SUPREME COURT NO. 98266-0

NO. 78899-0-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

AARON CALLOWAY,

Petitioner.

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

The Honorable Millie Judge, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Aaron Justin Calloway, the appellant below, seeks review of the Court of Appeals decision in State v. Calloway, noted at ___ Wn. App. 2d ___, 2020 WL 625278, No. 78899-0-I (Feb. 10, 2020) (Slip op.).

B. ISSUES PRESENTED FOR REVIEW

1. The officer claimed to have reasonable, articulable suspicion of criminal trespass and bicycle theft upon seeing Calloway cross two pieces of property in a rural area, enter a house, and pick up and ride a bicycle from a nearby RV, despite the fact that the officer had never seen Calloway before and did not know anything about Calloway's relationship to the owners of the property or the bicycle. The officer also claimed reasonable, articulable suspicion based on historical narcotics and squatting activity on one of the properties, including a "trespass agreement" law enforcement and the owners of one of the properties had entered to remove squatters. Were these circumstances insufficient to articulate a reasonable, individualized suspicion that Calloway was engaging in criminal activity such that his seizure was justified?

2. Even if the initial seizure was justified at its inception, did the officer exceed the permissible scope of the seizure given that everything Calloway did or said should have dispelled reasonable, articulable suspicion of criminal activity?

C. STATEMENT OF THE CASE

Officer Jeremy mooring stated he saw Calloway walk across two parcels of property and enter a house while he was patrolling a "high narcotics area." 1RP[1] 5-7. The house was known for squatters and drug use. 1RP 7. The house's owners had entered a "trespass agreement" allowing police to remove anyone and everyone from the property except for two authorized persons, "Calvin Hatch and another family member, but goes by the name of Boo Boo." 1RP 8, 17-18. However, Hatch's or Boo Boo's visitors were allowed on the property. 1RP 30.

Mooring approached the house, banged on the door, heard an unidentified woman ask who it was, and yelled, "nobody's supposed to be in this house." Ex. 2[2] at 8:17:34–8:17:45; 1RP 10. He received no immediate response and walked to the back. Ex. 2 at 8:17:50–8:18:40; 1RP 32-33. Mooring heard the front door open when he was behind the house, seeing Calloway walking toward the road. 1RP 10-11; Ex. 2 at 8:19:38–8:19:55. Calloway walked at a normal gait; Mooring walked quickly after him, given he was on the other side of the house. 1RP 10-11. Calloway approached an

[1] 1RP refers to consecutively paginated transcripts dated June 14 and 28, 2018; 2RP refers to the August 1, 2018 transcript.

[2] Exhibit 2 consists of Mooring's body camera footage and was admitted at the CrR 3.6 hearing. CP 97; 1RP 33. Calloway refers to the time stamp appearing in white text at the top center portion of the video.

RV parked on the street, obtained a bicycle, and began riding away. 1RP 11; Ex. 2 at 8:20:09–8:20:18.

Mooring yelled to Calloway, "How you doin' partner? Come here and talk to me for a second." Ex. 2 at 8:20:19–8:20:21. Mooring asked, "What you doin' over there at that house?" and Calloway responded, "Dropping by to see my friend Boo Boo." Ex. 2 at 8:20:24–8:20:28. Mooring then said, "That's it, for 30 seconds?" and "that's consistent with running dope, man," to which Calloway responded, "No, it's consistent with, uh, they said there could be nobody in the house." Ex. 2 at 8:20:36–8:20:39; 1RP 33. When told that only Boo Boo was allowed on the property because of the trespass agreement, Calloway repeatedly stated he was unaware of this restriction. Ex. 2 at 8:20:40–8:20:46; 1RP 27.

Mooring also asked, "is that your bike," and Calloway stated it was a friend's who permitted him to use it. Ex. 2 at 8:20:53–8:21:00. Mooring stated the reason he was asked was because "this whole area is crack alley," and Calloway replied, "I respect that, it's fine, sir" and handed his ID to Mooring. Ex. 2 at 8:20:06–8:20:08, 8:21:07–8:21:16; 1RP 14-15, 28. Calloway then admitted he had an outstanding warrant, was shortly thereafter arrested once the warrant was confirmed, and, in a search incident to arrest, Mooring found methamphetamine. Ex. 2 at 8:21:28–8:21:31, 8:34:35–8:34:40; 1RP 14-15, 28.

The trial court concluded that Calloway was not seized until Mooring asked for identification. CP 90. The trial court also concluded Mooring had reasonable suspicion of criminal trespass and bicycle theft, and denied Calloway's motion to suppress. CP 90; 1RP 45-50. The trial court found Calloway guilty of possessing a controlled substance. CP 63; 1RP 60-61.

