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Supreme Court No.
Court of Appeals No. 36044-0-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

V.

JOSUE MANUEL OSORIO LOPEZ, Petitioner

BRIEF OF PETITIONER

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A. IDENTITY OF PETITIONER

Josue Osorio Lopez, through his attorney, Alex Newhouse, petitioners the Court for review of a decision of the Court of Appeals in State v. Josue Osorio Lopez, Court of Appeals No. 36044-0-III

B. COURT OF APPEALS DECISION TO BE REVIEWED

The Court of Appeals filed an unpublished opinion on August 15, 2019. The Court affirmed the decision of the trial court upholding the seizure of the Mr. Osorio Lopez. A copy of the decision filed under case number 36044-0-III is attached to this petition and contained within its appendix.

C. ISSUE PRESENTED

Under both the Fourth Amendment and Article I, section 7 of the Washington Constitution, does a familiar but easily transferable and fungible vehicle involved in a prior supervised and controlled buy from over nine months prior give rise to the reasonable suspicion necessary to seize an unknown driver of a comparable vehicle unexpectedly engaged in similar parking lot maneuvers? The Appellant maintains that Washington law and/or the Washington and US Constitutions do not support such a seizure.

D. STATEMENT OF THE CASE

In March of 2016, LEAD Task Force learned form a confidential informant (CI) that the defendant may be involved in selling narcotics. (RP 7). LEAD arranged for the CI to purchase illegal drugs from the defendant on April 13, 2016. (RP 7). The CI was Direction to arrange the location and time of the contact with the defendant (RP 9). The defendant allegedly drove to the location, exited his vehicle after some parking lot maneuvering, and conducted an illegal transaction outside of his vehicle with the CI. (RP 15-16). The substance allegedly sold to the CI field tested positive for cocaine. Lab results for this substance did not return until after January 26, 2019 (RP 23).

The maneuvering on April 13, 2016 that Detective Gusby described through his testimony went as follows: 1) the CI arrived first; 2) a white ford truck with a Botech sticker on the tailgate arrived after the CI; 3) the occupants of the vehicle met and the CI entered the white ford; 4) the white truck drives around the parking lot and parks in a stall; 5) after a few seconds, the white truck drives back to the CI's car and the CI gets out; 6) the white truck parks and the defendant is seen exiting and walking to the CI's car; 7) the CI and the defendant met in person outside of the CI's car and shook

hands; 8) and finally the CI and the defendant parted ways. (RP 12-16). Before this date, it is completely unknown if Mr. Osorio Lopez had ever even been the subject of any criminal investigation whatsoever. There was no testimony about matching license plates, fleets of company vehicles with similar graphics as the suspect vehicle, or how law enforcement came to believe that the suspect vehicle was the only vehicle in the City of Sunnyside with the graphic at issue.

Almost 9 ½ months later on January 26, 2017, Detective Boone of the LEAD task force was in the parking lot of Bi-Mart in Sunnyside, WA conducting surveillance for an unrelated investigation. (RP 26). He noticed a truck that he recognized involved in the controlled buy from March of 2016. (RP 27). He recognized the vehicle as "being a suspect in . . . an unrelated investigation." (RP 27). He recognized the tailgate emblem and noticed that it was occupied by one individual. (RP 27). The race, sex, build, hair color, eye color and height of this individual was unknown at this time. Detective Boone testified:

> Yeah, immediately I recognized it as I participated in previous surveillance operations where I observed – I knew Mr. Lopez to be the operator of that vehicle. I observed that the vehicle throughout the community and

> knew Mr. Lopez to be the driver of it and it was immediately recognizable to me.

(RP 27).

Detective Boone testified about the vehicle maneuvering observed. (RP 28-33). The maneuvering went as follows: 1) A white ford truck with Botech graphics on the tailgate arrived in the parking lot and pulled up side by side to a blue Chevrolet pickup; 2) it is unknown how many occupants if any were in the blue Chevrolet at the onset but when Detective Boone moved to get a better view he could see two individuals in the white truck; 3) the white truck began moving so Detective Boone followed; 4) the white truck did not leave the parking lot so observations continued; 5) the white Ford was observed doing a half circle and then parked near the blue Chevrolet; 6) the decision was made to seize the Ford Truck and its occupant at this time. (RP 27-33); 7) Deputy Paganelli just happened to be in the area and was a K-9 officer. He was radioed to perform an investigative detention. (RP 33). The driver was not identified before the seizure. No drugs or money were seen exchanged before the seizure.

Based on the evidence recovered after the seizure at issue, the State of Washington charged Mr. Osorio Lopez with Possession with intent to deliver a controlled substance. The defense filed a 3.6

motion challenging the seizure in questions, which the trial court denied (CP 58). Though the state and the defense were arguing about the existence of reasonable suspicion for the seizure, the trial court denied the motion finding probable cause supported the seizure. (CP 58). The state did not argue that the stop was based on probable cause, nor did the defense. A stipulated trial followed for purposes of appealing the trial court's ruling.

