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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. REANASHA ANN MCCORD, Appellant.	No. 53039-2-II UNPUBLISHED OPINION

CRUSER, J. – Reanasha Ann McCord appeals from her jury trial conviction for unlawful possession of heroin.[1] She challenges the trial court's denial of her CrR 3.6 motion to suppress, arguing that portions of two of the trial court's findings of fact are not supported by substantial evidence and that the initial seizure was unlawful because it was not based on an individualized reasonable suspicion that she was engaged in criminal activity. Although McCord is correct that portions of the trial court's findings of fact are not supported by substantial evidence, the remaining findings of fact establish an individualized reasonable suspicion that McCord was engaged in criminal activity. Accordingly, the trial court properly denied McCord's suppression motion, and we affirm McCord's conviction.

[1] McCord was also convicted of bail jumping, but she does not challenge that conviction.

FACTS

I. BACKGROUND[2]

On August 23, 2017, City of Lacy Police Officer Dave Miller was dispatched to investigate a narcotics complaint. The dispatcher advised Miller that a citizen had reported that the occupants of a vehicle at 3815 Pacific Avenue were using heroin. When Miller arrived at the specified location, he observed three women inside a vehicle at the back of a restaurant parking lot.

As Miller approached the vehicle, he saw that the rear passenger door was open and that the woman in the rear passenger seat was preparing to "inject herself with a syringe in the vein of her front side elbow." Clerk's Papers (CP) at 28 (Finding of Fact (FF) 8). Miller determined "that the syringe was consistent with one used to inject heroin." *Id.* (FF 9). Miller did not see the two other women in the vehicle injecting or preparing to inject themselves with anything.

Miller walked up to the vehicle and "stated, 'Police, show me your hands.'" *Id.* (FF 12). He then "saw all occupants, including [McCord], attempting to conceal things" inside the vehicle. *Id.* (FF 13). Specifically, he observed "the driver, Ms. McCord, quickly . . . stuffing things in the driver side door pocket or compartment of the vehicle." *Id.* (FF 14).

After advising McCord of her of her *Miranda*[3] rights, McCord told Miller that there was some heroin "in the driver's side [door] pocket," and gave him permission to search the vehicle. Report of Proceedings (RP) (Nov. 5, 2018) at 15. Miller later testified that he found the drugs where McCord said they would be.

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[2] Unless otherwise indicated, these facts are drawn from the trial court's unchallenged findings of fact from the CrR 3.5 and CrR 3.6 suppression hearing, which are verities on appeal. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994).

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

The State charged McCord with unlawful possession of methamphetamine, unlawful possession of heroin, and bail jumping.

II. SUPPRESSION MOTION

McCord moved to suppress the drug evidence. She argued that the investigative detention of everyone in the car was not supported by articulable suspicion.

The State argued that Miller had reasonable and articulable suspicion of criminal activity. The State's response included a "certified statement" from the deputy prosecutor in which he stated that he "believe[d] a hearing or trial on this matter [would] elicit, in part," evidence establishing that (1) the dispatcher had advised Miller that a reporting citizen had observed "the occupants in a sliver Mercedes [sport utility vehicle (SUV)] Washington license BCW1957" using heroin, and (2) Miller "observed a silver Mercedes SUV with the same license plate" in the parking lot. CP at 19.

Miller was the sole witness at the suppression hearing. His testimony was consistent with the background facts set out above. Miller did not, however, describe the vehicle's make, model, color, or license plate number or testify that the dispatcher provided him with this information.

In addition to the facts set out above, the trial court made the follow findings:

> 4. Officer Miller was advised by dispatch that a citizen reported that occupants *in a silver Mercedes Washington license BCW1957* were using heroin.
> 5. Upon arrival, Officer Miller observed *a silver Mercedes SUV with the same license plate* in the rear parking lot of Taco Bell.

Id. at 27 (emphasis added).

The trial court's conclusions of law stated:

> 5. At that point the defendant was seized, the seizure was supported by lawful authority under *Terry v. Ohio*,[4] because the totality of circumstances supports the seizure of [McCord] .

Id. at 29. The trial court denied the motion to suppress.

The jury found McCord guilty of unlawful possession of heroin and bail jumping.[5] McCord appeals her unlawful possession of heroin conviction.