Calloway appealed. CP 12-13. The court of appeals agreed with Calloway that he was seized when Mooring commanded him to come over and talk to him for a second. Slip op. at 5-6. However, the court concluded that Mooring had reasonable suspicion to seize Calloway based on the trespassing agreement and the fact that Mooring did not recognize Calloway as one of the persons authorized to be on the property. Slip op. at 6-9. The court made much of the fact that Calloway exited the house (characterizing it as Calloway's attempt at escape) in a different direction from the direction he arrived. Slip. op. at 7-9. The court believed this furnished reasonable suspicion to seize Calloway for criminal trespass and bicycle theft.

D. ARGUMENT IN SUPPORT OF REVIEW

1. THE COURT OF APPEALS DECISION CONFLICTS WITH THE CONSTITUTIONAL REQUIREMENT OF INDIVIDUALIZED SUSPICION ESTABLISHED IN SEVERAL CASES

Warrantless seizures are per se unlawful unless they fall within one of the narrow, carefully delineated, and jealously guarded exceptions to the

warrant requirement. U.S. CONST. amend. IV; CONST. art. I, § 7; Katz v. United States, 387 U.S. 347, 357, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967); State v. Buelna Valdez, 167 Wn.2d 761, 777, 224 P.3d 751 (2009). One exception is the Terry[3] stop. To initiate such a stop, officers must have a "well-founded suspicion that the defendant is engaged in criminal conduct." State v. Doughty, 170 Wn.2d 57, 62, 239 P.3d 573 (2010). '"[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.'" Id. (quoting Terry, 392 U.S. at 21). There must be a "substantial possibility that criminal conduct has occurred or is about to occur." State v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1986).

The court reviews the totality of circumstances known to the investigating officer, which includes "examining each fact identified by the officer as contributing to that suspicion." State v. Fuentes, 183 Wn.2d 149, 159, 352 P.3d 152 (2015). The circumstances are judged against an objective standard and officers actions must be justified "at the moment of the seizure." Terry, 392 U.S. at 21-22; State v. Gatewood, 162 Wn.2d 534, 539, 182 P.3d 426 (2008). The state bears the burden to show the seizure was justified and must carry this burden by clear, cogent, and convincing

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

evidence. Doughty, 170 Wn.2d at 62; State v. Potter, 156 Wn.2d 835, 840, 132 P.3d 1089 (2006).

a. Neither Calloway's actions nor the actions of third parties established a reasonable, articulable suspicion of criminal activity particularized to Calloway

The court of appeals determined that Mooring had reasonable suspicion because he "knew what the two people who were authorized to stay at the house looked like, and Calloway wasn't one of them." Slip op. at 6. But, as the court of appeals acknowledged, Hatch and Boo Boo—and their visitors—were allowed on the property. Slip op. at 1, 6 & n.1. Mooring freely admitted he did not know Calloway or his relationship to either Boo Boo and Hatch when he commanded Calloway to come speak to him. 1RP 20. And no one had reported Calloway as a trespasser or squatter.

The court of appeals decision conflicts with Fuentes on an important constitutional question. The consolidated petitioner in Fuentes, Sandoz, entered the apartment of Jennifer Meadows, whom officers suspected of dealing drugs. 183 Wn.2d at 153, 160. Sandoz was inside Meadows's apartment for at least 15 minutes and then exited the house. Id. at 160. The officer believed he had reasonable suspicion to investigate Sandoz for trespassing, especially because a similar trespass agreement purportedly allowed him to investigate anyone on the property. Id. Sandoz's presence at the property occurred "without any known discord," such as someone

reporting a trespasser. Id. There was no basis to suspect trespassing, as the "facts suggest[ed] that Sandoz was an invited guest of Ms. Meadows" and "simply going into an apartment does not equal wrongdoing." Id.

Calloway's mere walking across properties and entering a house suspected generally of drugs and squatting does not furnish reasonable, articulable suspicion of criminal activity. Mooring didn't know Calloway or his relationship to the authorized persons; he could have been a guest. 1RP 20. No one reported Calloway as a trespasser. As in Fuentes, Calloway's mere presence on the property did not equal wrongdoing. The court of appeals' contrary conclusion conflicts with Fuentes, meriting RAP 13.4(b)(1) and (3) review.

The court of appeals also noted that when Mooring knocked on the door, a female voice answered and then he received no further response. Slip op. at 6-7, 9. How this shows Calloway's criminal activity, the court of appeals doesn't say. Nothing in the record indicates that the woman was a trespasser, rather than a visitor. And, even if the woman were suspected of criminal activity, Calloway's association with her does not support reasonable suspicion of criminal activity as to him. Fuentes, 183 Wn.2d at 160 (reasonable suspicion of third party not connected to Sandoz did not provide individualized suspicion); Doughty, 170 Wn.2d at 62-63 (visiting suspected drug house does not justify Terry stop); State v. Thompson, 93

Wn.2d 838, 841, 613 P.2d 525 (1980) ("mere proximity to others independently suspected of criminal activity does not justify the stop" (citing Ybarra v. Illinois, 444 U.S. 85, 100 S. Ct. 338, 62 L. Ed. 2d 238 (1979))). The court of appeals decision conflicts with these decisions, meriting review under RAP 13.4(b)(1) and (3).

