FILED
AUG 28, 2014
Court of Appeals
Division III
State of Washington

NO. 32233-5-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

APPELLANT,

v.

CODY RAY FLORES,

RESPONDENT.

APPELLANT'S REPLY BRIEF

D. ANGUS LEE
PROSECUTING ATTORNEY

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I. INTRODUCTION

The respondent in this case does an excellent job setting out the standards for a stop under *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L.Ed.2d 889 (1968), as those standards existed at the start of this case. He also creates a well-articulated argument that the police lacked the requisite individualized suspicion to stop Cody Flores for an investigative stop under *Terry* and its progeny, although he failed to discuss the most recent cases on the issue. However, that is all irrelevant. The State has never argued that the police were justified in stopping Flores pursuant to *Terry*. Instead they were justified in stopping Geovanni Powell, and the officers ordering the movement of Flores was justified to secure the scene as Flores was accompanying Powell.

The trial court did not rely on a *Terry* analysis in its decision, and notably here, the respondent does not attempt to justify the trial court's reasoning. While not fatal to the respondent's case, as the appellate court can affirm the trial court on any reason appearing in the record, *McDaniel v. City of Seattle*, 65 Wn. App. 360, 369, 828 P.2d 81 (1992), the dissonance between the trial court's reasoning and the respondent's is telling as to the lack of legal support for either.

II. ARGUMENT

A. The stop of Powell was justified.

Geovanni Powell had a warrant for his arrest. The respondent concedes this justifies stopping Powell. The Court need go no further to determine that Powell's stop was justified. However, should the court choose to go further, it can.

In the trial court the State conceded that the anonymous tip did not support stopping Powell. In doing so it relied on *Fla. v. J.L.*, 529 U.S. 266, 120 S. Ct. 1375, 146 L. Ed. 2d 254 (2000). However, as noted in the State's opening brief, after the trial court issued its decision the U.S. Supreme Court decided *Navarette v. California*, __ U.S. __, 134 S. Ct. 1683, 188 L. Ed. 2d 680 (2014), distinguishing *J.L.* After the State's opening brief was filed Division I decided *State v. Saggers*, __ Wn. App.__, _P.3d ___, 2014 Wash. App. LEXIS 1949 (2014). Division I held "a 911 phone call from an unknown caller who gives a contemporaneous eyewitness account of a serious offense presenting an exigent threat to public safety may provide a valid basis for an investigatory (Terry) stop." (Slip op. at 1) This describes exactly the call the officers responded to in this case. In *Sagger* the suspicion supporting the *Terry* stop had dissipated by the time the inculpatory evidence had been found. Not so in this case. The stop and finding of evidence was

immediately after the 911 call. Given recent case law this was a justifiable *Terry* stop.

B. Given the stop of Powell was justified, the cases cited by the respondent are not on point.

The respondent relies primarily on *State v. Z.U.E.*, 178 Wn. App. 769, 315 P.3d 1158 (2014) (*petition for review granted* 180 Wn.2d 1020), and *State v. Thompson*, 93 Wn.2d 838, 613 P.2d 525 (1980). However, both are concerned with the justification for the initial stop, not what happened to companions of the person stopped. In *Z.U.E.* Division II determined the initial stop was unreasonable, and expressly did not address the scope of the stop, which included Z.U.E. as a passenger in the car. *Z.U.E.*, 178 Wn. App. at 792 n.6. *Thompson* is similar. Thompson was the driver of a car that was stopped. The Supreme Court held the initial stop unreasonable, not that the scope of the stop extending to a companion was unreasonable. Because the stop of Geovanni Powell was reasonable, indisputably because of the warrant, and on a disputed basis as a *Terry* stop, the cases cited by the respondent are simply not on point.

The defendant also cites *State v. Richardson*, 64 Wn. App. 693, 825 P.2d 754 (1992). But that case is about when a social contact ripens into an investigative stop and consent to search, none of which is relevant to this case. In addition there was no indication of violence in

Richardson. This case is about whether the police can control the movements of a companion of a legitimately stopped person to ensure the scene is secure when there has been an anonymous tip of violent behavior with a firearm.

C. Given the stop of Powell was reasonable, the correct test to evaluate the seizure of Flores is *Mendez/Parker*.

As discussed in the State's opening brief, the correct test to apply as to what the police can do with a companion of a validly stopped suspect comes from *State v. Mendez*, 137 Wn.2d 208, 970 P.2d 722 (1999) and *State v. Parker*, 139 Wn.2d 486, 502, 987 P.2d 73 (1999). The State Supreme Court has expressly held the standards are not the same as those for a *Terry* stop. *Mendez*, 137 Wn.2d at 220-221. All that is required is an objective rational. *Id.* That objective rational is provided, both independently and when considered as a whole, by the anonymous tip about Powell pointing a gun at someone's head and the fact of Powell's arrest. There was also at least some corroboration of the tip in that Geovanni Powell was where the caller said he was. Supporting the officers' objective rational is the fact that Powell has been pictured on Facebook either with individuals sporting guns or holding a gun himself, and is identified as a Crip gang member. While these latter two facts are probably not enough in and of themselves to justify the caution exercised

during the stop, they do tend to emphasize that caution is required based on the first two facts.

While the anonymous tip may or may not be enough to support a *Terry* stop, there is absolutely no authority supporting the proposition that officers must risk their lives when conducting an otherwise legitimate stop by ignoring such a tip. If officers have insufficient evidence to support a stop they need not engage. Here that was not an option because of a warrant. The difference is noted by the U.S. Supreme Court. "[T]he requirement that an anonymous tip bear standard indicia of reliability in order to justify a stop in no way diminishes a police officer's prerogative, in accord with *Terry*, to conduct a protective search of a person who has already been legitimately stopped. We speak in today's decision only of cases in which the officer's authority to make the initial stop is at issue." *Fla. v. J.L.*, 529 U.S. at 274.

III. CONCLUSION

Officer McCain legitimately stopped Geovanni Powell by saying "Geo, you need to stop." RP 72. Cody Flores was walking next to Powell and stopped at the same time. Maybe this case would have been different if Flores had kept walking, but he did not. *Mendez* and *J.L.* are clear that Terry standards for an initial stop do not apply to this situation, at least as far as controlling companions of the stopped person and moving them

around to where the officers need them for safety purposes. Instead all that is needed is an objective rational. That rational is provided by the anonymous tip and the arrest of Mr. Powell. As Flores was being moved to where the officers needed him to be to control the situation Flores told Officer Ouimette he had a gun. Given the tip provided the officers were more than justified in taking the gun for their security and to investigate further. "Where an officer's conduct is connected to safety concerns rather than investigatory goals, [the court is] particularly reluctant to substitute [its] own judgment for that of the officer." *State v. Collins*, 121 Wn.2d 168, 173. 847 P.2d 919 (1993). The trial court erred when it substituted its judgment for that of Officers McCain and Ouimette. The decision of the trial court should be reversed and the case remanded for further proceedings.

Dated this 27th day of August 2014.

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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON, Appellant, v. CODY RAY FLORES, Respondent.	)	No. 32233-5-III DECLARATION OF SERVICE

Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to Respondent and to David Bustamante, his attorney, containing a copy of the Appellant's Reply Brief in the above-entitled matter. A copy of said Appellant's Reply Brief was also e-mailed to David Bustamante at the address below.

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Dated: August 28, 2014.

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