On Appeal, Division III of the Washington Court of appeals upheld the trial court's denial of Mr. Osorio Lopez's motion to suppress when it ruled that: 1) a trained law enforcement officer cannot rely on observations of abnormal behavior alone to justify a seizure; 2) that the driving in the parking lot on January 26, 2017 alone did not give reasonable suspicion for the seizure in question; and 3) the prior controlled buy and the distinct truck, coupled with the abnormal behavior observed did give law enforcement probable cause to arrest the unknown driver of the suspect vehicle. (State v. Osorio Lopez 36044-0-III, pages 11 – 12, 13). Division III correctly pointed out that Mr. Lopez-Osorio cites no authority that would indicate a ruling otherwise would be appropriate. Id. at 13 Mr. Osorio-Lopez is asking that this court create such authority and offers the reasons for his request in the argument that follows.

E. ARGUMENT

THE FACTS KNOWN TO LAW ENFORCEMENT WERE NOT SUFFICIENT ENOUGH UNDER THE WASHINGTON STATE CONSTITUTION, THE US CONSTITUTION, OR WASHINGTON CASE LAW TO JUSTIFY THE SEIZURE.

Under the laws of the State of Washington, its constitution and case law included, and the US Constitution, the seizure at issue cannot stand. In its opinion, Division III cites to State v. Pressley, 64 Wn. App. 591 (1992) to support its contention that:

> [w]hile and inchoate hunch is insufficient to justify a stop, circumstances which appear innocuous to the average person may appear incriminating to a police officer in light of past experience. The officer need not ignore that experience.

Lopez 36044-0-III, page 10. In response to this cited support, appellant must first point to the testimony from Detective Gusby when it comes to the surveillance at issue. He stated:

> It depends - - it all depends on what we're doing at that time. IF we're watching a drug transaction we try to set up depending on how many people we have on our team at the time, either in a parking lot, outside the parking lot, so we can see all traffic in. See our target if it's a specific drug dealer, who he's meeting with, vehicles, try to get identification so we can – we try to set up also for a – we call it a takeaway so if they leave the parking lot we're able to follow him no matter what direction they leave out of the parking lot.

(RP 5).

Based on their training and experience, LEAD officers apparently have developed a strategy. The strategy was developed to: 1) "see if it's a specific drug dealer; 2) see who [the drug dealer] is meeting with; and 3) identify vehicles to officers are "able to follow [the drug dealer] no matter what direction they leave out of the parking lot." (RP 5). In this case, a law enforcement officer observed a truck he thought he recognized from 9 months earlier. Law enforcement did not identify the driver of this truck. They did not identify the other individual involved. Law enforcement seized the truck and its occupant just outside of the parking lot. (RP 22-33) The seizure in this case clearly did not fall under the surveillance techniques testified too. What was important in the strategy to be employed was completely tossed aside to effectuate the seizure in question.

This "training and experience" issue is further exacerbated by what we know of Detective Boone's training and experience. Detective Boone started working for the Gambling Commission in July of 2012. (RP 24). He was assigned to the LEAD Drug Task Force in December of 2015. On the date of the 2017 incident, he had been working with LEAD for approximately 13-14 months. It is unknown when he received his 280 hours (7 days) of training "regarding drug detention and interdiction." (RP 24 – 25). For all we know, he could have just

finished it leaving him rather inexperienced or he could have finished it or started and completed it after January 26, 2017. We do not know how many instances of surveillance he had conducted up until the day in question but considering the length of time he had been with LEAD it could not have been many. (RP 25- 26).

Appellant must also cite to State v. Weyand, 188 Wn.2d 804 (2017) in response. In the Weyand case, the Court held: "the facts known to the police did not justify stopping Weyand and the evidence discovered during that encounter should have been suppressed." State v. Weyand, 188 Wn.2d 804, 807 (2017).

In Weyand, the facts as taken direct from the case are easily comparable to what we are dealing with here.

> On December 22, 2012, at 2:40 in the morning, Corporal Bryce Henry saw a car parked near 95 Cullum Avenue, Richland, Washington, that had not been there 20 minutes prior. Corporal Henry did not recognize the car and ran the license plate through an I/LEADS (Intergraph Law Enforcement Automated System) database. That license plate search revealed nothing of consequence about the vehicle or its registered owner. After parking his car, Corporal Henry saw Weyand and another male leave 95 Cullum. As the men walked quickly toward the car, they looked up and down the street. The driver looked around once more before getting into the car. Weyand got into the passenger seat. Based on these observations and Corporal Henry's knowledge of the drug history at 95 Cullum, he conducted a Terry stop of the car.