The court of appeals also justified the stop because Calloway "left through the front door and headed to the road, rather than retrace the steps of his arrival."[4] Slip op. at 7. This does not establish reasonable suspicion as a matter of law. State v. Larson, 93 Wn.2d 638, 645, 611 P.2d 771 (1980) (leaving upon arrival of police does not give rise to reasonable suspicion); Thompson, 93 Wn.2d at 842 (rapidly walking away from officers constitutionally insufficient to support seizure). In any event, Calloway was merely obeying Mooring's command that no was allowed on the property: he promptly left, which dispels suspicion of criminal activity. RAP 13.4(b)(1) and (3) review is appropriate.

Nor does seeing a person take a bike and begin to ride it away amount to reasonable suspicion of criminal activity. It might sometimes, depending on the circumstances known to the officer. But Mooring knew nothing about Calloway, the occupants or owners of the RV where the

[4] Calloway assigned error to the trial court's findings that Calloway ran or exited quickly from the house. Br. of Appellant at 1, 22-23. The court of appeals cursorily concludes Calloway attempted to escape or avoid Mooring, slip op. at 7-9, yet curiously fails to address Calloway's assignments of error on the subject.

bicycle was parked, the relationship between Calloway and the RV occupants, any other information that indicated Calloway was not permitted to use the bicycle, or whether Calloway was a welcome visitor. 1RP 13, 20, 23-24, 28. Without information about the bicycle, including who owned it, there was no individualized suspicion that Calloway was stealing it.

The court of appeals claimed, "we don't look at these facts about the bicycle in isolation. Under the totality of the circumstances, it was reasonable for Sergeant Mooring to believe that Calloway was taking a bike that did not belong to him." Slip op. at 7. This conclusory statement fails for the reasons already discussed: nothing that Calloway did supported an individualized suspicion of criminal activity. The court of appeals decision fails to point to *which* circumstances gave rise to an individualized reasonable probability that Calloway had trespassed or stolen a bicycle. There were none. Review should be granted under RAP 13.4(b)(1) and (3).

b. The State failed to carry its burden of proving what the trespassing agreement actually authorized

As noted, when a seizure occurs, the State bears the burden of proving its justification. Potter, 156 Wn.2d at 840. Available information about the trespassing agreement shows the state failed to carry this burden.

The court of appeals characterized the trespassing agreement as permitting the "police [to] document and remove any person on that property

except for two male individuals and their visitors." Slip op. at 6. The court of appeals also concluded Calloway could not have been Boo Boo's guest because "if Boo Boo were in the house, he would have likely responded when Sergeant Mooring identified himself as the police" and "Boo Boo would have told Calloway he was free to remain as his guest." Slip op. at 9.

The State did not establish whether Boo Boo was in the house; Calloway stated Boo Boo was home and this evidence was not contradicted. Ex. 2 at 8:20:24–8:20:28. Nothing in the record supports the court of appeals' speculation that Boo Boo would come to the door had Calloway been his guest or the proposition that Boo Boo's guests were allowed only when Boo Boo himself was also present. All that was established in the record with respect to the trespass agreement was that it was designed to curtail illegal squatting on the property and that only Boo Boo, Hatch, and their visitors were permitted. 1RP 7-9, 17-18, 20-22, 30. As noted, Mooring did not know Calloway or whether he was a guest. 1RP 20, 30. Calloway did not readily appear as a squatter as opposed to a guest. 1RP 32.

Even assuming a trespass agreement could ever provide individualized suspicion of criminal activity, the state failed to adduce facts sufficient to establish that *this* trespass agreement did. Nothing established that the trespass agreement actually authorized police to seize anyone on the property other than Hatch and Boo Boo for trespassing. Given the dearth of

pertinent facts, the court of appeals shifted the burden to Calloway to prove that the trespassing agreement did *not* furnish reasonable suspicion, conflicting with constitutional precedent that it is the State's burden to prove the seizure was justified. RAP 13.4(b)(1) and (3) review should be granted.

c. Individualized suspicion of trespass cannot be established merely by walking on land where nothing indicates guests are not welcome

The crime of criminal trespass requires knowledge. RCW 9A.52.070(1); RCW 9A.52.080. There is a general privilege to enter or remain on improved and apparently used land, which is neither fenced nor otherwise enclosed in a manner to exclude intruders. RCW 9A.52.010(2). It is also a defense if the actor reasonably believed he was licensed to enter or remain on the property. RCW 9A.52.090(3).

Because criminal trespass requires knowledge, for actions to give rise to suspicion of criminal trespass, a person must enter or remain on property where it is obvious that he or she is not welcome. Here, no signage, fencing, or anything else would indicate to anyone that merely entering or remaining on property would be criminal. 1RP 13, 18-19. Mooring's suspicion of criminal trespass was based on nothing more than a hunch.

