked semiautomatic pistol between the front armrests. During a subsequent search of the car the officers found an additional gun and weapons. 60 Wn. App. at 447.

Thierry's motion to suppress was denied, and he was convicted of carrying a loaded pistol without a license. Thierry, 60 Wn. App. at 446-47. On appeal, Division II rejected his argument that the initial stop made by the officers was invalid, because "the officers, working a high crime area, observed behavior consistent with the profile of drive-by shootings." But the court also noted: "Even if Thierry's behavior might arguably be viewed as innocent, the ultimate test for reasonableness of an investigative stop involves weighing the invasion of personal liberty against the public interest to be advanced. . . . The officers' intrusion in this case was negligible, and their seizure of the pistol and additional weapons was valid." Thierry, 60 Wn. App. at 449.

In this case, the trial court concluded that the stop was justified based on the following:

> Officer Tracy suspected that the vehicle was involved or about to be involved in a drive-by shooting. His suspicion was based on the following behavior (1) the

> vehicle circled around the neighborhood moments following a drive-by shooting; (2) the time of night—11:00 pm; (3) the vehicle operated its high beams; (4) the neighborhood's high incidents of gang related crimes and violence; (5) the number of passengers; and (6) the driver's behavior changed upon noticing the officer.

(CP 100, 102).[2]

It is not clear from the trial court's findings how Ross' "behavior changed" after noticing Officer Tracy, as Tracy testified that he did not observe Ross violate any traffic codes or notice any of the occupants make furtive movements. (RP 32, 37, 41) The court may be referring to Officer Tracy's testimony that Ross repeatedly looked at the officer in his rearview mirror. (RP 47) Nevertheless, the facts articulated by Officer Tracy and found by the trial court (even when "[v]iewed through the lens of the officer's training and experience," Opinion at 6), do not reasonably warrant a well-founded suspicion sufficient to justify a Terry stop.

Officer Tracy repeatedly stated that Ross' driving behavior "didn't make sense." (RP 13) But odd behavior is a far cry from behavior indicating that a crime has or is about to take place. And, when pressed to explain what specific facts indicated to the officer

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[2] When reviewing the denial of a motion to suppress, the trial court's conclusions of law are reviewed *de novo*. Mendez, 137 Wn.2d at 214 (citing State v. Johnson, 128 Wn.2d 431, 443, 909 P.2d 293 (1996)).

that Ross' vehicle and its occupants were involved in the recently reported drive-by shooting, Officer Tracy admitted "I have nothing that would tell me that they were involved at that time." (RP 37)

Unlike in Moreno and Thierry, all of the behavior observed by Officer Tracy—driving at night in a high crime neighborhood with multiple passengers and no obvious destination—is more consistent with innocent conduct than with criminal conduct. Drivers circle a block or turn out of dead-end streets for all sorts of non-criminal reasons: they are lost, they are having trouble locating an unfamiliar address; or they are simply out driving for pleasure.

In Moreno, the car sped out of an alley one block away from a just-reported shooting and an occupant was wearing rival gang colors. In this case, Ross' car was several miles away from the reported shooting, was not observed speeding away from the scene, did not match the description of the car reportedly involved in the shooting, and the occupants were not initially observed wearing gang-related items. In Thierry the windows were rolled down despite very cold weather, the driver and passenger were slouched down so their bodies were concealed, and they drove slowly around a parking lot in an area known for gang violence, actions understood by police to be consistent with gang shootings. In this case, Ross simply drove

in a manner that appeared to Officer Tracy to be aimless.

Unlike in Moreno and Thierry, Officer Tracy's suspicions were aroused primarily by facts not specifically related to Ross' or You's behavior—more than one car often involved in drive-by shootings, high crime neighborhood, car in relative proximity to recently reported shooting—rather than by specific actions taken by Ross or You or the third passenger. This is the "very brand of interference with people's everyday lives" that the Terry stop threshold was created to prevent. Doughty,170 Wn.2d at 63.

