Supreme Court No. 91798-1
NO. 71837-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DELANTE HOWERTON,

Appellant.

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

The Honorable Douglass North, Judge

PETITION FOR REVIEW

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Delante Howerton requests this Court grant review pursuant to RAP 13.4 of the published decision of the Court of Appeals in State v. Howerton, ___ Wn. App. ___, ___ P.3d ___, 2015 WL 2185218 (No. 71837-1-I, filed March 30, 2015).[1] On May 7, 2015, Howerton's motion to reconsider was denied and the State's motion to publish was granted.[2]

B. ISSUE PRESENTED FOR REVIEW

Police may not detain a person without reasonable, articulable suspicion of criminal activity. Here, a 911 caller said she saw someone break into a car across the street, but then explained she only heard the car start and saw a person move around in the car and then walk away. A few minutes later, police seized Howerton because he was walking in the direction described by the caller, matched her description, and turned to walk the other way upon seeing the police. Must the resulting evidence be suppressed because the seizure violated Howerton's rights under the Fourth Amendment and Article I, Section 7 of the Washington Constitution?

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[1] A copy of the opinion is attached as Appendix A.
[2] A copy of the order denying reconsideration is attached as Appendix B.

C. STATEMENT OF THE CASE

1. Procedural Facts

The King County prosecutor charged Howerton with one count of attempted theft of a motor vehicle, one count of making or having vehicle theft tools, and one count of intimidating a public servant. CP 1-2. The court dismissed the intimidation charge for insufficient evidence. 3RP 14. The jury found Howerton guilty of making or having vehicle theft tools and of the lesser-included misdemeanor charge of attempted taking a motor vehicle without permission. CP 51-52. The Court of Appeals affirmed Howerton's conviction. Howerton requests this Court grant review.

2. Substantive Facts

Laura Parks called 911 to report a "robbery." CP 23. She gave her address and phone number and explained, "someone broke into a car" across the street. CP 23. When the dispatcher asked how long ago she saw it she explained, "Well, I heard it," and "it just now happened." CP 24. She describd a black man with short hair wearing a baggy black leather jacket, about 5'7" and average build. CP 25. She told the dispatcher she did not think he was carrying anything but he did enter the car. CP 23-24. She said the man walked away going south on 2nd. CP 24. She said the car was a blue late '90s Dodge minivan, one of four vehicles outside. CP 25.

She did not say that the car belonged to her. She did not say who the car belonged to or whether she was in a position to know whether the person she described had a right to enter the car.

Officer Hutchinson arrived on the scene almost immediately and saw Howerton, who matched Parks' description, in the location she described and going in the direction she described. 1RP 8-10. When Howerton saw the officer, he turned and walked in the opposite direction, towards the site of the alleged crime. 1RP 10. On this basis, Hutchinson detained Howerton. 1RP 10-11. Hutchinson was dispatched at 2:03 a.m. and arrived at 2:06. 1RP 12-13. He was only 50 yards from the vehicle in question. 1RP 13.

After Hutchinson detained Howerton, he searched for weapons and found a foot-long bread knife, a screwdriver, a red pocketknife, pruning shears, and a box cutter with no blade in it. 2RP 58. The blade of the bread knife was sticking out of the end of Howerton's sleeve. 2RP 58.

Deputy Kinsey arrived while Howerton was standing with his hands on Hutchinson's patrol car. 2RP 94. He contacted Parks, who said she could see Howerton and he was the person she had called about. 2RP 25, 97. Howerton was placed under arrest. 2RP 63-64.

Kinsey inspected the car Parks pointed out and saw the front passenger window was broken, there was shattered glass outside the van, part of the center console plate had been removed and the stereo space was

empty. 2RP 99. The cover of the right side of the steering column was partly broken off and part of the ignition switch was broken out. 2RP 99. Kinsey testified this damage was consistent with an attempt to steal the car. 2RP 100. Detective Skaar testified car theft requires a tool to break away the plastic cover on the ignition lock such as a box cutter or heavy gauge scissors, and something to pry away the plastic. 2RP 108-09.

At trial, Parks testified she was asleep on her living room couch when she awoke to the sound of a car engine repeatedly trying to turn over. 2RP 18-20. She looked outside and saw what looked like a struggle inside her neighbor's van across the street. 2RP 20-21. She saw someone she did not recognize get out of the van, and she called 911 as she watched the person walk away. 2RP 22-23. He was out of her sight for a brief time before he walked back into her view and was stopped by Deputy Hutchinson. 2RP 23-24.

Gretchen Lemon testified she was awakened by Parks' phone call and went outside to find several police officers had arrived and her van was both running and damaged. 2RP 42-43. She testified she had not left the van running and the damage was new. 2RP 45. She testified she did not know Howerton and had not given him permission to enter or drive her van. 2RP 50.

On appeal, Howerton argued Hutchinson lacked reasonable suspicion because there was no indication Parks was reliable and Hutchinson failed to corroborate any non-innocuous information before detaining him. The Court of Appeals rejected these arguments, holding that Parks could be presumed reliable, that even without the presumption there were indicia of reliability, and that there was sufficient corroboration. Howerton respectfully requests this Court grant review.

E. REASONS WHY REVIEW SHOULD BE GRANTED AND ARGUMENT

THIS COURT SHOULD GRANT REVIEW BECAUSE HOWERTON WAS SEIZED WITHOUT REASONABLE SUSPICION IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS.