The court of appeals' contrary conclusion conflicts with the plurality decisions in State v. Glover, 116 Wn.2d 509, 806 P.2d 760 (1991), and State v. Little, 116 Wn.2d 488, 806 P.2d 749 (1991). Little and Glover both

involved an apartment complex that experienced problems with gang and drug activity. Glover, 116 Wn.2d at 511; Little, 116 Wn.2d at 490. The management agreed police could investigate anyone suspected of being a trespasser. Id. In addition, the management had "surrounded the complex with a fence topped with concertina wire and posted several no trespassing or loitering signs throughout the property" and there was also an armed guard at the entrance. Glover, 116 Wn.2d at 511-12; Little, 116 Wn.2d at 490. Signage included "Tenants and Their Guests Only" and "Violators Will Be Prosecuted." Little, 116 Wn.2d at 490.

Unlike here where there was no signage or other measures designed to keep everyone other than tenants and guests out, the apartment complex in Little/Glover resembled an armed fortress full of signs, fences, wire, and a guard that indicates that nonresidents and guests were unwelcome.

The court of appeals failed to acknowledge that Glover and Little were plurality opinions. The concurrences in both Glover and Little agreed that the seizures were justified to address "a chronic trespass situation on enclosed premises familiar to the patrolling officers." Little, 116 Wn.2d at 498 (Guy, J., concurring); accord Glover, 116 Wn.2d at 516 (Guy, J., concurring) (adopting Little concurrence reasoning). "These reasons might fail if the context of these stops was not a patrol of private enclosed property . . . ." Little, 116 Wn.2d at 499 (Guy, J., concurring) (emphasis added).

The court of appeals assumed that a trespass agreement combined with the facts that Mooring did not recognize Calloway and Calloway walked away provided reasonable suspicion, relying on Little and Glover for this proposition. Slip op. at 8. But a majority of the Washington Supreme Court has never conclusively held this, as Justice Guy's concurrences in both cases establish. The court of appeals decision carelessly reads the decisions too expansively and thereby conflicts with them, meriting RAP 13.4(b)(1) and (3) review.

2. THIS COURT SHOULD REEXAMINE ITS SUPER PREDATOR ERA PLURALITY DECISIONS IN LITTLE AND GLOVER, AND HOLD IT VIOLATES THE CONSTITUTION FOR THE GOVERNMENT AND PRIVATE CITIZENS TO JOIN FORCES TO CREATE ZONES OF LESSER CONSTITUTIONAL PROTECTION

To the extent that Little and Glover decisions allow a private agreement to facilitate a seizure of any person for investigation simply by virtue of the person being at a particular place, the decisions are constitutionally infirm. The decisions jettison the *individualized* suspicion required by the Fourth Amendment and article I, section 7. These substantial issues of constitutional magnitude and public importance merit reexamination of Glover and Little under RAP 13.4(b)(3) and (4).

A person's presence in an area suspected of criminal activity does not provide individualized suspicion of criminal activity. Fuentes, 183

Wn.2d at 161; Doughty, 170 Wn.2d at 62-63. "Other facts must exist to suggest criminal behavior." Fuentes, 183 Wn.2d at 161. "It is beyond dispute that many members of our society live, work, and spend their waking hours in high crime areas . . . . That does not automatically make those individuals proper subjects for criminal investigation." Larson, 93 Wn.2d at 645; accord Ybarra, 444 U.S. at 91-92 ("Although the search warrant . . . gave officers authority to search the premises and to search [the bartender], it gave them no authority whatever to invade the constitutional protects possessed individually by the tavern's customers."); Brown v. Texas, 443 U.S. 47, 51, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979) ("[S]eizures must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the *particular* individual . . . ." (emphasis added)); State v. Weyand, 188 Wn.2d 804, 816, 399 P.3d 530 (2017) ("Reasonable suspicion must be individualized to the person being stopped.").

The court of appeals reads Little and Glover to permit seizures of anyone on a piece of property subject a trespass agreement whom officers do not recognize. Slip op. at 8. But this subjects citizens to seizure not because they are reasonably suspected of criminal activity but because they are present in a particular place. This contradicts the numerous cases cited above that provide that the federal and state constitutions require individualized suspicion. Review is appropriate. RAP 13.4(b)(1), (3).

The court of appeals decision and the lead opinions in Glover and Little set a disturbing precedent. Even assuming that combatting drug activity is a laudable law enforcement objective, accomplishing this goal through generalized seizures based merely on geography creates a regime in which persons can freely carry on their business in public only at the whim of police officers. Indeed, under the court of appeals decision, officers now have a way to ensure they can stop anyone and everyone they want: they must simply enter private agreements with nearby property owners to create geographical zones in which unfamiliar persons may be automatically seized. This is nothing short of a generalized writ of assistance based on place. Justice Utter was correct in his dissents in Little and Glover: "a private agreement between two parties cannot grant the police power that the constitution denies them." Glover, 116 Wn.2d at 519 (Utter, J., dissenting); accord Little, 116 Wn.2d at 502 ("The agreement cannot give the police authority that the constitution forbids them."). The courts' failure to insist on individualized suspicion presents a matter of substantial constitutional and public importance that should be definitively resolved, meriting RAP 13.4(b)(3) and (4) review.

