31868-1-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

WESLEY J. WEYAND, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF BENTON COUNTY

APPELLANT'S SUPPLEMENTAL BRIEF

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A. ISSUE

1. Does a person's visit to a known drug house at 2:30 in the morning constitute grounds for an investigative seizure if, upon leaving the house, the person walks quickly to a nearby car and looks up and down the street before getting in and driving away?

B. STATEMENT OF THE CASE

A police officer stopped Mr. Weyand after seeing him and a companion leave a known drug house at 2:30 in the morning, walk briskly to a parked car, look up and down the street, get into the car and drive away. The trial court found that Mr. Weyand's actions gave rise to an articulable suspicion that he was engaged in criminal activity and that the fruits of the investigative stop were admissible at trial. (CP 72) Mr. Weyand appealed his ensuing conviction. This court affirmed the conviction, acknowledging:

> We consider the State of Washington to have presented the slimmest of evidence needed to justify the stop of Wesley Weyand. For this reason, we do not wish the opinion to become precedential and we decline publishing it.

State v. Weyand, 2015 WL 411604 at 18, COA No. 31868-1-III.

The Supreme Court granted review and remanded for reconsideration in light of *State v. Fuentes*, 183 Wn.2d 149, 352 P.3d 152 (2015).

C. ARGUMENT

1. NEITHER WALKING BRISKLY NOR LOOKING AROUND IS SUSPICIOUS ACTIVITY THAT CAN SUPPORT THE STATE'S SEIZURE OF ANY PERSON LATE AT NIGHT IN A HIGH-CRIME AREA.

Conclusions of law in an order pertaining to suppression of evidence are reviewed *de novo*. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999). Under Article 1, § 7 of the Washington Constitution, warrantless seizures are per se unreasonable and the State bears the burden of demonstrating that the warrantless stop falls within one of the narrow exceptions to the general rule. *State v. Williams*, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). Exceptions authorizing seizure on less than probable cause are narrowly drawn and carefully circumscribed. *State v. White*, 97 Wn.2d 92, 640 P.2d 1061 (1982).

One such exception is a brief stop to investigate suspicious activity. *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); *State v. Hudson*, 124 Wn.2d 107, 112, 874 P.2d 160 (1994); *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). "A *Terry* stop requires

a well-founded suspicion that the defendant engaged in criminal conduct." *State v. Doughty*, 170 Wn.2d 57, 62, 239 P.3d 573 (2010). In determining the presence of such a suspicion, the court considers the totality of the circumstances. *Id.* "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." *Id*.

Circumstances that appear suspicious to an officer do not support a reasonable suspicion of criminal activity unless the suspicion indicates, or at least suggests, criminal activity. *See State v. Fuentes*, 183 Wn.2d at 159-69.

A suspect's startled reaction on seeing the police does not suggest criminal behavior. 183 Wn.2d at 159, *citing State v. Gatewood*, 163 Wn.2d 534, 540, 182 P.3d 426 (2008). The fact that a suspect is pale and shaking does not add to "circumstances that suggest criminal activity" unless the officer attributes this appearance to any illicit conduct. *Id*.

On the other hand, a suspect whose arrival at a known drug house occurs following numerous brief visits by other individuals, and who carries a shopping bag into the premises and returns shortly thereafter with the bag noticeably less full, may be reasonably suspected of specific criminal activity, namely delivery of a controlled substance. *Id.* at 162-63.

Walking briskly and looking around is conduct which may or may not be associated with criminal activity, but it does not suggest any particular activity merely because is occurs late at night at premises with a known history of drug sales. Indeed, leaving the visited premises and walking immediately to a nearby vehicle without stopping is conduct tending to negate suspicions of drug loitering. *Id.* at 160.

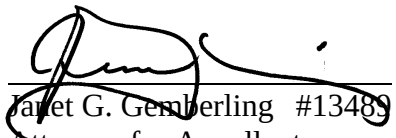
The Court of Appeals decision fails to identify any rational basis for inferring drug-related activity from a suspect's walking briskly to his vehicle while looking around. An officer's testimony that the behavior appeared "suspicious," without more, merely confirms that the alleged suspicion of criminal activity was just that, mere inarticulable suspicion. The opinion affirming a conviction that rests on the alleged reasonableness of such suspicion is inconsistent with *Fuentes*.

D. CONCLUSION

Mr. Weyand's conviction should be reversed.

Dated this 12th day of November, 2015.

JANET GEMBERLING, P.S.



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No.31868-1-III
	)	
vs.	)	CERTIFICATE
	)	OF MAILING
WESLEY J. WEYAND,	)	
	)	
Appellant.	)	

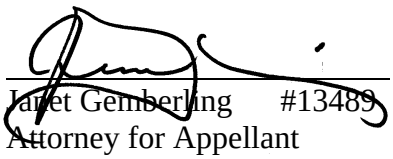
I certify under penalty of perjury under the laws of the State of Washington that on November 12, 2015, I served a copy of the Appellant's Supplemental Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

Andrew K. Miller
prosecuting@co.benton.wa.us

I certify under penalty of perjury under the laws of the State of Washington that on November 12, 2015, I mailed a copy of the Appellant's Supplemental Brief in this matter to:

Wesley J. Weyand
705 Eighth Street
Benton City, WA 99320

Signed at Spokane, Washington on November 12, 2015.



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