Under the Fourth Amendment and article 1, section 7 of the Washington Constitution,[3] warrantless seizures are "per se unreasonable." State v. Kinzy, 141 Wn.2d 373, 384, 5 P.3d 668 (2000); State v. Hendrickson, 129 Wn.2d 61, 70, 917 P.2d 563 (1996) (citing Coolidge v. New Hampshire, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971)). The issue in this case is whether police had reasonable suspicion to seize Howerton without a warrant under the exception for brief investigative

[3] The Fourth Amendment provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." Article 1, § 7 provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

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

Review is warranted for two main reasons. First, this case presents a significant constitutional issue involving substantial public interest: whether a conclusory allegation from a named but unknown 911 caller alone presents sufficient reasonable suspicion to warrant an investigative detention under article I, section 7 of Washington's constitution or the Fourth Amendment. RAP 13.4(b)(3), (4). Second, this Court's holding that the 911 call was sufficient in this case conflicts with the Court of Appeals' decisions in State v. Saggers, 182 Wn. App. 832, 332 P.3d 1034 (2014); State v. Z.U.E., 178 Wn. App. 769, 315 P.3d 1158, 1165 (2014), review granted, June 6, 2014; State v. Hopkins, 128 Wn. App. 855, 117 P.3d 377 (2005), and State v. Randall, 73 Wn. App. 225, 868, P.2d 207 (1994).

a. Parks' 911 Call Was Not a Reliable Report of Criminal Activity.

"Even a named, but otherwise unknown, citizen informant is not presumed to be reliable and a report from such an informant may not justify an investigative stop." Z.U.E., 178 Wn. App. at 783. In the past, courts have stated that named citizen informants are presumed reliable. State v. Wakeley, 29 Wn. App. 238, 241, 628 P.2d 835 (1981). But more

recent decisions have clarified this principle. When officers do not know the caller, the caller does not necessarily describe criminal conduct, and officers do not independently corroborate any incriminating or information before detaining the targeted person, the detention is unlawful. Hopkins, 128 Wn. App. at 863-66.

This case directly parallels Hopkins, in which a citizen informant called 911 to report a minor who appeared to be carrying a gun. 128 Wn. App. at 858. The dispatch center had the caller's name and two different phone numbers. Id. But police knew nothing about the caller's identity or reliability or whether the caller knew Hopkins. Id.

A few minutes later, the caller called back to say Hopkins was now at a different location. Id. When the officers arrived, they saw Hopkins, who partially met the caller's description, in a phone booth, hanging up a phone. Id. at 859. The officers observed no illegal or suspicious activity. Id. The caller had not explained how he knew the person with the gun was a minor. Id. at 864-65. Nevertheless, the officers approached and detained Hopkins and asked him if he had a gun, based on the citizen informant's tip. Id.

In finding Parks' tip reliable, the Court of Appeals reasoned that Parks "reported objective facts that indicated criminal, rather than legal, activity." Slip op. at 8. Similarly, the court distinguished Z.U.E. and

Hopkins by pointing out that the 911 caller in each of those cases did *not* actually allege any criminal activity. Slip op. at 12 (discussing Z.U.E., 178 Wn. App. at 786; Hopkins, 128 Wn. App. at 864).

But the objective facts Parks reported also did not actually describe criminal activity. She reported she saw a person break into a car, but then clarified she only heard it. CP 24. When asked if the person actually entered the car, she answered, "Yeah." CP 24. But entry into a vehicle is not a crime. Parks described what she saw as a "robbery" but did not report any objective facts to suggest this was true. She did not claim it was her vehicle or even that she knew who owned it. She did not claim to know whether or not the person who entered the vehicle had the owner's permission to do so. Like carrying a gun, entering a car is not a crime without significant other circumstances being present. As in Hopkins and Z.U.E., the 911 call provided no basis to believe those other circumstances existed.

b. No Emergency Existed to Justify Detaining Howerton Without Further Investigation.

Reasonable suspicion is evaluated by considering the totality of the circumstances, which includes "emergent risks of imminent violence," in deciding whether to conduct an investigatory stop. State v. Saggers, 182 Wn. App. 832, 841-42, 332 P.3d 1034 (2014). A "less stringent standard"

may be applied when the report involves a "significant threat to public safety," because under those circumstances, police do not have time to engage in detailed inquiry before acting to detain a suspect. Id. It is the absence of any threat to public safety that distinguishes this case from Navarette v. California, ____ U.S. ____, 134 S. Ct. 1683, 1689, 188 L. Ed. 2d 680 (2014).

In Navarette, a driver called 911 to report she had just been run off the road and gave the license plate number and description of the offending vehicle. ___ U.S. at ___, 134 S. Ct. at 1686-87. The Court concluded the information about having been run off the road necessarily implied first-hand eyewitness knowledge of the incident. ___ U.S. at ___, 134 S. Ct. at 1689. The Court also concluded the traceability of 911 calls and the immediacy of the report weighed in favor of finding the caller reliable. ___ U.S. at ___, 134 S. Ct. at 1689-90.