Finally, we should call Glover and Little what they are: racist blemishes on Washington's jurisprudence. As Justice Utter grossly understated, "The Seattle Police Department's tactic of stopping and

arresting young black males on Seattle Housing Project grounds, however well intentioned, has the potential for harassment." Little, 116 Wn.2d at 508. Indeed, policies like those approved of in Little and Glover permitted police to occupy and criminalize entire communities, undoubtedly leading to the racist, classist mass incarceration state we live in today.

Further, the mere idea that police officers recognized more than 500 residents at the Lakeshore Village Apartments and could distinguish between each of the 500 residents, their guests, and potential trespasses is laughable. See Glover, 116 Wn.2d at 514 ("In light of the officers' observations of Glover and their familiarity with the residents, the officers had probable cause to believe that a crime, criminal trespass, was being committed in their presence."); Little, 116 Wn.2d at 497 (similar). The suggestion that two officers knew each and every resident by sight such that they could distinguish between residents, guests, and trespassers offends basic intelligence. Because the decisions rest on such an absurd proposition, Little and Glover are transparently pretextual, endorsing or acquiescing in law enforcement's racist policies that have succeeded in furthering the super predator myth and criminalizing an entire generation of men of color. RAP 13.4(b)(4) review is warranted to reexamine the decisions.

The trespass agreement did not and cannot constitutionally provide reasonable, individualized suspicion that Calloway was involved in criminal

activity. The Glover and Little decisions should be reexamined so that lower courts do not continue to rely on them to excuse the constitutional requirement of individualized suspicion from the Terry analysis.

3. EVEN IF THERE WAS A VALID BASIS FOR SEIZURE, THE COURT OF APPEALS DECISION CONFLICTS WITH DECISIONS LIMITING THE SCOPE OF PERMISSIBLE SEIZURE

Even if Calloway's seizure was somehow justified at its inception, everything Calloway did and said dispelled suspicion. The seizure should therefore have been immediately terminated.

A Terry stop "must be temporary, lasting no longer than is necessary to effectuate the purpose of the stop" and "the investigative methods employed must be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." State v. Williams, 102 Wn.2d 733, 738, 689 P.2d 1065 (1984) (citing Florida v. Royer, 460 U.S. 491, 500, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983)). The court of appeals approval of Mooring's actions conflicts with these principles, warranting RAP 13.4(b)(1) and (3) review.

After Mooring seized Calloway, he asked, "What you don' over there at that house" and Calloway responded, "Dropping by to see my friend Boo Boo" and confirmed that Boo Boo was presently in the house. Ex. 2 at 8:20:24–8:20:34. Mooring knew Boo Boo was permitted on the property

and Mooring also knew that the trespass agreement allowed Boo Boo to have guests. Calloway's identification of himself as a guest of Boo Boo should have dispelled suspicion and the encounter should have terminated.

Mooring, however, asked, "that's it, for 30 seconds?" and "that's consistent with running dope, man." Ex. 2 at 8:20:36–8:20:39; 1RP 26. Calloway replied that it was not consistent with running dope but with obeying Mooring's command that no one was allowed at the house. Ex. 2 at 8:20:39; 1RP 33. Again, this should have dispelled suspicion: not only did Calloway know Boo Boo and claim Boo Boo was home, but he had an amply plausible explanation for his short stay—he was obeying Mooring.

Calloway also repeatedly stated he had no idea he was not allowed to visit the property or that there was a trespassing agreement in effect. Ex. 2 at 8:20:40–8:20:46; 1RP 27. Even in Little or Glover, a trespass admonishment was provided rather than a full-fledged criminal investigation when officers did not recognize a person at the property. Little, 116 Wn.2d at 490 (discussing creation and maintenance of trespass admonishment cards). Calloway's ignorance of the fact he was considered a trespasser also dispels suspicion of criminal activity.

And, as discussed above, Mooring had no idea who owned the bicycle Calloway rode or whether Calloway had permission to use it as he claimed. Ex. 2 at 8:20:53–8:21:00.

In sum, Calloway stated he was visiting his friend (which was never disproved by the state), abided by commands to leave the property, and admitted he was unaware he was not permitted on the property. Under Williams, the purpose of the seizure had been satisfied, Calloway was leaving the property, there was no indication of criminal activity, and Mooring should have ended the encounter.