Id. at 807. In our case, we have a familiar truck that was involved in a carefully orchestrated controlled buy 9 months prior – *one incident*. In Weyand, we had two males come out of a home mired in a history of drug offenses and other crime. Id. The males looked up and down the street suspiciously and furtively before getting in the car. Id. Once in the car, the officer in Wyland performed a Terry Stop. The facts in Weyand continue:

> The history of drug activity at 95 Cullum extends back to June 2011. In June 2011, officers served a search warrant at 95 Cullum, found methamphetamine, and arrested numerous individuals for possession of a controlled substance. In January 2012, someone called the police seeking help for a resident of 95 Cullum who they reported was using methamphetamine. Also in January 2012, officers went to 95 Cullum to find a wanted subject. They found the subject, who lived at 95 Cullum at the time, and he was in possession of a controlled substance. In May 2012, an anonymous complainant reported that four to five people lived at 95 Cullum and they appeared to be using narcotics and "tweaking." In June 2012, an anonymous complainant reported that there had been a high flow of short stay foot traffic at 95 Cullum.
>
> In June 2012, the police sent a landlord notification letter to the owner of 95 Cullum, alerting her that several of the residents had extensive criminal histories. Over the course of the following six months, police arrested those residents several times for both drug- and non-drug-related offenses. In December 2012, police arrested two subjects for drug offenses. Neither of them were 95 Cullum residents, but both had been at 95 Cullum prior to their arrests. Finally, on December 18, 2012 (four days before Weyand's arrest), police executed a search warrant at 95 Cullum. During that search, police found methamphetamine and drug

> paraphernalia, and police arrested several people for both drug- and non-drug-related offenses. Because of this history of drug use and possession, Corporal Henry identified 95 Cullum as a "known drug location."

Id. 808. Again, in Mr. Osorio Lopez's case, *we have one single incident of a prior controlled buy from 9 months prior* in a truck (easily transferable) as opposed to a home with a long list of illicit drug and other criminal activity. Also, in Mr. Osorio Lopez's case, the drugs obtained by the controlled buy in 2016 were not lab tested before the 2017 event. No arrests had been made and no charges filed from the 2016 event. The record is silent as to whether law enforcement even suspected Mr. Osorio Lopez of still being actively engaged in the practice of selling illicit drugs. The facts in Weyand continue on:

> After stopping Weyand, Corporal Henry observed that Weyand's eyes were red and glassy and his pupils were constricted. Corporal Henry is a drug recognition expert and believed that Weyand was under the influence of a narcotic. When Corporal Henry ran Weyand's name, he discovered an outstanding warrant and arrested Weyand. Corporal Henry searched Weyand incident to that arrest and found a capped syringe. Corporal Henry advised Weyand of his Miranda rights, and Weyand admitted that the substance in the syringe was heroin that he had bought from a resident inside 95 Cullum.

Id. 809. There are no allegations of impairment in Mr. Osorio Lopez's case. Mr. Osorio Lopez did not have a warrant for his arrest.

> The State charged Weyand with one count of unlawful possession of a controlled substance. Clerk's Papers at 1; RCW 69.50.4013(1). Weyand moved to suppress all evidence and statements under Criminal Rules (CrR) 3.5 and 3.6 and to dismiss the case against him. Weyand argued that the officer did not have sufficient individualized suspicion to conduct the investigatory stop.

Id. It is difficult from the perspective of the defense, when comparing Weyand with the facts in Mr. Osorio Lopez's case, to see how Mr. Orsorio Lopez's fact pattern should result in a different outcome as it appears on its face that the fact pattern in Weyand would create identical amounts of suspicion. In Weyand, the Court found fault in the trial court's heavy reliance on the "known drug location" (*in Mr. Osorio Lopez's case we have a vehicle involved in a prior incident 9 months earlier, as opposed to a home involved with ongoing criminal activity*). There needed to be something more. Id. 814 -815. If visiting a home known for criminal activity is not enough, how can the seizure against Mr. Osorio Lopez stand considering the following when pondering the maneuvering in the parking lot:

> In this case, the Court of Appeals distinguished Doughty, apparently concluding that walking quickly while looking up and down the street was a furtive movement. But one could conclude that looking around at 2:40 in the morning is an innocuous act, which cannot justify an intrusion into a person's private affairs.

Id. 815.