But the Court also focused on another salient fact: the call involved a probably intoxicated driver on a highway who had already endangered lives by running the 911 caller's car off the road. Navarette, ___ U.S. at ___, 134 S. Ct. at 1686-87. Even with this enormous and demonstrated risk to public safety, the Court described Navarette as a "close case." ___ U.S. at ___, 134 S. Ct. at 1692. Nothing in the 911 call

in this case and nothing about Howerton's location or appearance comes close to suggesting an analogous risk of violence or threat to public safety.

The Court of Appeals erred in disregarding this distinction. Slip op. at 15 n. 6; Saggers, 182 Wn. App. at 841-42; see also State v. Randall, 73 Wn. App. 225, 868 P.2d 207 (1994). Like Saggers, Randall held that reasonable suspicion is evaluated under the totality of the circumstances test. 73 Wn. App. at 228-29. The Court clarified that, in performing this analysis, the nature of the suspected crime is "an important factor" that "must be examined." Id. at 229.

In Randall, police responded to an eyewitness report of an armed robbery. Id. at 230. Ten minutes after the report, police found Randall, who matched the description, six blocks away. Id. at 226, 231. When he saw the police, he and his companion turned and walked away. Id. On this basis, the police stopped Randall.

In upholding the detention as lawful, the Court found the violent, serious nature of the crime was an essential component in the totality of the circumstances analysis. Id. at 230. The court noted the tip was of "an alleged armed robbery, a violent crime posing a significant threat to the safety of the officers and the public general." Id. Therefore, the officer did not have time for a "methodical, measured inquiry into whether the tip is reliable." Id.

The court expressly contrasted the armed robbery in that case with cases where only "a nonviolent offense such as possession of drugs has been committed." Id. In support of this reasoning, the court cited two Washington Supreme Court decisions, State v. Sieler, 95 Wn.2d 43, 621 P.2d 1272 (1980) and State v. Lesnick, 84 Wn.2d 940, 530 P.2d 243 (1975). Randall, 73 Wn. App. at 229-30. Because of the threat to public safety, the officer in Randall was permitted to rely on the reliability of the dispatch report and act when his observations corroborated the report. Id. at 230. Although the officers observed nothing more incriminating than that Randall turned and left upon seeing the police, the Court upheld the stop as lawfully based on reasonable suspicion under the totality of the circumstances. Id. at 230-31.

c. Turning and Walking Away Upon Seeing Police Does Not Create Reasonable Suspicion.

The Court of Appeals' decision in this case also conflicts with Randall in holding that simply turning and walking away from police can support a finding of reasonable suspicion. Randall demonstrates that merely turning and walking away upon seeing police is not sufficient corroboration to warrant investigative detention without the additional circumstance of the exigency created by the report of a serious, violent crime. Id.

Here, despite the caller's initial use of the word "robbery," the officer was well aware the call involved a vehicle prowl or attempted theft, not any sort of a crime against a person. 1RP 6-7, 22. There was no need to act quickly to prevent violent harm, as there was in Randall. But the other information available to the officers in this case directly parallels Randall: both cases involved a conclusory allegation of a crime by an eyewitness; a person matching the description was in the vicinity immediately after the report; and the person turned and walked the other direction upon seeing police. 1RP 8-10; Randall, 73 Wn. App. at 230. Under Randall, a report of a far less serious crime would not have warranted detention on such a scant factual basis. 73 Wn. App. at 229-30.

As in Z.U.E. and Hopkins, Parks' 911 call did not assert objective facts constituting a crime. Nor was there any corroboration of suspicious facts before Howerton was detained. And in contrast to Randall and Navarette, there was no particular urgency that required acting quickly before doing additional investigation such as contacting the 911 caller. Under the totality of the circumstances, Howerton's detention was not justified by reasonable suspicion. Because this case presents significant issues of constitutional law and public interest and the Court of Appeals' decision is in conflict with several other decisions of that court as discussed above, Howerton requests this Court grant review. RAP 13.4(b)(2), (3), (4).

E. CONCLUSION

The Court of Appeals' opinion conflicts with other decisions by the Court of Appeals and presents significant questions of constitutional law and public interest. Howerton requests this Court grant review under RAP 13.4 (b)(2), (3), and (4).

DATED this 5th day of June, 2015.

Respectfully submitted,

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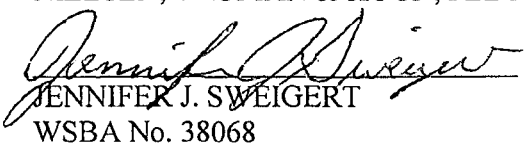

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Appendix A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. DELANTE IAN HOWERTON, Appellant.	)	NO. 71837-1-I DIVISION ONE UNPUBLISHED OPINION FILED: March 30, 2015

LAU, J. — Delante Howerton appeals his conviction for second degree attempted taking of a motor vehicle without permission and making or having vehicle theft tools. Howerton argues the trial court erred when it failed to suppress evidence following an unconstitutional seizure. He contends police acted on an unreliable 911 citizen informant tip and therefore seized him without the reasonable suspicion required by Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). He also argues the trial court erred by failing to timely file written findings of fact and conclusions of law. Because the citizen informant's tip demonstrated sufficient indicia of reliability supporting a reasonable suspicion and because Howerton fails to demonstrate that the trial court's findings and conclusions prejudiced him, we affirm the judgment and sentence.