The court of appeals disagreed: "All that Calloway's response proves is that he knew that Boo Boo lived at the house." Slip op. at 9. The court of appeals also assumed that if Boo Boo were home, he "would have likely responded when Sergeant Mooring identified himself as the police" or "would have told Calloway he was free to remain as a guest." Slip op. at 9. The court of appeals might be right if there were evidence Boo Boo was not at home or that guests could be present only when Boo Boo was, but there was none. And the court of appeals' speculation echoes Mooring's statement that he would not have believed anything Calloway said because "anyone can tell me anything they want." 1RP 28. As this court recently acknowledged, '"Whether you stand still or move, drive above, below, or at the speed limit, you will be described by police as acting suspiciously should they wish to stop or arrest you. Such subjective, promiscuous appeals to an ineffable intuition should not be credited."' Weyand, 118 Wn.2d at 816 (quoting United States v. Broomfield, 417 F.3d 654, 655 (7th Cir. 2005).

The State did not present any evidence at the CrR 3.6 hearing, including the body camera recording, indicating there was any valid basis to disbelieve Calloway. Mooring continued to act on nothing more than his inarticulate hunch, which cannot justify his continuing seizure. The court of appeals decision conflicts with decisions like Williams that hold an investigative detention may last no longer than necessary to fulfill its purpose. It also conflicts with Weyand's acknowledgment that vague facts or speculation are not a reliable indicator of criminal activity. Accordingly, RAP 13.4(b)(1) and (3) review should be granted.

E. CONCLUSION

Because he satisfies RAP 13.4(b)(1), (3), and (4), Calloway asks that review be granted.

DATED this 11th day of March, 2020.

Respectfully submitted,

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Attorneys for Petitioner

APPENDIX

FILED
2/10/2020
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON ,

Respondent,

v.

AARON JUSTIN CALLOWAY,

Appellant.

No. 78899-0-I

DIVISION ONE

UNPUBLISHED OPINION

FILED: February 10, 2020

APPELWICK, C.J. — Calloway appeals his judgment and sentence. He argues that a police officer's investigatory stop of him was unlawful, and that the evidence that flowed from it should have been suppressed. We affirm.

FACTS

While on a routine patrol, Tulalip Tribal Police Patrol Sergeant Jeremy Mooring observed Aaron Calloway walk into a derelict property on Old Tulalip Road. Sergeant Mooring knew from experience that the area was a high narcotics area. The specific property was known for squatters and substance abusers. The owners of the house had entered into an agreement with the Tulalip Tribe for assistance in enforcing trespassing ordinances. The agreement provided that only two individuals, Calvin Hatch and a male who goes by the name of "Boo Boo," were allowed to stay on the property. Hatch and Boo Boo were allowed to have visitors. The property owners granted tribal police the right to enter the property for the purpose of identifying and removing all others from the property.

Sergeant Mooring approached the house and knocked on the door. A female voice answered, asking who was there. Sergeant Mooring responded, "It's the police. Nobody's supposed to be in this house." He received no further response. Sergeant Mooring walked around the backside of the house to investigate the rear entrance. He then heard the front door close. He moved back towards the front of the home to investigate, and observed Calloway walking away from the home towards the street. Sergeant Mooring followed and observed Calloway proceed down the street to a recreational vehicle (RV), pick up a bicycle off the ground near the RV, and attempt to ride away. Sergeant Mooring called out to him, "How you doin' partner? Come over here and talk to me for a second." Sergeant Mooring testified that, at the time, he was suspicious that Calloway had committed two counts of trespass and potentially stolen the bike. Calloway then peddled towards Sergeant Mooring.

Sergeant Mooring asked Calloway what he was doing at the house. Calloway responded that he was "stopping by to see my friend Boo Boo." Sergeant Mooring asked if Boo Boo was in the house. Calloway responded, "Yeah I just went in there to say hi to him." Sergeant Mooring then stated, "That's it? For 30 seconds? That's consistent with running dope, man." Calloway denied this, saying, "[N]o, it's consistent with they said nobody can be in the house." He said that he did not know that no one was allowed in the house.

Sergeant Mooring then asked Calloway if he had identification. Calloway responded that he did, and reached into his pocket to retrieve it. While Calloway did this, Sergeant Mooring asked him if the bike that he was riding was his.

Sergeant Mooring pointed out that Calloway had originally approached the house on foot from a different direction, but was now leaving on a bike that he had not come with. Calloway responded that it was "his friend's bike. I'm using it. It's fine." Calloway then handed Sergeant Mooring his identification card. He disclosed to Sergeant Mooring that he had a misdemeanor warrant in Fife. At that point, Sergeant Mooring called in Calloway's information over his radio.

The two continued to converse while police looked into the warrant. During this time, another officer arrived at the scene. After two more officers arrived, Sergeant Mooring indicated that he had been told to arrest Calloway on the basis of the Fife warrant. He told Calloway that he was being placed under arrest for the warrant and handcuffed him. During the search incident to arrest, Sergeant Mooring recovered a scale, a needle, and a bag of methamphetamine from Calloway's pockets.

The State charged Calloway with possession of a controlled substance. Calloway contended that the stop was unlawful and moved to suppress all evidence gathered as a result. The trial court denied the motion, finding that Sergeant Mooring had reasonable and articulable suspicion sufficient to support the investigatory stop. The trial court found Calloway guilty as charged.