ANALYSIS

McCord argues that (1) the portions of findings of fact 4 and 5 that refer to the vehicle's description and license plate number are not supported by substantial evidence, and (2) the trial court's findings do not support conclusion of law 5, which concludes that the seizure was lawful under *Terry*. McCord is correct that the portions of the trial court's findings related to the vehicle's description and license plate number are not supported by the substantial evidence. But because the remainder of the findings are sufficient to establish that Miller had a reasonable, articulable, individualized suspicion that McCord was engaging in or about to engage in criminal activity, we hold that the trial court did not err when it denied McCord's suppression motion.

I. LEGAL PRINCIPLES

We review challenged findings of fact to determine whether they are supported by substantial evidence. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). Substantial evidence exists when there is sufficient evidence in the record "'to persuade a fair-minded person of the truth of the stated premise.'" *Id.* (quoting *State v. Reid*, 98 Wn. App. 152, 156, 988 P.2d 1038 (1999)). "[T]he ultimate determination of whether those facts constitute a violation of the

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

[5] The jury found McCord not guilty of unlawful possession of methamphetamine.

constitution is one of law and is reviewed de novo." *State v. Budd*, 186 Wn. App. 184, 196, 347 P.3d 49 (2015), *aff'd*, 185 Wn.2d 566, 374 P.3d 137 (2016).

The Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution provide that officers may not generally seize a person without a warrant. *Garvin*, 166 Wn.2d at 249. One exception to the warrant requirement is the *Terry* investigative detention. *Id.*

Under *Terry*, an officer "may briefly stop and detain an individual for investigation without a warrant if the officer reasonably suspects the person is engaged or about to be engaged in criminal conduct." *Id.* at 250. We evaluate the reasonableness of the officer's suspicion by examining the totality of the circumstances known to the officer. *State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 760 (1991).

Whether an officer had reasonable suspicion is an objective standard, and the officer's suspicion must be based on specific and articulable facts known to the officer at the inception of the stop. *State v. Gatewood*, 163 Wn.2d 534, 539-40, 182 P.3d 426 (2008). When the activity is consistent with criminal activity but also consistent with noncriminal activity, it may still justify a brief detention. *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). The officer's reasonable suspicion must, however, be individualized to the person being seized, and "mere proximity to others independently suspected of criminal activity does not justify the [seizure]." *State v. Thompson*, 93 Wn.2d 838, 841, 613 P.2d 525 (1980).

II. FINDINGS OF FACT 4 AND 5

McCord first argues that the portions of findings of fact 4 and 5 referring to the description of the vehicle are not supported by substantial evidence because Miller did not testify that the

dispatcher advised him of the vehicle's make or license plate number or that he identified the vehicle by its make or license plate number. We agree.

The State did not present any evidence at the suppression hearing establishing that the dispatcher advised Miller of any identifying information regarding the vehicle or that he identified the vehicle as the one described by the dispatcher based on such identifying information. Accordingly, the portions of findings of fact 4 and 5 referring to the vehicle's description are not supported by substantial evidence.

We acknowledge that the State argues that under ER 1101(c)(1), the trial court could have relied on the deputy prosecutor's certified statement for these factual findings. But the State does not cite, nor could we locate any authority establishing that ER 1101(c)(1) applies to a prosecutor's summary of the evidence he or she "believe[s]" will be elicited at a hearing, so the trial court could not rely on this statement. CP at 19. The State also suggests that we can consider Miller's trial testimony to support these findings. But our review of a trial court's decision on a motion to suppress is limited to the evidence before the trial court when it made its decision, and, in this instance, that does not include trial testimony.

Because the challenged portions of findings of fact 4 and 5 are not supported by substantial evidence, we do not consider those portions of the findings when we examine the conclusions of law.

III. REASONABLE, INDIVIDUALIZED SUSPICION

McCord next challenges the trial court's conclusion of law 5, in which the trial court concluded that the totality of the circumstances supported McCord's seizure under *Terry*. McCord argues that the trial court erred when it concluded that the initial detention, when Miller ordered

everyone in the vehicle to show their hands,[6] was based on reasonable, individualized suspicion as to McCord, and McCord's later movement inside the vehicle was sufficient to establish reasonable suspicion. We disagree.