Furthermore, unlike in Thierry, where the officers simply approached Thierry's already stationary car and observed weapons in plain view, the initial stop in this case was highly intrusive. Officer Tracy followed and then stopped Ross' vehicle even though Ross had not committed any immediate traffic infraction, and ordered Ross and You and the third passenger out of the vehicle in order to conduct weapons pat-downs. (RP 31-32, 19-22)

The initial stop, and everything that followed, was improper.[3] If the initial stop was unlawful, any subsequent search and fruits of

[3] You may object to any search of Ross' vehicle because automatic standing applies when a passenger is charged with possessory offense. See State v. Jones, 146 Wn.2d 328, 332-33, 45 P.3d 1062 (2002); State v. Coss, 87 Wn. App. 891, 895-96, 943 P.2d 1126 (1997).

that search are inadmissible as fruits of the poisonous tree. State v. Kennedy, 107 Wn.2d 1, 4, 726 P.2d 445 (1986) (citing Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L.Ed.2d 441 (1963); State v. Larson, 93 Wn.2d 638, 611 P.2d 771 (1980)). The Court of Appeals erred when it affirmed the trial court's denial of You's motion to suppress, and You's conviction must be reversed.

B. THE STATE'S EVIDENCE SHOWED NOTHING MORE THAN YOU'S PROXIMITY TO THE FIREARM, WHICH IS INUSFFICIENT TO PROVE DOMINION AND CONTROL AND CONSTRUCTIVE POSSESSION OF THE FIREARM.

"Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt." City of Tacoma v. Luvene, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, 119 Wn.2d at 201.

Under RCW 9.41.040, a person is guilty of unlawful

possession of a firearm "if the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted . . . in this state or elsewhere of any serious offense[.]" Possession of property may be either actual or constructive. State v. Callahan, 77 Wn.2d 27, 459 P.2d 400 (1969); State v. Ibarra-Raya, 145 Wn. App. 516, 524, 187 P.3d 301 (2008).

Actual possession means that the goods are in the personal custody of the person charged with possession; whereas, constructive possession means that the goods are not in actual, physical possession, but that the person charged with possession has dominion and control over the goods. Callahan, 77 Wn.2d at 29 (citing State v. Walcott, 72 Wn.2d 959, 435 P.2d 994 (1967)). Constructive possession can be established by showing the defendant had dominion and control over the item or the premises where the item was found. See Ibarra-Raya, 145 Wn. App. at 524; State v. Portrey, 102 Wn. App. 898, 904, 10 P.3d 481 (2000).

However, mere proximity to the contraband is insufficient to show dominion and control to establish constructive possession. State v. Raleigh, 157 Wn. App. 728, 737, 238 P.3d 1211 (2010). Knowledge of the presence of contraband, without more, is also insufficient to show dominion and control. State v. Hystad, 36 Wn.

App. 42, 49, 671 P.2d 793 (1983).

In cases in which the defendant was the driver or owner of the vehicle where contraband was found, courts have routinely found sufficient evidence of constructive possession, and dominion and control.[4] "But courts hesitate to find sufficient evidence of dominion or control where the State charges passengers with constructive possession." State v. Chouinard, 169 Wn. App. 895, 900, 282 P.3d 117 (2012).

For example, in State v. Cote, the evidence showed that the defendant arrived at a residence as a passenger in a stolen truck and his fingerprints were on mason jars containing methamphetamine precursor chemicals, found in the back of the truck. 123 Wn. App. 546, 550, 96 P.3d 410 (2004). Division Three reversed Cote's unlawful possession conviction, stating: "The evidence establishes that Mr. Cote was at one point in proximity to the contraband and touched it . . . this is insufficient to establish dominion and control. Accordingly, there was no evidence of constructive possession." 123 Wn. App. at 550.