Again, it is important to note that we do not know if what was observed by Detective Boone during the day and in public was more inherently suspicious or innocent because the record is relatively silent on this issue. See Pressley, 64 Wn. App. at 596. Is evidence of just how innocuous and common behavior actually is within this community not necessary? (RP 5-6, 31-31). Would what was observed justify a seizure if it involved a van as opposed to a familiar pickup? Is it more suspect or innocent in Sunnyside, WA for an unknown individual to pull up and speak to another in a parking lot and ultimately let them in to show off a new stereo, phone, or gadget? What if the driver of the familiar truck was female and all the other facts were the same? Would there still be lawful reasons to stop the familiar truck? The defense would argue that there would not be. Division III of the Court of Appeals stated: "The facts in Josue Lopez's appeal contain additional suspicious behavior." Lopez 36044-0-III, page 12. The Court explains by stating: "Lopez previously sold cocaine to an informant, drove the same unique pickup truck, and employed the same vehicle maneuvers during the transaction." Id. Respectfully, the appellant feels it important to point out that who was driving the "unique pickup truck" was not known before the seizure at issue; however, the Court does acknowledge this later in its opinion but notes that Lopez cited no authority indicating the

facts as known would not support a finding of reasonable suspicion. Id. at 13.

In State v. Doughty, 179 Wn.2d 57 (2010), a Spokane police officer stopped the defendant after he saw him park his car outside a suspected drug house at 3:20am, enter the house, return to his car in less than two minutes, and then drive away. Doughty, 179 Wn.2d at 59. The Court in Doughty noted that a person's presence in a high-crime area at a "late hour" does not give rise to a reasonable suspicion sufficient to detain that person. Id. at 62. In Mr. Lopez Osorio's case, during daylight hours and in public, a familiar *vehicle* demonstrated a similar driving pattern observed from a controlled buy that occurred 9 months earlier. Again, it is hard for the defense to see how the facts of Mr. Osorio Lopez's case can result in a different outcome than Doughty, especially when one reads the Doughty case with State v. Richardson, 64 Wn. App. 693 (1992) in mind. *See also* State v. Fuentes, 183 Wn.2d 149 (2015) and State v. Kinzy, 141 Wn.2d 373 (2000).

In Mr. Ororio Lopez's case with respect to the 2017 incident, an individual in another vehicle was involved and never identified (hereinafter Suspect 2). No drugs or money was seen exchanged. (CP 56) (RP 27). During daylight hours, we have a familiar truck engaged

with Suspect 2 and another vehicle in public. The engagement – according to testimony on the matter – was indicative of a drug transaction. This suspicion coupled with the 2016 controlled buy was what the trial court found as amounting to probable cause for Mr. Ororio Lopez's seizure. In Richardson, we have an individual walking at 2:30pm with another who had been seen earlier engaged in activity suspected of "running drugs." The Court in Richardson found the stop not supported by reasonable suspicion. Richardson, 64 Wn. App. 693, 697 (1992) It is important to note that drugs can just as easily be carried in a pocket and moved on foot. They often are. It is hard to see how walking with a suspected drug trafficker late at night/early in the morning is any less suspicious than what was observed and known in Mr. Osorio Lopez's case.

F. Conclusion

To meet its burden of showing a Terry stop was valid, the State must prove the officer had a well-founded suspicion that the defendant was engaged in criminal conduct. Doughty, 170 Wn.2d at 62. This requires the State to demonstrate that the circumstances at the time of the stop were more consistent with criminal than with innocent conduct. Pressley, 64 Wn. App. at 595-596. Was there any demonstration at the hearing in question that what was observed on January 26, 2017 did or

did not happen frequently in Sunnyside, WA for completely lawful reasons? The answer is a resounding "no." Though what occurred may appear to the trained officer as suspicious or indicative of criminal activity, and while an officer is not required to ignore the behavior observed, *true reality* may easily tell us that it could just as easily be innocent behavior in the community in which it occurred. Id. We cannot pretend this reality does not exist. It may differ from culture to culture and community to community, and we must remember it is the State's burden here. "The State must establish the exception to the warrant requirement by clear and convincing evidence." State v. Garvin, 166 Wn.2d 242, 250 (2009). It is a heavy burden of proof. Id. The state simply cannot meet its heavy burden here since ". . . it is an elementary maxim that a search, seizure or arrest cannot be retroactively justified by what is uncovered." U.S. v. Como, 340 F.2d 891, 893 (1965). The facts and circumstances behind the seizure in question must result in suppression of the evidence obtained. At its most fundamental level and without artful legal language, the question really is this: should one single controlled act that is never charged or pursued through lab analysis be allowed to attach to a *vehicle* in order to elevate subsequent hunches to a degree permitting seizure of all of this vehicle's occupants even when their identities are not known? And

if so, for how long? Forever? Based on the arguments contained herein and in the record in its entirety, the appellant respectfully requests review by the Washington State Supreme Court and requests that the Court suppress the evidence as a violation of Mr. Osorio Lopez's right to be free from unreasonable search and seizure.

G. ACKNOWLEDGMENT

I, Josue Osorio Lopez, acknowledge that I have been personally served with an exact copy of the brief of Petitioner hereto attached. I received a hardcopy on 8-26-19 from my attorney, Alex Newhouse.

I acknowledge that I have been served with a copy of the appellant's first brief, the State's response, the appellant's response, Division III of the Court of Appeal's ruling, and that I am the appellant. I have no further argument at this time.