Calloway appeals.

DISCUSSION

Calloway argues that the trial court erred in denying his motion to suppress the evidence seized as a result of Sergeant Mooring stopping him. He claims that Sergeant Mooring was unable to articulate reasonable suspicion that he was

engaged in criminal activity. As a result, he contends that his detention was unconstitutional from its inception, and that all evidence that flowed from it should have been suppressed.

Generally, under the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution, an officer may not seize a person without a warrant. State v. Fuentes, 183 Wn.2d 149, 157-58, 352 P.3d 152 (2015). A seizure occurs when, considering all the circumstances, an individual's freedom of movement is restrained and the individual would not believe he or she is free to leave or decline a request due to an officer's use of force or display of authority. State v. Harrington, 167 Wn.2d 656, 663, 222 P.3d 92 (2009). An officer may, without a warrant, briefly detain a person for questioning if the officer has reasonable suspicion that the person stopped is engaged in criminal activity. Fuentes, 183 Wn.2d at 158.

Reasonable suspicion must be based on specific and articulable facts. Id. To determine the reasonableness of an officer's suspicion, a reviewing court must look at the totality of the circumstances known to the officer at the time of the stop. Id. The exclusionary rule mandates the suppression of evidence obtained as the direct result of an unlawful detention. See State v. Garvin, 166 Wn.2d 242, 254, 207 P.3d 1266 (2009). In reviewing the denial of a motion to suppress, we review the trial court's conclusions of law de novo and its findings of fact used to support those conclusions for substantial evidence. Fuentes, 183 Wn.2d at 157.

I. Seizure

The trial court found that a seizure occurred when Sergeant Mooring asked for Calloway's identification card. Calloway contends that the seizure occurred when the officer initially stopped him. The State concedes this point. That concession is well taken.

The trial court characterized the initial contact between Sergeant Mooring and Calloway as "social," because Sergeant Mooring "asked" Calloway to come over. This characterization is consistent with the trial court's finding of fact 12, that the officer initiated contact with the words, "'[H]ow you doing partner? Why don't you come over here and talk to me a sec[ond]?'" The trial court did not find that a seizure occurred until Sergeant Mooring asked for Calloway's identification.

Finding of fact 12 is not supported by substantial evidence. Sergeant Mooring testified that he initially "asked" Calloway to come talk to him. However, his body camera records him saying "How you doin' partner? Come over here and talk to me for a second," rather than "'[H]ow you doing partner? Why don't you come over here and talk to me a sec[ond]?'" A reasonable person would interpret the latter as a request, but the former as a command. This is especially so because Calloway had just exited a property after Sergeant Mooring had informed the occupants that no one was allowed to be there. Under the circumstances, a reasonable person would not feel free to disobey a police officer's command to talk to him. See State v. Fredrick, 34 Wn. App. 537, 541, 663 P.2d 122 (1989) (officer seized a suspect by saying, "'Stop, I want to talk to you.'").

We reverse the trial court's finding that Calloway's seizure did not begin until Sergeant Mooring asked for his identification. We instead find that Calloway's detention began when Sergeant Mooring initially stopped him. We evaluate the reasonableness of the stop based on the facts known to Sergeant Mooring at that point in time. See State v. Gatewood, 163 Wn.2d 534, 540, 182 P.3d 426 (2008).

II. Reasonable Suspicion

Calloway argues that Sergeant Mooring's seizure was not justified by reasonable suspicion.

Sergeant Mooring testified that he stopped Calloway on suspicion of two counts of trespass and theft of a bike. Sergeant Mooring had personally observed Calloway walk across private property to enter a house on different private property. The owners of the house that Calloway entered had requested that police document and remove any person on that property except for two male individuals and their visitors.[1] Sergeant Mooring knew what the two people who were authorized to stay at the house looked like, and Calloway wasn't one of them. When Sergeant Mooring knocked on the door to investigate, a female voice answered. When he identified himself as a police officer, he received no further

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[1] When asked why Sergeant Mooring said "no one was allowed" in the house when there were two lawful occupants, Sergeant Mooring responded,

> Calvin's allowed to stay there and Boo Boo. And then anybody else, from my knowledge, . . . there were several people that were trespassed, but I didn't have access to the photographs and names at that time. So when I just announced it generally that nobody's allowed to be there other than Calvin and Boo Boo that was just my understanding nobody's supposed to be staying there. Calvin and Boo Boo can have visitors, but nobody's -- you know, takes care of the squatting problem.

response. Sergeant Mooring then walked around to the back of the house. Calloway exited the property while Sergeant Mooring was in the backyard. He left through the front door and headed to the road, rather than retrace the steps of his arrival. And, out on the road, he picked up a bicycle from beside an RV and began to ride it away. This course of conduct raised a reasonable suspicion that Calloway was trespassing, attempting to avoid apprehension, and stealing a bicycle in the process.