The trial court's unchallenged findings of fact establish that before Miller initiated the seizure by telling the vehicle's occupants to put their hands up, he had received a report of people using heroin in a vehicle at this location, and he personally observed one of the three people in the car actively engaging in drug use consistent with the reported activity. Although Miller did not personally observe McCord engaging in drug use, his observation of the passenger using drugs verified the reported information; McCord, the driver of the car, was in close proximity to the passenger who was actively engaging in illegal drug use. Furthermore, within moments of the initial seizure, Miller observed McCord herself engage in suspicious behavior. The totality of these circumstances, would allow an objective person to form a reasonable suspicion that McCord herself was engaged in or about to be engaged in criminal activity. And although McCord's furtive movement could have been consistent with noncriminal activity, it still justified a brief detention to investigate. *Kennedy*, 107 Wn.2d at 6. Thus, the trial court did not err when it concluded that the seizure was proper and denied the motion to suppress.

McCord's arguments do not persuade us that the seizure was improper. First, McCord argues that this case is similar to *State v. Richardson*, 64 Wn. App. 693, 825 P.2d 754 (1992), and

[6] Because we hold that the seizure was proper, we do not address the State's contentions that McCord was not detained when Miller announced, "'Police, show me your hands,'" or that McCord's voluntary consent overcame any illegal seizure. CP at 28 (FF 12). For the same reason, we do not address McCord's argument that her later consent to the vehicle search was vitiated by the unlawful seizure.

that, as in *Richardson*, McCord's mere proximity to the rear seat passenger was not sufficient to establish individualized suspicion. But *Richardson* is distinguishable.

In *Richardson*, the defendant, Richardson, was seized while "in a high crime area, late at night, walking near someone the officer suspected of 'running drugs.'" 64 Wn. App. at 697. The arresting officer had not heard any conversations between the two men or observed any suspicious activity between them. *Id.* Division Three of this court held that these circumstances were not sufficient to establish a reasonable suspicion that Richardson was or had been engaged in criminal activity. *Id.* The court stated, that although Richardson was seen with a person reasonably suspected of drug-related activity, "an individual's mere proximity to others independently suspected of criminal activity justify an investigative stop; the suspicion must be individualized." *Id.*

But in *Richardson*, the arresting officer had observed the man Richardson was with engaging in "suspicious activity consistent with 'running drugs'" 20 minutes before the officer encountered Richardson. Id. at 694. Unlike here, the officer had not observed the other man engaging in illegal activity in Richardson's presence at the time of the seizure within a confined area, such as a vehicle. *Id.* at 694-95. Here, McCord's immediate association to the back seat passenger's illegal activity, the confined nature of the space, and the report that the people in the vehicle were using drugs, provide a basis for an individualized reasonable suspicion that McCord was engaged in or about to be engaged in illegal behavior.

Next, citing *Gatewood*, 163 Wn.2d 534, McCord argues that her furtive movement inside the vehicle was not sufficient to establish a substantial probability that she was engaging in criminal activity. But *Gatewood* is also distinguishable.

In *Gatewood*, patrol officers drove past a bus shelter where Gatewood was sitting, observed Gatewood's eyes widen, and saw him twist his body as though to hide something. 163 Wn.2d at 537. Gatewood then left the bus shelter and jaywalked across the street, where the officers stopped him. *Id.* at 537-38. Our Supreme Court held that "[s]tartled reactions to seeing the police do not amount to reasonable suspicion." *Id.* at 540.

But unlike in *Gatewood*, Miller observed more than a startled reaction. Miller observed the passenger engaged in criminal activity in the immediate proximity of McCord; he had information that the occupants of the vehicle were engaged in illegal activity; and he then observed McCord engage in what appeared to be purposeful furtive movements in response to his announcing his presence, not just a startled reaction. As discussed above, these facts would allow an objective person to form a reasonable suspicion that McCord herself was engaged in or about to be engaged in criminal activity. Thus, McCord's reliance on *Gatewood* is not persuasive.

Although, as discussed above, McCord is correct that portions of the trial court's findings of fact are not supported by substantial evidence, the remaining findings of fact establish individualized reasonable suspicion that McCord was engaged in or about to engage in criminal activity. We hold that the trial court did not err when it denied McCord's suppression motion. Accordingly, we affirm McCord's conviction.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Cruser, J.
CRUSER, J.

We concur:

Worswick, J.
WORSWICK, P.J.

Melnick, J.
MELNICK, J.