FACTS

On September 29, 2013, at 2:00 a.m., Laura Parks called 911 from her cell phone to report that she just witnessed someone break into a van parked across the street from her house. She provided her name, address, and telephone number to the dispatcher. Parks described the suspect as a black male, average build, five feet seven inches tall, wearing a baggy black leather jacket and baggy pants. She stated he left the area on foot and was heading south on Second Avenue in Burien, Washington.

King County Deputy Sheriff David Hutchinson was dispatched to the area at 2:03 a.m. and arrived at 2:06 a.m—six minutes after Parks dialed 911. He received the description of the suspect from the 911 dispatcher—black male with short hair, wearing a black leather jacket and baggy pants. He also knew the suspect was heading south on Second Avenue. As Hutchinson drove north on Second Avenue, he saw Delante Howerton walking south. Howerton matched the description of the suspect from the 911 call. When Howerton saw Hutchinson's patrol car, he turned around and walked the other direction. Howerton complied when Hutchinson told him to stop and come over to his car. He placed Howerton in handcuffs and noticed a blade sticking out of Howerton's sleeve. When Hutchinson searched Howerton for weapons, he found a foot-long bread knife and a screwdriver.

Deputy Kelley Kinser arrived, spoke to Hutchinson, and spoke with Parks on the telephone. Parks watched Hutchinson detain Howerton from her house. She confirmed

that Howerton was the individual she saw break into the van earlier. Hutchinson arrested Howerton and read him his Miranda rights.[1]

The vehicle Parks saw Howerton break into was damaged. The front passenger window was smashed out and the ignition and steering column sustained significant damage. Gretchen Lemon, the owner of the van, confirmed that it was not damaged when she parked it the night before. Lemon did not know Howerton and did not give him permission to enter her van.

Howerton was charged by information with attempted theft of a motor vehicle, making or having vehicle theft tools, and intimidating a public servant. The trial court later dismissed the charge of intimidating a public servant. Howerton moved to suppress evidence obtained as a result of the investigatory detention. Specifically, Howerton argued Hutchinson lacked reasonable articulable suspicion to detain him when Hutchinson's only source of information was from a named but unknown telephone informant. After a CrR 3.5 and 3.6 hearing, the trial court denied Howerton's motion to suppress.

A jury convicted Howerton of misdemeanor second degree attempted taking of a motor vehicle without permission and making or having vehicle theft tools. The court imposed suspended consecutive sentences of 364 days on each count on the condition that Howerton serve 150 days of confinement. Howerton appeals.

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[1] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

ANALYSIS

Standard of Review

The court reviews a trial court's order following a motion to suppress evidence to determine if substantial evidence supports the trial court's factual findings. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). We review the trial court's legal conclusions de novo. State v. Carneh, 153 Wn.2d 274, 281, 103 P.3d 743 (2004).

Whether policed have seized a person is a mixed question of law and fact. State v. Armenta, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997). What the police said and did and what the defendant said and did are questions of fact. State v. Bailey, 154 Wn. App. 295, 299, 224 P.3d 852 (2010). What legal consequences flow from those facts is a question of law. State v. Lee, 147 Wn. App. 912, 916, 199 P.3d 445 (2008). Whether a warrantless seizure or Terry stop passes constitutional muster is a question of law the court reviews de novo. State v. Rankin, 151 Wn.2d 689, 694, 92 P.3d 202 (2004).

Whether the 911 Call Supported Reasonable Suspicion

"[A] stop, although less intrusive than an arrest, is nevertheless a seizure and therefore must be reasonable under the Fourth Amendment and article 1, section 7 of the Washington Constitution." State v. Kennedy, 107 Wn.2d 1, 4, 726 P.2d 445 (1986). An investigatory Terry stop is permissible if the investigating officer has "a reasonable and articulable suspicion that the individual is involved in criminal activity." State v. Walker, 66 Wn. App. 622, 626, 834 P.2d 41 (1992). A reasonable suspicion is the "substantial possibility that criminal conduct has occurred or is about to occur." Kennedy, 107 Wn.2d at 6.

> It is well established that, "[i]n allowing such detentions, Terry accepts the risk that officers may stop innocent people." [Illinois v.] Wardlow, 528 U.S. [119,] 126[, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000)]. However, despite this risk, "[t]he courts have repeatedly encouraged law enforcement officers to investigate suspicious situations. State v. Mercer, 45 Wn. App. 769, 775, 727 P.2d 676 (1986)."

Lee, 147 Wn. App. at 918. A reasonable suspicion can arise from information that is less reliable than that required to establish probable cause. Alabama v. White, 496 U.S. 325, 330, 110 S. Ct. 2412, 110 L. Ed. 2d 301 (1990). We review the reasonableness of the police action in light of the particular circumstances of each case. State v. Lesnick, 84 Wn.2d 940, 944, 530 P.2d 243 (1975).

An informant's tip can provide police with reasonable suspicion to justify an investigatory Terry stop if the tip possesses sufficient "'indicia of reliability.'" State v. Sieler, 95 Wn.2d 43, 47, 621 P.2d 1272 (1980) (quoting Adams v. Williams, 407 U.S. 143, 147, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972)). Courts employ the totality of the circumstances test to determine whether an informant's tip possessed sufficient indicia of reliability to support reasonable suspicion. State v. Marcum, 149 Wn. App. 894, 903, 205 P.3d 969 (2009); see Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). When deciding whether this indicia of reliability exists, the courts will generally consider several factors, primarily "(1) whether the informant is reliable, (2) whether the information was obtained in a reliable fashion, and (3) whether the officers can corroborate any details of the informant's tip." Lee, 147 Wn. App. at 918. "The existing standard does not require all three factors to establish indicia of reliability." State v. Saggers, 182 Wn. App. 832, 840 n.18, 332 P.3d 1034 (2014).