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[4] *See e.g.*, State v. Bowen, 157 Wn. App. 821, 828, 239 P.3d 1114 (2010); State v. Turner, 103 Wn. App. 515, 521, 13 P.3d 234 (2000); State v. McFarland, 73 Wn. App. 57, 70, 867 P.2d 660 (1994); State v. Reid, 40 Wn. App. 319, 326, 698 P.2d 588 (1985); State v. Echeverria, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997).

And in State v. George, the State's evidence showed that George rode in the driver's side backseat while the vehicle's owner rode in the front passenger seat, and troopers found a glass pipe with burnt marijuana and empty beer cans and bottles on the floorboard behind the driver's seat, where George had been sitting. 146 Wn. App. 906, 912-13, 193 P.3d 693 (2008). Division One reversed George's drug possession convictions, holding that George's mere proximity to the pipe and drugs, and knowledge of its presence, was insufficient to convict George of constructive possession. 146 Wn. App. at 923.

Most recently, in Chouinard, Division Two found insufficient evidence to establish constructive possession of a firearm by a backseat passenger in another person's vehicle. 169 Wn. App. at 903. Officers could see a firearm in the trunk of the car, and the firearm was visible and accessible to the passenger compartment because the backrest on the backseat had been detached from the car. 169 Wn. App. at 898. The State presented evidence that Chouinard was the backseat passenger, and Chouinard also acknowledged to the arresting officer that he saw the firearm in the trunk. 169 Wn. App. at 898. Division Two reversed Chouinard's unlawful possession of a firearm conviction, noting the lack of

evidence that Chouinard owned or used the firearm, and stating: "the State demonstrated Chouinard's mere proximity to the weapon and his knowledge of its presence in the vehicle. This evidence, alone, does not sustain a conviction for constructive possession of a firearm." 169 Wn. App. at 903.

Contrary to the Court of Appeals' decision in this case (Opinion at 8), the State's evidence in this case is even weaker than the insufficient evidence in Cote, George and Chouinard. Like the defendants in Cote, George and Chouinard, You was a passenger in the vehicle where the contraband was found, and was not the owner or driver of the vehicle. (RP 118, 153) Like the defendants in Cote, George and Chouinard, You was sitting in close proximity to the contraband. (RP 122, 125) But unlike in Cote, George and Chouinard, there was no additional evidence in this case that You saw the firearm, knew the firearm was under the seat, or ever touched the firearm. Unlike in Cote, there were no fingerprints on the firearm to indicate that You handled the firearm. Unlike in George, the firearm was not out in the open where any passenger would be aware of its presence. And unlike in Chouinard, You did not make any statements indicating that he knew the firearm was in the vehicle. And Officer Tracy did not observe You make any

movements that might indicate he was placing a firearm under the seat. (RP 122)

The State's only evidence to support the conviction was You's proximity to the firearm. This is not sufficient proof of dominion and control or constructive possession, and cannot sustain a conviction for unlawful possession of a firearm. You's conviction must be reversed.

VI. CONCLUSION

Driving around at night in a high crime area within a few miles of a recently reported crime does not provide a basis for an investigative detention. Furthermore, mere proximity to a firearm in another person's vehicle does not establish that a passenger has dominion and control, and therefore constructive possession of a firearm. You respectfully requests that this Court grant his petition for review, and reverse his conviction.

DATED: March 7, 2014

STEPHANIE C. CUNNINGHAM, WSB #26436
Attorney for Petitioner Sam Nang You

CERTIFICATE OF MAILING

I certify that on 03/07/2014, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Sam Nang You, DOC# 332300, Olympic Corrections Center, 11235 Hoh Mainline, Forks, WA 98331.

Stephanie Cunningham

STEPHANIE C. CUNNINGHAM, WSBA #26436

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. SAM NANG YOU, Appellant.	No. 43738-4-II UNPUBLISHED OPINION

LEE, J. — Sam Nang You appeals his conviction of first degree unlawful possession of a firearm, arguing that (1) the firearm's discovery was the result of an illegal stop of the car in which he was a passenger, (2) the State failed to prove that he constructively possessed the firearm, and (3) the trial court erred in rejecting his request to continue sentencing so that he could argue that some of his prior offenses counted as one under the same criminal conduct rule. We hold that the stop of the car was justified and that the State provided sufficient evidence of constructive possession, but that the trial court erred in refusing to continue sentencing. We affirm the conviction, but remand for resentencing.