Calloway argues that this is not enough information to suspect theft of the bicycle. He points out that Sergeant Mooring testified to knowing nothing about the bike or its owner, only that there were bikes piled up at the RV, but that he had no idea whether they were stolen or not. But, we don't look at these facts about the bicycle in isolation. Under the totality of the circumstances, it was reasonable for Sergeant Mooring to believe that Calloway was taking a bike that did not belong to him.

Calloway raises the lack of signage or fencing around the property indicating that trespassers were not allowed. He contends that this differentiates Calloway's case from cases like State v. Glover, 116 Wn.2d 509, 511-12, 806 P.2d 760 (1991), and State v. Little, 116 Wn.2d 488, 490-91, 806 P.2d 749 (1991). Each of those cases involved officers stopping trespassers at the Lakeshore Village Apartments. Little, 116 Wn.2d at 490; Glover, 116 Wn.2d at 511. The complex was surrounded by fencing topped with concertina wire, no trespassing signs, and had an armed security guard at the main entrance. Little, 116 Wn.2d at 490. Similar to the facts here, management had also entered into an agreement with

the Seattle Police Department to investigate persons who were suspected of being trespassers. Id.

The court in Little considered the security and no trespassing signs to be a factor that contributed to the officer's reasonable suspicion.[2] Id. at 497. However, in both Little and Glover, the most significant factor was the officers' familiarity with the complex residents, combined with their unfamiliarity with the trespassers. Little, 116 Wn.2d at 497; Glover, 116 Wn.2d at 514. This gave the officers reasonable suspicion that a trespass was occurring. Little, 116 Wn.2d at 497; Glover, 116 Wn.2d at 514. Here, Sergeant Mooring's reasonable suspicion of Calloway's conduct was not negated by the fact that there were no signs prohibiting trespassers. Sergeant Mooring knew that only two individuals were allowed to occupy the property, knew who they were, and knew that Calloway was not one of them. This fact, combined with Calloway's departure from the property and his attempt to avoid Sergeant Mooring, who had identified himself as an officer and stated no one was supposed to be there, provided sufficient reasonable suspicion to justify an investigatory stop.

Calloway argues in the alternative that even if the seizure was lawful at the time, whatever reasonable suspicion Sergeant Mooring had of him trespassing dissipated at the beginning of their conversation. To do so, he relies on the conversation occurring after the lawful seizure. When Sergeant Mooring asked him what he was doing at the house, Calloway responded that he was "see[ing]

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[2] The Glover court does not mention the various security measures in its analysis of the reasonableness of the investigatory stop. 116 Wn.2d at 514.

my friend Boo Boo." Calloway claims that this should have dissipated Sergeant Mooring's suspicion because it was clear that he was a guest of a permitted occupant and therefore not trespassing. This is not so. All that Calloway's response proves is that he knew that Boo Boo lived at the house. It was reasonable for Sergeant Mooring's suspicion to remain because, if Boo Boo were in the house, he would have likely responded when Sergeant Mooring identified himself as the police. And, Boo Boo would have told Calloway he was free to remain as his guest. Instead, the only responses were a woman's voice and Calloway's attempt to escape the property without detection. The suspicion of trespass had not attenuated.

Calloway seeks to analogize this case to Fuentes. In that case, police suspected criminal activity when Sandoz entered an apartment and remained for about 15 minutes before leaving. Fuentes, 183 Wn.2d at 159. The area was known for drugs, and the owner of the apartment complex had given police permission to expel "loiterers." Id. at 155. The Washington Supreme Court overruled the trial court's finding of reasonable suspicion primarily because Sandoz's conduct was more indicative of being a visitor than a loiterer. Id. 160-61.

In contrast to Fuentes, the owners of the property here instructed police to identify and remove all individuals from the property except for two people, and their visitors. Calloway was not one of the two authorized persons and Sergeant Mooring did not otherwise recognize him. This is much more specific than a simple "no loitering" policy. Also, Sergeant Mooring had reason to believe that Calloway

was not an authorized guest. Neither he nor Boo Boo responded when Sergeant Mooring knocked on the door and announced himself, and he instead sought evade detection by police by leaving. These crucial differences provide the reasonable suspicion necessary to justify Sergeant Mooring's investigatory stop of Calloway.

The seizure was supported by an articulable suspicion based on a totality of the circumstances. Part of Sergeant Mooring's mandate was to identify and document anyone on the property who was not an authorized person. It was a reasonable investigatory next step to ask for Calloway's identification for documentary purposes. At that point, Calloway volunteered that he had a warrant out for his arrest, which provided reasonable grounds to continue to hold him while Sergeant Mooring checked the warrant. The warrant provided the basis for the arrest. The trial court did not err in not suppressing the evidence at issue.

We affirm.

WE CONCUR:

NIELSEN KOCH P.L.L.C.

March 11, 2020 - 4:40 PM

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