> "Reasonable suspicion, like probable cause, is dependent upon both the content of information possessed by police and its degree of reliability. Both factors—

> quantity and quality—are considered in the 'totality of the circumstances—the whole picture,' United States v. Cortez, 449 U.S. 411, 417[, 66 L. Ed. 2d 621, 101 S. Ct. 690] (1981), that must be taken into account when evaluating whether there is reasonable suspicion."

Lee, 147 Wn. App. at 917 (alteration in original) (quoting State v. Randall, 73 Wn. App. 225, 229, 868 P.2d 207 (1994)).

1. Reliability of the Informant

Known citizen informants are presumptively reliable. "Citizen informants are deemed presumptively reliable." State v. Gaddy, 152 Wn.2d 64, 73, 93 P.3d 872 (2004); see also Kennedy, 107 Wn.2d at 8 ("The neighbors' information does not require a showing of the same degree of reliability as the informant's tip since it comes from 'citizen' rather than 'professional' informants."); State v. Conner, 58 Wn. App. 90, 96, 791 P.2d 261 (1990) ("We hold that . . . a citizen informant reporting a crime can be inherently reliable for purposes of a Terry stop, even if calling on the telephone rather than speaking to the police in person."). In Lee, we discussed the enhanced reliability of an eyewitness informant:

> A citizen-witness's credibility is enhanced when he or she purports to be an eyewitness to the events described. State v. Vandover, 63 Wn. App. 754, 759, 822 P.2d 784 (1992); United States v. Colon, 111 F. Supp. 2d 439, 443 (S.D.N.Y. 2000) ("crystal clear that the caller had first hand knowledge of the alleged criminal activity"), rev'd on other grounds, 250 F.3d 130 (2d Cir. 2001). Indeed, "victim-witness cases usually require a very prompt police response in an effort to find the perpetrator, so that a leisurely investigation of the report is seldom feasible." 2 [WAYNE R.] LAFAVE, [SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 3.4(a),] at 210 [(3d ed. 1996)]. Moreover, courts should not treat information from ordinary citizens who have been the victim of or witness to criminal conduct the same as information from compensated informants from the criminal subculture. 2 LAFAVE, *supra*, at 204.
>
> > [A]n ordinary citizen who reports a crime has been committed in his presence . . . stands on much different ground than a police informer. He is a witness to criminal activity who acts with an intent to aid the police in law enforcement because of his concern for society or for his own safety.

> 2 LAFAVE, *supra*, at 208. Thus, the police are entitled to give greater credence to a report from a citizen crime victim than to a report from a criminal associate of the suspect. 2 LAFAVE, *supra*, at 205. Indeed, there is no constitutional requirement that police distrust ordinary citizens who present themselves as crime victims and "[c]ourts are not required to sever the relationships that citizens and local police forces have forged to protect their communities from crime." United States v. Christmas, 222 F.3d 141, 145 (4th Cir. 2000).

Lee, 147 Wn. App. at 918–19 (last alteration in original).

> When a citizen informant provides information, a relaxed showing of reliability suffices "because there is less risk of the information being a rumor or irresponsible conjecture which may accompany anonymous informants" and "an identified informant's report is less likely to be marred by self-interest."
>
> Accordingly, "[c]itizen informants are deemed presumptively reliable."

State v. Ollivier, 178 Wn.2d 813, 850, 312 P.3d 1 (2013) (alteration in original) (quoting Gaddy, 152 Wn.2d at 64, 73).

But even if Parks receives no presumption of reliability, we nevertheless conclude that her tip possessed adequate indicia of reliability to justify an investigative detention.

First, Parks's 911 call demonstrated a sufficient factual basis to provide reasonable suspicion for the seizure. Though not a required element, the factual basis of an informant's tip may be relevant to its reliability: "[A]n officer's information regarding the factual basis for the informant's conclusion that criminal activity has occurred is relevant to the totality of the circumstances analysis." State v. Z.U.E., 178 Wn. App. 769, 785, 315 P.3d 1158 (2014); see also, Marcum, 149 Wn. App. at 904 ("Unlike the analysis in an Aguilar/Spinelli[2] inquiry, the so-called 'veracity' and 'basis of knowledge' 'prongs' are not distinct under the totality of the circumstances test; rather,

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[2] Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964); Spinelli v. United States, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969)

these elements are relevant but are 'no longer both essential.'" (quoting State v. Jackson, 102 Wn.2d 432, 435–36, 688 P.2d 136 (1984)). An informant's credibility is enhanced when he or she is an eyewitness. Lee, 147 Wn. App. at 918; see also Navarette v. California, __ U.S. __, 134 S. Ct. 1683, 1689, 188 L. Ed. 2d 680 (2014) (noting that eyewitness knowledge of the alleged criminal activity "lends significant support to the tip's reliability.").