FACTS

Shortly after 11:00 PM on March 4, 2012, Puyallup Tribal Police Officer Joey Tracy responded to the 3700 block of East Roosevelt Avenue to assist Tacoma police officers in finding a vehicle involved in a drive-by shooting near the 6400 block of East Portland Avenue. The majority of Tracy's work involves investigating gang-related crimes. Based on his training

and experience, Tracy knew this location to be a high-crime area with frequent incidents of gang activity and violence.

Tacoma dispatch described the suspect car as a black Pontiac Grand Prix last seen heading northbound on East Portland Avenue. While Officer Tracy was patrolling the area in search of the Pontiac, his vehicle was approached from behind by a dark blue sedan with its high beam headlights activated. Tracy saw the blue sedan, which contained three occupants, circle the block and leave the area. Tracy continued to investigate the drive-by shooting.

About five minutes later, Officer Tracy saw the blue sedan turn from East 35th onto East Portland Avenue. The sedan turned out in front of Tracy, who then followed it. As he did so, the driver continuously looked back at the patrol vehicle. After both vehicles turned right onto East 29th Street, Tracy saw the sedan turn right onto East R Street and drive southbound to East 35th Street, where it turned and made a full circle from where Tracy had initially seen the car.

Officer Tracy wondered why the sedan was driving in circles in an area that had just experienced a drive-by shooting. He suspected that the sedan had some involvement in the shooting based on these facts: its circling of the neighborhood moments after a drive-by shooting, the lateness of the hour, the sedan's use of its high beams, the neighborhood's many incidents of gang-related crimes and violence, the number of passengers, and the driver's behavior on noticing the officer. Although he knew he was not following a Pontiac, he thought that the dark blue sedan could have been mistaken for that vehicle.

Officer Tracy decided to stop the sedan and investigate. The driver was waiting with his license and registration paperwork and appeared both combative and unusually talkative, as though he was trying to distract the officer. Tracy noticed that the driver had the number four

tattooed on each forearm, which Tracy understood to be a gang-related symbol. Tracy also saw that the passengers were wearing red, which is the color associated with a Tacoma gang. The driver told Tracy he was attempting to drive through Salishan, which is an area claimed by a gang.

While Officer Tracy was contacting the driver, he noticed that You, the front seat passenger, was sitting motionless. After Tracy had the driver step out of the vehicle for a pat-down, he opened the passenger door and brought You out. When You moved his feet, Tracy saw a revolver between them that was protruding from under his seat. The gun was blocked from going completely under the seat by a plastic bottle, and its handle was wrapped with toilet paper.

Officer Tracy arrested You and the other occupants and obtained a search warrant for the vehicle. In the front center console, he found .357 ammunition that matched the ammunition in the gun. Tracy found a 9 mm semi-automatic pistol underneath the back seat and a 9 mm bullet in the jacket that had been next to the rear passenger. That passenger's identification was in the jacket.

Because You had a prior serious felony conviction, the State charged him with first degree unlawful possession of a firearm. After the trial court denied You's motion to suppress, Officer Tracy testified to the above facts, and the jury found You guilty as charged.

When the verdict was returned on June 19, You's attorney asked the court to delay sentencing until late July because a same criminal conduct analysis might apply to some of You's criminal history. Defense counsel had requested documents from the State to assist in that analysis. The State objected to the delay, and the trial court set sentencing for June 29 over defense counsel's objection.

At the June 29 sentencing hearing, defense counsel again sought a continuance of two to three weeks because he still needed police reports to determine whether some of You's prior offenses might constitute the same criminal conduct. The State responded that there was no precedent for what counsel was requesting, and the trial court denied You's request for a continuance, ruling that a same criminal conduct analysis of You's prior convictions was not appropriate. Based on an offender score of 8 that counted You's prior offenses separately, the trial court imposed a sentence of 90 months. You appeals his conviction and sentence.