I declare under penalty of perjury under the laws of the State of Washington that the above is true and correct to the best of my knowledge.

8-26-19, Sunnyside WA
Date and Place of Signature

Josue Osorio Lopez

H. APPENDIX

Attached hereto in this order are: 1) A copy of the Division III of the Court of Appeals for the State of Washington's final decision, an unpublished opinion; 2) a copy of the language as taken from the 4th Amendment to the United States Constitution; and 3) a copy of the language as taken from Article 1, Section 7 of the Washington State Constitution.

Respectfully submitted this 26th day of August, 2019

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WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	
	)	No. 36044-0-III
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
JOSUE MANUEL OSORIO LOPEZ,	)	
	)	
Appellant.	)	

FEARING, J. — Josue Lopez challenges the stopping of his white pickup, which stop led to the seizure of controlled substances inside the vehicle. He argues that reasonable articulable suspicion did not justify the stop. We disagree and affirm his conviction of possession with intent to deliver a controlled substance.

FACTS

This appeal's facts cover two controlled buys of controlled substances implicating appellant Josue Lopez. The first sale occurred on April 13, 2016. The second sale,

which led to Lopez's arrest and conviction, transpired on January 26, 2017. We garner the facts from testimony during a motion to suppress hearing.

On April 13, 2016, Sunnyside Police Department Detective John Gusby worked for the Law Enforcement Against Drugs task force in Yakima County. Detective Gusby had learned from an informant that Josue Lopez may engage in the sale of cocaine. With that information, the task force assembled a surveillance team to shadow Lopez's activity. Task force members observed Lopez driving a large, lifted, four-door pickup truck. The truck's tailgate bore an emblem with the tradename "BOWTECH" accompanied by a picture of a deer's neck, head, and antlers. No other truck in Sunnyside displayed this distinct emblem.

The drug task force arranged for its informant to purchase cocaine from Josue Lopez on April 13, 2016. Before the controlled buy, task force members searched the informant and his vehicle for drugs or excess cash. The task force handed the informant cash for the controlled buy.

On April 13, detectives followed Josue Lopez to a business parking lot within the city of Sunnyside, where the informant arranged to meet Lopez. Lopez entered the parking lot in his truck and drove to the informant's car. After Lopez parked next to the driver's side door of the informant's car, the informant exited his vehicle and sat in Lopez's truck. Lopez drove around the parking lot, parked briefly in a parking stall away from the informant's vehicle, and then drove back to the informant's driver side door.

The informant exited Lopez's truck and returned to his own vehicle. Lopez drove to another location in the parking lot and parked his truck. Lopez walked to the informant's vehicle. Detective John Gusby observed a handshake between Lopez and the informant. The informant returned to his vehicle and drove away. The informant returned to task force members with a plastic parcel containing a white powdery substance that field tested for cocaine. Law enforcement did not then arrest Lopez.

We forward to January 2017, when Detective Michael Boone surveilled Josue Lopez. Detective Boone serves as a special agent with the Washington State Gambling Commission assigned to the drug task force in Yakima County. Boone underwent surveillance training that included forty hours of rolling surveillance tactics, eighty hours of drug enforcement administration, eighty hours of basic drug trafficking investigation school, and undercover certification school. Rolling surveillance entails trailing someone moving in a vehicle.

On January 26, 2017, Detective Michael Boone parked in the Sunnyside Bi-Mart parking lot, while conducting surveillance for an unrelated investigation. Detective Boone observed a white, lifted Ford F-250, with a "BOWTECH" emblem on the tailgate. Boone knew that the truck belonged to a suspect in another task force drug investigation headed by Detective John Gusby. Josue Lopez's truck passed in front of Boone's vehicle and parked in a parking stall next to a blue Chevrolet pickup truck. Only one person then occupied Lopez's truck. The blue Chevrolet remained in the middle of the traveling part

of a parking lot aisle. Detective Boone drove to a parking stall behind the two trucks to gain a better view. Boone spied two individuals now inside Lopez's truck, while no one occupied the blue Chevrolet. Lopez's truck moved, and Boone notified his surveillance team of the direction of travel of Lopez's truck as Boone tailed the truck. Lopez's truck approached the exit of the Bi-Mart parking lot, but did not leave the lot. Instead, the truck moved in a half-circle and stopped parallel to the blue Chevrolet. In order to avoid raising suspicion, Detective Boone exited the parking lot, but continued observing the two other vehicles. Boone did not observe the passenger exit Lopez's vehicle and return to the blue Chevrolet.

Based on Detective Michael Boone's training and experience, he concluded that the movement of Josue Lopez's truck and the rendezvous between the two men signaled the trafficking of illegal drugs. Boone relayed his observations to Detective John Gusby. Gusby told Boone that the behavior in the parking lot mirrored behavior during the April 2016 controlled buy. Both detectives agreed that the action did not follow normal shopping behavior. Boone and Gusby believed that Boone observed a possible drug transaction.