Here, Parks unequivocally indicated to the 911 dispatcher that she was an eyewitness. When she called 911, she told the dispatcher, "I just saw a robbery." She provided her full name, her address, and her telephone number. She indicated that she was willing to speak with police if they needed to contact her. She told the dispatcher the incident occurred "directly across the street" from her house and that it "just now happened." She stated that an individual "broke into a car." She said she actually saw him enter the car. She gave a detailed description of the suspect—black male, average build, short hair, five feet seven inches tall, wearing a baggy black leather jacket and baggy pants. The dispatcher immediately broadcast this description via radio to officers. Parks stated that the suspect just left the scene heading south on Second Avenue. She also accurately described the street location. She stated that there were four parked cars in the area and the one broken into was a blue, late '90s model Dodge Caravan.

Further, Parks reported objective facts that indicated criminal rather than legal activity. Kennedy, 107 Wn.2d at 7. An informant's "bare conclusion unsupported by any factual foundation" is insufficient to support an investigatory stop. Sieler, 95 Wn.2d at 49. In both Z.U.E. and Hopkins, the court found informants unreliable when they

failed to allege objective facts indicating a crime had occurred. Z.U.E., 178 Wn. App. at 786; State v. Hopkins, 128 Wn. App. 855, 864, 117 P.3d 377 (2005). Here, Parks told the dispatcher that she "saw a robbery." She later clarified that someone "broke into a car." Parks also confirmed that the suspect had entered the car:

> Dispatch: Okay. But he actually did enter the car?
> Caller: Yeah.

Parks reinforced her factual basis for these allegations by stating that the incident "just now happened" and that the car was directly across the street from her house. Parks reported facts she personally observed.

Howerton argues that even if Parks provided a sound factual basis for her claims, Hutchinson was unaware of this factual basis. We disagree. Specifically, Howerton claims that Hutchinson was unaware that Parks was an eyewitness. Indeed, police may not assume that an informant was an eyewitness. See State v. Vandover, 63 Wn. App. 754, 759–60, 822 P.2d 784 (1992). But here, the record shows that the 911 dispatcher communicated all the relevant facts to Hutchinson, including that the citizen informant personally saw criminal activity. A summary of the radio communication[3] between Hutchinson and the dispatcher demonstrates the dispatcher told Hutchinson that the citizen informant saw Howerton enter a parked car:

> [Dispatch:] VEH PROWL JUST, SUSP COA ON FOOT SB 2ND
> . . . .
> Race: B Sex: M Hght: 507 Wght: THIN Misc: BLK BAGGY LEATHER JACKET BAGGY PANTS SHORT HAIR
> . . . .

[3] A computer-aided dispatch (CAD) printout records all of the communication traffic involving 911 dispatch, the reporting party, and the officers.

> RP [Reporting Party] SAW HIM ENTER A VAN , UNK[OWN] IF HE STOLE ANYTHING . . . . VAN IS PARKED W/4 OUTHER [sic] VEHS ACROSS STREET FROM LOC
> . . .
> VehCol: BLU Year: 1995 Make: DODG Model: MINIVAN

(Emphasis added.) At the suppression hearing, Hutchinson confirmed that the report indicated the citizen informant was an eyewitness and that he received the report before seizing Howerton:

> [The State:] Sir, on the CAD [computer-aided dispatch report] around minute 2:04:09, the information there about the suspect being unknown of what was taken by suspect in a van, was that information that was provided to you as well in advance of your seeing Mr. Howerton?
> [Hutchinson:] It looks like that information was provided at 0204, and I came into the area at 0206, so approximately two minutes beforehand is when that information would have been provided.
> Q. And so this indicates that a reporting party saw him, the suspect, in her van—
> A. Right.
> Q. -- unknown if he stole anything, parked across the street from the location. So that information, is that indicative of what would have been related to you over the radio?
>
> [Hutchinson:] I believe so, yes.

1 Report of Proceedings (Mar. 10, 2014) at 27–28. The CAD report and Hutchinson's testimony show that he knew the citizen informant was an eyewitness and had reported objective facts indicating criminal activity. The facts known to Hutchinson, discussed above, support a reasonable suspicion sufficient to detain Howerton.

Parks's contemporaneous report of the criminal activity also weighs in favor of her reliability. In Navarette, commenting, "[T]his is a 'close case,'" 134 S. Ct. at 1692, the Supreme Court found an informant's tip reliable when the informant reported a drunk driver almost immediately after being run off the road by that driver:

> That sort of contemporaneous report has long been treated as especially reliable. In evidence law, we generally credit the proposition that statements about an event and made soon after perceiving that event are especially trustworthy because "substantial contemporaneity of event and statement negate the likelihood of deliberate or conscious misrepresentation." Advisory Committee's Notes on Fed. Rule Evid. 803(1) . . . . Unsurprisingly, 911 calls that would otherwise be inadmissible hearsay have often been admitted on those grounds.

Navarette, 134 S. Ct. at 1689. The Court noted that police confirmed the drunk driver's location based on the informant's tip. It was located a few miles away roughly 18 minutes after the 911 call. Navarette, 134 S. Ct. at 1689. Similarly, Parks reported the crime immediately after she witnessed it. She told the 911 dispatcher that it "just now happened." Six minutes later, Hutchinson found Howerton walking south on Second Avenue Southwest just as Parks had described. When Hutchinson detained Howerton, it was within 50 yards of the car he had broken into. Parks was able to view Hutchinson's entire interaction with Howerton from her house.