DISCUSSION

A. TERRY STOP

You first contends that the initial stop of the car in which he was a passenger was invalid and that the trial court erred in denying his motion to suppress. We disagree.

The Fourth Amendment protects against unlawful search and seizure, and article I, section 7 of the Washington Constitution protects against unlawful government intrusions into private affairs. *State v. Doughty*, 170 Wn.2d 57, 61, 239 P.3d 573 (2010). A seizure occurs when, considering all the circumstances, a reasonable person would not feel free to leave. *State v. Diluzio*, 162 Wn. App. 585, 590, 254 P.3d 218, *review denied*, 272 P.3d 850 (2011). Warrantless seizures are per se unreasonable, and the State must demonstrate that a warrantless seizure falls into a narrow exception to the rule. *Doughty*, 170 Wn.2d at 61.

One exception to the prohibition on warrantless seizures is a law enforcement officer's investigatory stop of a vehicle based on a reasonable suspicion to believe that criminal activity is indicated. *Diluzio*, 162 Wn. App. at 590. To be lawful, an investigatory stop, also known as a *Terry* stop, must be based on "'specific and articulable facts which, taken together with rational

inferences from those facts, reasonably warrant [the] intrusion.'" *Diluzio*, 162 Wn. App. at 590 (quoting *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)). The standard for articulable suspicion is a "substantial possibility that criminal conduct has occurred or is about to occur." *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986).

Whether a warrantless seizure or a *Terry* stop is lawful is a question of law that we review de novo. *State v. Bailey*, 154 Wn. App. 295, 299, 224 P.3d 852, *review denied*, 169 Wn.2d 1004 (2010). The State must establish the exception by clear and convincing evidence. *State v. Garvin*, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009). The purpose of the *Terry* rule is to stop police from acting on mere hunches. *Doughty*, 170 Wn.2d at 63; *Kennedy*, 107 Wn.2d at 5-6. Crime prevention and crime detection are legitimate purposes for investigative stops or detentions. *Doughty*, 170 Wn.2d at 63; *Kennedy*, 107 Wn.2d at 5-6. However, where no crime has been committed, simply being in a high-crime area at night is insufficient to justify a stop. *State v. Moreno*, 173 Wn. App. 479, 492, 294 P.3d 812, *review denied*, 177 Wn.2d 1021 (2013).

A police officer may rely on his experience to evaluate apparently innocuous facts. *Moreno*, 173 Wn. App. at 492; *State v. Thierry*, 60 Wn. App. 445, 448, 803 P.2d 844 (1991). Such experience was key to upholding the investigatory stop in *Thierry*, where officers watched two teenagers drive through a high-crime area one winter afternoon with the car windows rolled down and loud music playing. 60 Wn. App. at 446-47. The car drove through a parking lot containing open spaces without attempting to park and stopped at the entrance. *Thierry*, 60 Wn. App. at 447. As the officers approached, they saw a wooden bat at the driver's feet and noticed the passenger making furtive hand motions. *Thierry*, 60 Wn. App. at 447. After ordering the

two to bring their hands into view, an officer saw a pistol between the front armrests. *Thierry*, 60 Wn. App. at 447.

This court upheld the stop, stating that the officers had observed behavior consistent with the profile of drive-by shootings and were not required to ignore their observations. *Thierry*, 60 Wn. App. at 448. We explained that officers may bring their experience to bear on a situation, and it is necessary only that the circumstances at the time of the stop be more consistent with criminal than innocent conduct. *Thierry*, 60 Wn. App. at 448. Given the high crime nature of the area in question and the drive-by shooting profile, the facts that existed immediately before the stop did not comport with innocent activity. *Thierry*, 60 Wn. App. at 448-49.