At the request of Detective Michael Boone, Yakima County Sheriff Deputy Justin Paganelli stopped Josue Lopez's truck for an investigative detention. Lopez informed Deputy Paganelli that a firearm lay in the door of his truck. A Sunnyside Police Department officer placed Lopez in handcuffs for officer safety. Deputy Paganelli

supervises a drug detection dog trained to detect heroin, cocaine, and methamphetamine or a combination of the three. Paganelli walked his dog around the truck, and the dog alerted to the partially opened driver's door. The Sunnyside officer transported Lopez to jail. Investigating officers obtained a search warrant to search Lopez's vehicle and seized a functional digital scale, a pill bottle with a white powdered substance, later determined to be 2.9 grams of cocaine hydrochloride, and a loaded Ruger SR 40, .40 caliber pistol.

PROCEDURE

The State of Washington charged Josue Lopez with possession of cocaine, a controlled substance, with intent to deliver. Lopez brought a motion to suppress the seized scale, cocaine, and pistol. He argued that the drug task force conducted an unlawful *Terry* stop.

After conducting a suppression evidentiary hearing, the trial court entered findings of fact and conclusions of law. Finding of fact number four reads:

> What Detective Boone observed on January 26, 2017 was consistent with the controlled buy involving the defendant that occurred on April 13, 2016 which was the subject of LEAD Task Force investigation under case number 16X00040. Furthermore, based on Detective Boone's training and experience, Detective Boone's observations on January 26, 2017 were consistent with the trafficking of illegal drugs and counter surveillance employed by those involved in the trafficking of illegal drugs.

Clerk's Papers (CP) at 56. The trial court upheld the validity of the investigatory stop of Lopez's vehicle because law enforcement, based on the totality of the circumstances, held reasonable articulable suspicion of criminal activity. Accordingly, the court denied

Lopez's motion to suppress evidence. The trial court convicted Josue Lopez of possession with intent to deliver a controlled substance after a stipulated facts trial.

LAW AND ANALYSIS

On appeal, Josue Lopez assigns error to the trial court's denial of his motion to suppress evidence of the scale, cocaine, and pistol. When reviewing the denial of a suppression motion, this court must determine whether substantial evidence supports the trial court's findings of fact. *State v. Levy*, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006). Evidence is substantial when it suffices to persuade a fair-minded, rational person of the truth of the finding. *State v. Wayman-Burks*, 114 Wn. App. 109, 111, 56 P.3d 598 (2002). Unchallenged findings of fact are verities on appeal. *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). This court reviews de novo conclusions of law pertaining to suppression of evidence. *State v. Levy*, 156 Wn.2d at 733.

We first analyze whether substantial evidence supports the trial court's findings of fact. We later address whether the findings support the conclusions of law.

Josue Lopez only challenges finding of fact 4 to the extent the finding presumes criminal activity. To repeat, finding of fact number four reads:

> What Detective Boone observed on January 26, 2017 was consistent with the controlled buy involving the defendant that occurred on April 13, 2016 which was the subject of LEAD Task Force investigation under case number 16X00040. Furthermore, based on Detective Boone's training and experience, Detective Boone's observations on January 26, 2017 were consistent with the trafficking of illegal drugs and counter surveillance employed by those involved in the trafficking of illegal drugs.

CP at 56. Lopez argues that Detective Michael Boone's observations failed to establish the requisite suspicion for seizure. The State contends substantial evidence supports the finding. We agree with the State.

The trial court heard testimony regarding surveillance of Josue Lopez in April 2016 and January 2017. Detective John Gusby testified to his observations during the 2016 controlled buy with the informant. Gusby saw Lopez drive a distinct white Ford pickup with a "BOWTECH" emblem on the tailgate. Lopez retrieved the informant in a parking lot, drove in the lot for a short time, returned to the informant's car, shook hands, and left the informant. The informant presented Gusby with cocaine.

Detective Michael Boone testified to his observations during the January 2017 incident. Boone observed a similar elapse of events involving Lopez's lifted, white Ford F-250 with the "BOWTECH" insignia on the tailgate. Lopez parked next to an occupied vehicle in a parking lot, the occupant entered Lopez's truck, the two drove inside the lot momentarily, the two returned to the other vehicle, and the driver of the white pickup parked parallel to the passenger's vehicle. The trial court justifiably concluded the two occasions paralleled each other.

Detective Michael Boone testified about his surveillance training and how that training informed his observations on January 26, 2017. Boone scrutinizes behavior to determine if a suspect engages in activity intended to confuse law enforcement or hide illegal conduct, activity known as counter surveillance techniques. Counter surveillance

tactics include switching parking positions, stopping at unconventional spots in a parking lot, or stopping along the side of the road.