Howerton argues Parks's tip lacked sufficient indicia of reliability, relying mainly on Hopkins and Z.U.E.[4] We are not persuaded by Howerton's reliance on these cases. Neither case controls due to the significant factual differences present here. For instance, in Z.U.E., the court found one informant's tip unreliable when the record failed to clearly establish the basis for the informant's knowledge. Z.U.E., 178 Wn. App. at 785. The court found the second informant's tip unreliable because the informant failed to allege objective facts indicating criminal activity. Z.U.E., 178 Wn. App. at 786. The second informant alleged facts suggesting the suspect was a minor in possession of a firearm, but the informant failed to explain how she knew the suspect was a minor, and

[4] We note that Z.U.E. is currently under review at the Washington Supreme Court. State v. Z.U.E., No. 89894-4.

simply "carrying a gun is not automatically a crime." Z.U.E., 178 Wn. App. at 786. Similarly, in Hopkins the informant alleged only that the suspect was carrying a gun, which is "insufficient to justify an investigatory stop." Hopkins, 128 Wn. App. at 864 n.6.

The record here clearly establishes Parks's basis of knowledge. Unlike the first informant in Z.U.E., Parks unequivocally stated she was an eyewitness and 911 dispatch communicated that fact to Hutchinson before he seized Howerton. Further, unlike the second informant in Z.U.E. and the informant in Hopkins, Parks alleged objective facts indicating criminal activity. The dispatcher told Hutchinson that the reporting person actually saw the suspect enter a parked car. These facts present a far more compelling case for reliability than either Z.U.E. or Hopkins. It is well settled that the reasonableness of police action when making an investigatory stop must be reviewed on a case by case basis. Lesnick, 84 Wn.2d at 944 ("Terry . . . emphasize[s] that no single rule can be fashioned to meet every conceivable confrontation between the police and citizen. Evaluating the reasonableness of the police action and the extent of the intrusion, each case must be considered in light of the particular circumstances facing the law enforcement officer."). We conclude Parks was a reliable citizen informant under the circumstances here.

2. Whether the Information was Obtained by Reliable Means

Under the totality of the circumstances test, courts also consider whether the information was obtained in a reliable fashion. Lee, 147 Wn. App. at 918. In Navarette, the Court stated that use of the 911 system enhances the reliability of an informant's tip. Navarette, 134 S. Ct. at 1689–90. Specifically, "[a] 911 call has some features that allow for identifying and tracing callers, and thus provide some safeguards against

making false reports with immunity. . . . Given the foregoing technological and regulatory developments . . . a reasonable officer could conclude that a false tipster would think twice before using such a system." Navarette, 134 S. Ct. at 1689–90; see also Saggers, 182 Wn. App. at 847 ("[The Supreme Court's] discussion of reliability [in Navarette] includes the observation that the Federal Communications Commission [FCC] requires cellular phone carriers to report a caller's phone number and geographic location to 911 dispatch, making the caller more readily identifiable." (citing Navarette, 134 S. Ct. at 1690)). In Saggers, the informant "was completely unknown to the police, called from a pay phone that was not traceable to him personally, and he disappeared after making the call." Saggers, 182 Wn. App. at 845–46. Under these facts, the technological safeguards of the 911 system described in Navarette made no difference as to the 911 call's reliability.

But unlike Saggers, Parks called 911 from her house using her personal cell phone.[5] She provided her full name, telephone number, and address. She indicated she was willing to speak with police should they decide to contact her. In Saggers, we noted the "officers had good reason to question the reliability of the 911 call . . . ." Saggers, 182 Wn. App. at 847. Here, Hutchinson had no reason to doubt Parks' reliability.

[5] The caller used "the 911 emergency system, which records calls and can be used to later identify tipsters." Saggers, 182 Wn. App. at 843–44. And the FCC requirement that cellular carriers report the caller's telephone number and location to all 911 dispatch facilitates identity of the caller. Navarette, 134 S. Ct. at 1690.

Corroboration

While not a required factor, as noted above, courts also consider whether police corroborated information from the informant's tip. Lee, 147 Wn. App. at 918. Howerton contends that Hutchinson failed to "corroborate the tip by observing suspicious behavior . . . and '[c]onfirming a subject's description or location or other innocuous facts does not satisfy the corroboration requirement.'" Br. of Appellant at 13 (quoting Z.U.E. 178 Wn. App. at 787). We disagree. The complete facts known to Hutchinson before he detained Howerton corroborate the citizen informant's 911 call.

In Marcum, the court rejected an approach that views observations by police officers "one by one," in isolation divorced from the totality of the circumstances test:

> The trial court's conclusion that the police observations confirming the informant's tip were "innocuous" was likewise unfounded. Indeed, the United States Supreme Court has specifically criticized viewing incriminating police observations, one by one, in a manner divorced from their context as a "divide-and-conquer" approach that is inconsistent with the totality of the circumstances test. See United States v. Arvizu, 534 U.S. 266, 274, 122 S. Ct. 744, 151 L. Ed. 2d 740 (2002). Here, as in Arvizu, the lower court's "evaluation and rejection" of the officers' observations "in isolation from each other" did "not take into account the 'totality of the circumstances.'" 534 U.S., at 274. Here, as in Arvizu, the lower court appeared to believe that each of the officers' observations "was by itself readily entitled to 'no weight.'" 534 U.S. at 274 (quoting United States v. Arvizu, 232 F.3d 1241, 1249-51 (9th Cir. 2000)). Here, as in Arvizu, this approach "departs sharply from the teachings" of the cases that properly examine the totality of the circumstances to determine whether reasonable suspicion exists. 534 U.S. at 274, 122 S. Ct. 744. Contrary to the trial court's implication in its order, "determination that reasonable suspicion exists . . . need not rule out the possibility of innocent conduct." Arvizu, 534 U.S. at 277; see also Kennedy, 107 Wn. 2d at 6 (explaining that activity consistent with both criminal and noncriminal activity may justify a brief detention). Rather, "the determination of reasonable suspicion must be based on commonsense judgment and inferences about human behavior." Illinois v. Wardlow, 528 U.S. 119, 125, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000). "In allowing [investigative] detentions, Terry accepts the risk that officers may stop innocent people." Wardlow, 528 U.S. at 126.