The trial court cited *Thierry* in upholding Officer Tracy's stop of the car in which You was riding. Although You argues that the facts are distinguishable, we are persuaded that reliance on the officer's experience controls here. Officer Tracy investigates gang-related crimes and was in a high-crime area with frequent incidents of gang activity and violence. Officer Tracy was responding to a late night report of a drive-by shooting when he saw a car with its high beams on. The car drove in circles around the area. Tracy knew that the blue sedan did not match the description of the car he had received, but he thought that a mistaken description was possible. He also knew that drive-by shootings often involve multiple vehicles, including look-out and/or retaliatory vehicles. Although being in a high-crime area at night does not justify a stop when a crime has not been committed, here a drive-by shooting had been committed. Viewed through the lens of the officer's training and experience, the circumstances at the time of the stop were more consistent with criminal than innocent conduct, and the trial court did not err in upholding the investigatory stop and in denying You's motion to suppress.

B. CONSTRUCTIVE POSSESSION

You next argues that the evidence was insufficient to prove that he constructively possessed the firearm found at his feet. We disagree.

Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wn.2d at 201. Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Possession may be actual or constructive. *State v. Raleigh*, 157 Wn. App. 728, 737, 238 P.3d 1211 (2010), *review denied*, 170 Wn.2d 1029 (2011). Constructive possession is established by showing that the defendant had dominion and control over the firearm. *State v. Murphy*, 98 Wn. App. 42, 46, 988 P.2d 1018 (1999), *review denied*, 140 Wn.2d 1018 (2000). The defendant's control over the firearm does not have to be exclusive, but mere proximity to the firearm is insufficient to show control. *Raleigh*, 157 Wn. App. at 737. The ability to reduce an object to actual possession is an aspect of dominion and control, but other aspects such as physical proximity should be considered as well. *State v. Hagen*, 55 Wn. App. 494, 499, 781 P.2d 892 (1989). The court must look at the totality of the circumstances to determine whether the jury could reasonably infer dominion and control. *State v. Potts*, 93 Wn. App. 82, 88, 969 P.2d 494 (1998).

You argues that the evidence showed only his proximity to the firearm, and thus, there was insufficient evidence to show that he constructively possessed the weapon. As support, he

cites *State v. Cote*, 123 Wn. App. 546, 550, 96 P.3d 410 (2004), where officers found a Mason jar containing contraband in the car in which the defendant had been riding. Although the jar contained the defendant's fingerprint, it was found in the back of the vehicle and not in the passenger area. Evidence that the defendant was in proximity to and at one point touched the contraband was insufficient to establish the dominion and control needed to prove constructive possession. *Cote*, 123 Wn. App. at 550.

You also cites *State v. George*, 146 Wn. App. 906, 922-23, 193 P.3d 693 (2008), where evidence that a marijuana pipe was found on the rear passenger floorboard of a vehicle, next to where the defendant had been sitting, was insufficient to prove dominion and control. You relies further on a more recent decision from this court holding that evidence was insufficient to prove constructive possession where a firearm was found behind the backseat of a vehicle, next to where the defendant had been sitting. *State v. Chouinard*, 169 Wn. App. 895, 902-03, 282 P.3d 117 (2012), *review denied*, 176 Wn.2d 1003 (2013); *but see State v. Echeverria*, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997) (evidence sufficient to prove constructive possession where officer saw gun sticking out from under defendant's seat; ability to reduce object to actual possession is aspect of dominion and control).

You asserts that the evidence of constructive possession in this case is even weaker than that in *Cote*, *George*, and *Chouinard*. We disagree.

Here, as in *Echeverria*, the officer saw a firearm sticking out from between You's feet when he approached the passenger side of the car. There was ammunition in the center console beside You that matched the ammunition in the gun. Tracy found a different type of gun underneath the rear passenger seat, and ammunition matching that gun was in the rear

passenger's jacket. Viewing the circumstances as a whole, they show that You had the ability to reduce the firearm at his feet to actual possession and that he had dominion and control over that firearm.