Detective Michael Boone testified that Josue Lopez's behavior on January 26, 2017 echoed the actions of one engaged in a drug transaction and counter surveillance. The trial court justifiably concluded in finding of fact 4 that, based on the detective's training and experience, the 2017 observations were consistent with the trafficking of illegal drugs and counter surveillance employed by one involved with drug trafficking.

We must now review whether the trial court's findings of fact support a conclusion that law enforcement held reasonable articulable suspicion to stop Josue Lopez's car on January 26, 2017. Josue Lopez contends that the State failed to meet its burden of establishing a valid investigative detention on January 26. The State argues that the detention of Lopez's truck was a valid investigative detention under *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

Generally, warrantless searches and seizures are per se unconstitutional under the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). But, a few carefully drawn exceptions exist, which include exigent circumstances, inventory searches, searches incident to arrest, plain view searches, and *Terry* stops. *State v. Garvin*, 166 Wn.2d at 249; *State v. Fuentes*, 183 Wn.2d 149, 158, 352 P.3d 152 (2015). The State bears the burden of proving the exception to the warrant requirement

by clear and convincing evidence. *State v. Smith*, 115 Wn.2d 775, 789, 801 P.2d 975 (1990).

As noted, a brief investigatory seizure, commonly referred to as a *Terry* stop, is one exception to the warrant requirement. *Terry v. Ohio*, 392 U.S. 1 (1968). Under this exception, a police officer may, without a warrant, briefly detain an individual for questioning if the officer has reasonable and articulable suspicion that the person is or is about to be engaged in criminal activity. *State v. Fuentes*, 183 Wn.2d at 158 (2015). This court looks at the totality of the circumstances known to the officer at the time of the stop when evaluating the reasonableness of the officer's suspicion. *State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 760 (1991). The totality of the circumstances includes the location of the stop, the officer's training and experience, the conduct of the person detained, the purpose of the stop, and the amount of physical intrusion into the person's liberty. *State v. Weyand*, 188 Wn.2d 804, 811-12, 399 P.3d 530 (2017). The suspicion must be individualized to the person being stopped. *State v. Weyand*, 188 Wn.2d at 812. In the absence of reasonable suspicion, the evidence uncovered from the stop must be suppressed. *State v. Fuentes*, 183 Wn.2d at 158.

Josue Lopez contends and underscores that: (1) Detective Michael Boone's observations of Lopez's truck were not of inherently suspicious behavior, (2) law enforcement never saw drugs or cash passing hands, and (3) law enforcement never identified the driver of the truck. We rule that officers could reasonably conclude that the

behavior in the two parking lots suggested criminal activity. We further hold that law enforcement need not see drugs or cash and need not have identified the driver to gain reasonable, articulable suspicion for a *Terry* stop.

When the activity is consistent with criminal activity, but also consistent with noncriminal activity, the behavior may still justify a brief detention. *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). While an inchoate hunch is insufficient to justify a stop, circumstances which appear innocuous to the average person may appear incriminating to a police officer in light of past experience. *State v. Pressley*, 64 Wn. App. 591, 596, 825 P.2d 749 (1992). The officer need not ignore that experience. *State v. Pressley*, 64 Wn. App. at 596. While Lopez's driving behavior was susceptible to innocent explanations, Detective Michael Boone, through his training and experience, articulated that these maneuvers evoked criminal activity.

In response to Josue Lopez's emphasis that drug task force officers never observed a drug transaction, the State relies on cases concerning suspected drug transactions that involved no firsthand observation of any exchange. *State v. Kennedy*, 107 Wn.2d 1 (1986); *State v. Glover*, 116 Wn.2d at 514 (1991). The *Glover* court noted that courts consider an officer's training and experience when determining the reasonableness of a *Terry* stop. *State v. Glover*, 116 Wn.2d at 514. Citing *Terry v. Ohio*, 392 U.S. 1 (1968), the State also argues that an officer may base an investigative stop solely on unusual activity recognized by an experienced police officer.

We disagree with the State's contention that abnormal behavior observed by a trained law enforcement officer can by itself justify an investigative stop. Although not cited by either party, our Supreme Court's recent decision in *State v. Weyand*, 188 Wn.2d 804 (2017) must be considered in response to the State's argument. Corporal Bryce Henry conducted a *Terry* stop of a car after observing, at 2:40 a.m., Wesley Weyand and another man leave 95 Cullum Avenue, a house documented as the site of numerous drug deals. As the men quickly walked toward the car, they looked up and down the street multiple times. Based on these observations, coupled with the officer's knowledge of the extensive drug history at the residence, he stopped the vehicle. After the stop, Corporal Henry ran Weyand's name and discovered he had an outstanding warrant. A search incident to arrest of Wesley Weyand led to the discovery of a capped syringe on his person.