Marcum, 149 Wn. App. at 907–08 (alteration in original) (footnote omitted).

Hutchinson's observations confirming the citizen informant's 911 tip are not disputed. At around 2:03 a.m., he was dispatched to the location of a suspected vehicle prowl. He knew that the citizen informant called 911 within minutes of observing the suspect enter a van that was parked with four other vehicles across the street from the citizen informant's location. He knew the citizen informant did not know if any items were stolen from the van. The dispatcher provided Hutchinson with a detailed description of the suspect and the specific street location and direction he was walking. Three minutes after receiving this information, Hutchinson drove in his patrol vehicle to Second Avenue Southwest and observed Howerton walking south in the direction reported by the citizen informant. When Howerton noticed the police vehicle's presence, he immediately turned around and walked away. Hutchinson detained Howerton because he matched the detailed description of the vehicle prowl suspect provided by the citizen informant to 911. Although a suspect's flight from police alone is not enough to justify an investigative stop, it is a factor that may be considered in determining whether reasonable suspicion existed.[6] State v. Gatewood, 163 Wn. 2d 534, 540, 182 P.3d 426 (2008). Facts that appear innocuous to an average person may appear suspicious to a police officer in light of past experience. See State v. Moreno, 173 Wn. App. 479, 493, 294 P.3d 812 (2013).

[6] We are also not persuaded by Howerton's claim that an attempted car theft does not present a danger warranting an investigative stop. Given our discussion above, this claim warrants no discussion.

The Trial Court's Findings of Fact and Conclusions of Law

Howerton argues in his opening brief that the trial court failed to enter written findings of fact and conclusions of law as required by CrR 3.6. The trial court filed its written findings and conclusions after Howerton submitted his opening appellate brief.

Findings of fact and conclusions of law may be submitted and entered while an appeal is pending if the delay does not prejudice the defendant and there is no indication that the findings and conclusions were tailored to meet the issues presented on appeal. State v. Quincy, 122 Wn. App. 395, 398, 95 P.3d 353 (2004). Here, Howerton waived the issue. In his opening brief, Howerton specifically reserved the right to assign error to the trial court's findings and address the issue of prejudice in his reply brief or a supplemental brief should the trial court file its findings and conclusions. But after the trial court filed its written findings and conclusions, Howerton assigned no error to those findings and did not address the issue of prejudice in his reply brief. Nor did he submit any supplemental briefing addressing the issue.

In any event, Howerton demonstrated no prejudice. The language of the findings and conclusions is consistent with the trial court's oral ruling. The attorney who drafted the findings and conclusions was unaware of the appellate issues. Further, the trial court formally incorporated its oral ruling into the written findings. The trial court's findings and conclusions are properly before this court. Because Howerton assigned no error to any of the findings after they were filed, they are verities on appeal. State v. O'Neill, 148 Wn.2d 564, 571, 62 P.3d 489 (2003).

CONCLUSION

Under the totality of the circumstances, the indicia of reliability in this case demonstrated sufficient reasonable suspicion to support Howerton's detention by Deputy Hutchinson. The citizen informant's 911 tip demonstrated sufficient indicia of reliability, and the officer's observations corroborated suspicious activity. Howerton established no prejudice based on the tardy CrR 3.6 findings and conclusions. We conclude the trial court properly denied Howerton's CrR 3.6 motion to suppress evidence. We affirm the judgment and sentence.

WE CONCUR:

Appendix B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

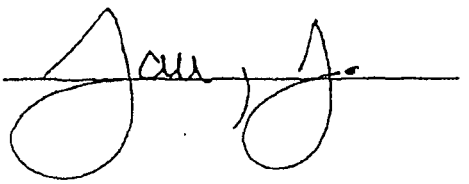
STATE OF WASHINGTON, Respondent, v. DELANTE IAN HOWERTON, Appellant.	NO. 71837-1-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION

The appellant Delante Ian Howerton has filed a motion for reconsideration, and the panel has determined that the motion should be denied; therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

Dated this 7th day of May, 2015.

FOR THE PANEL:



IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Respondent, v. DELANTE HOWERTON, Petitioner.	)))))))))	SUPREME COURT NO. _____ COA NO. 71837-1-I

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 5TH DAY OF JUNE 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DELANTE HOWERTON
DOC NO. 350367
WASHINGTON CORRECTIONS CENTER
P.O. BOX 900
SHELTON, WA 98584

SIGNED IN SEATTLE WASHINGTON, THIS 5TH DAY OF JUNE 2015.

X Patrick Mayovsky

Sanders, Laurie

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