C. CONTINUANCE FOR SAME CRIMINAL CONDUCT DETERMINATION

Finally, You argues that the trial court abused its discretion by refusing to continue the sentencing hearing based on the understanding that no same criminal conduct analysis was appropriate.

The grant or denial of a continuance is within the trial court's discretion and will not be disturbed absent a showing that the court abused its discretion and the defendant was prejudiced thereby. *State v. Herzog*, 69 Wn. App. 521, 524, 849 P.2d 1235, *review denied*, 122 Wn.2d 1021 (1993). However, where a defendant has requested a sentencing alternative authorized by statute, the categorical refusal to consider that alternative is a failure to exercise discretion and is subject to reversal. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). Further, remand for resentencing is often necessary where a sentence is based on a trial court's erroneous belief about the governing law. *State v. McGill*, 112 Wn. App. 95, 100, 47 P.3d 173 (2002).

At issue here is the trial court's refusal to continue sentencing to address the issue of whether some of You's prior offenses constituted the same criminal conduct. Under the same criminal conduct rule, multiple offenses count as one in calculating the defendant's offender score if they were committed at the same time and place against the same victim and require the same criminal intent. RCW 9.94A.589(1)(a).

A current sentencing court must calculate an offender score based on an offender's "other current and prior convictions." RCW 9.94A.589(1)(a); *State v. Williams*, 176 Wn. App. 138,

141, 307 P.3d 819 (2013). If a prior sentencing court found multiple offenses that encompassed the same criminal conduct, the current sentencing court must count those prior convictions as one offense. RCW 9.94A.525(5)(a)(i); *Williams*, 176 Wn. App. at 141. If the prior sentencing court did not make this finding, but nonetheless ordered the offender to serve the sentences concurrently, the current sentencing court must independently evaluate whether those prior convictions encompass the same criminal conduct and, if they do, must count them as one offense. RCW 9.94A.525(5)(a)(i); *see also State v. Torngren*, 147 Wn. App. 556, 563, 196 P.3d 742 (2008) (sentencing court must apply same criminal conduct test to multiple prior convictions that a court has not already concluded amount to the same criminal conduct), *abrogated on other grounds by State v. Graciano*, 176 Wn.2d 531, 295 P.3d 219 (2013). The defendant bears the burden of proving that his prior offenses constitute the same criminal conduct. *Graciano*, 176 Wn.2d at 539.

You's criminal history includes 12 juvenile and adult offenses committed on three different dates. You refused to sign a stipulation that counted these offenses separately, and after the verdict he requested a month's continuance so that he could obtain documentation that would enable him to make the same criminal conduct argument. You's attorney objected to the court's decision to set sentencing only 10 days later, and he again requested a continuance at sentencing so that he could obtain the documents needed to make the same criminal conduct analysis. The trial court declined to grant the continuance, explaining that a same criminal conduct evaluation was not then appropriate and was instead a matter for appellate review.

While acknowledging the holding in *Torngren* set forth above, the State seems to assert that You has waived this claim of error by being unprepared to make a same criminal conduct

argument at sentencing and by failing to raise a related claim of ineffective assistance of counsel on direct appeal. The State asserts further that because You has failed to show that his prior offenses constituted the same criminal conduct, he can show no prejudice from the court's refusal to continue sentencing.

These arguments are not persuasive. Defense counsel was unprepared to make the same criminal conduct argument at sentencing because he did not have the documents he requested from the State that he needed to make the argument. Without those documents, You is prevented from making the same argument on appeal. The trial court abused its discretion by declining to continue sentencing so that the defense could prepare for the mandatory same criminal conduct evaluation of You's prior offenses. The trial court's reason for not granting the continuance was based on an erroneous belief of the governing law.

Accordingly, we affirm You's conviction, but remand so the parties and the court may engage in the same criminal conduct evaluation of You's prior offenses before resentencing.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, J.

We concur:

Penoyar, P.J.

Maxa, J.

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