The Washington Supreme Court reversed Wesley Weyand's conviction. The Supreme Court noted that, although Corporal Henry identified 95 Cullum as a "known" drug house, he failed to articulate a reasonable suspicion that Weyand was involved in criminal activity at that residence based on Weyand's conduct at the inception of the stop. The court emphasized that reasonable suspicion must be individualized to the person being stopped and police cannot justify a suspicion of criminal activity based on a person's locale in a high crime area. Also, Weyand's looking up and down the street, considered to be furtive movements, failed to supply reasonable suspicion.

We compare the stop of Wesley Weyand to the investigatory stop of Josue Lopez. Rather than a "known" drug house with an extensive history, Lopez operated a "known" vehicle with a history of a single drug sale. In *Weyand*, the defendant walked quickly and looked up and down the street multiple times. This behavior, coupled with the history of the house, did not justify a suspicion of criminal activity, even at 2:40 in the morning. Josue Lopez parked his truck at a grocery store, let a passenger inside, drove in a half-circle, and returned to his passenger's car. This behavior, coupled with the history of Lopez's vehicle, led Detective Michael Boone to believe a drug transaction had taken place. A vehicle being driven abnormally in a parking lot and a person looking up and down a street can both be seen as innocent conduct. With that in mind, *Weyand* compels that this court conclude that, based solely on the driving in the parking lot, Detectives Boone and Gusby did not possess reasonable suspicion individualized to Lopez at the moment his vehicle was stopped.

The facts in Josue Lopez's appeal contain additional suspicious behavior. In *State v. Weyand*, Corporal Bryce Henry only articulated an unknown individual acting suspiciously after leaving a "known" drug house late at night before his *Terry* stop. Lopez previously sold cocaine to an informant, drove the same unique pickup truck, and employed the same vehicle maneuvers during the transaction.

Case law does not require that a suspect be identified prior to a valid *Terry* stop. In *State v. Glover*, 116 Wn.2d 509 (1991), officers observed Conjewel Glover acting

suspiciously when turning from the officers and walking faster after leaving an apartment building. Officers did not recognize Glover as a resident of the apartment complex, which has a no trespassing policy and history of gang and drug activity. Officers stopped the unknown man to investigate a possible criminal trespass and subsequently found cocaine on his person after they noticed a clear plastic baggie. The court held that the arresting officers had substantial evidence to justify a *Terry* stop, and they had reasonable grounds to believe that defendant was committing the crimes of criminal trespass and drug possession.

Josue Lopez also questions whether a police officer can rely on information from a previous controlled buy, occurring nine months before, as a basis to form reasonable suspicion. He emphasizes that, in January 2017, officers did not determine if ownership of the pickup truck had changed since April 2016. Officers also did not confirm that the driver of the pickup truck in January was the same as the driver in April. Nevertheless, Lopez cites no authority for the proposition that these specific facts prevent a finding of reasonable articulable suspicion. Some cases require information used by officers to support probable cause or articulable suspicion to be recent information, but here the law enforcement officers had both old information and new information.

We note that, in April 2016, a confidential informant informed law enforcement that Josue Lopez engaged in the sale of controlled substances. We know nothing about the informant's previous record of supplying reliable information to law enforcement.

Nevertheless, the informant confirmed by a controlled buy that Lopez sold cocaine. That information alone, plus the use of the distinct pickup truck, could have formed probable cause to arrest the driver of the truck in January 2017. In his analysis, Lopez fails to recognize his sale of cocaine in April 2016.

CONCLUSION

We affirm the trial court's denial of Josue Lopez's motion to suppress evidence. We confirm Lopez's conviction for possession of a controlled substance with intent to deliver.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Fearing, J.

WE CONCUR:

Korsmo, J.

Lawrence-Berrey, C.J.

UNITED STATES CONSTITUTION

4th AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

WASHINGTON CONSTITUTION

ARTICLE I, SECTION 7

No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent,

v.

JOSUE MANUEL OSORIO LOPEZ,

Appellant.

Trial Court: 17-1-00201-39

Appellate No: 360440

Declaration of Service

Declaration of Service

Alex Newhouse, attorney for Josue Osorio Lopez, states that on August 26, 2019 he sent through the USPS, postage prepaid, a copy of the Brief of Petitioner, a copy of the Unpublished opinion of Division III under 36044-0-III, and a copy of the relevant Constitutional provisions that was attached to the Brief of the Petitioner to the Yakima County Prosecuting Attorney's Office located at 128 N. 2nd Street, Room 314 in Yakima, WA 98901. The purpose of all the documents so served is to facilitate review by the Supreme Court of Washington.

I declare under penalty of perjury under the laws of the State of Washington that the forgoing is true and correct to the best of my knowledge.

DATE: 8/26/19, Sunnyside, WA

Alex Newhouse, WSBA# 40052

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