

62734-1

62734-1

NO. 62734-1-I

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

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2009 JUN -5 PM 1:26

CITY OF BOTHELL,
Respondent,

v.

ROBERT WALLACE,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY,

The Honorable Bruce E. Heller

OPENING BRIEF OF APPELLANT

Jeffrey Steinborn
Sharon J. Blackford
Attorneys for Appellant

JEFFREY STEINBORN PLLC
3161 Elliott Avenue, Suite 340
Seattle, Washington 98121
(206) 622-5117

ORIGINAL

TABLE OF CONTENTS

A. SUMMARY OF ARGUMENT 1

B. ASSIGNMENTS OF ERROR 2

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 3

D. STATEMENT OF THE CASE..... 5

E. ARGUMENT 6

 1. Suspicion that a misdemeanor other than those listed in
 RCW 10.31.100(1)-(10) may have been committed
 Outside the presence of an officer does not provide
 Lawful authority to seize an individual 8

 2. The seizure of Mr. Wallace was not a lawful Terry stop
 Because there was not well founded suspicion based
 On specific, objective facts that he or his passenger
 Had committed a crime 15

 a. The double hearsay tip lacks reliability and does
 not support the Terry stop 15

 b. Even if the informants’ tip were reliable, it did not
 provide a basis upon which to seize Mr.
 Wallace and his companion 19

 3. There was no nexus between the alleged criminal
 activity and the place searched 22

 4. The Terry stop was not reasonably related in scope to
 the circumstances which prompted the stop 24

 5. The stop to investigate for evidence of possessing drug
 paraphernalia was pretextual because the true purpose
 of the stop was to conduct a general investigation for
 drugs 26

E CONCLUSION 29

TABLE OF AUTHORITIES

DECISIONS OF THE WASHINGTON SUPREME COURT

State v. Duncan, 146 Wn.2d 166, 43 P.3d 513 (2001)..... 13

State v. Ferrier, 136 Wn.2d 103, 960 P.2d 927 (1998)..... 7

State v. Hendrickson, 129 Wn.2d 61, 917 P.2d 563 (1996) 7, 8, 19

State v. Hobart, 95 Wn.2d 437, 617 P.2d 429 (1980)..... 20

State v. Johnson, 128 Wn.2d 431, 909 P.2d 293 (1996)..... 9

State v. Kennedy, 107 Wn.2d 1, 726 P.2d 445 (1986)..... 20, 22

State v. Ladson, 138 Wn.2d 343, 979 P.2d 833 (1999) 27

State v. Mendez, 137 Wn.2d 208, 970 P.2d 722 (1999)..... 9

State v. O’Neill, 148 Wn.2d 564, 62 P.2d 489 (2003)..... 21

State v. Patterson, 83 Wn.2d 49, 515 P.2d 496 (1973)..... 23

State v. Seiler, 95 Wn.2d 43, 621 P.2d 1272 (1980) 15-17

State v. Thein, 138 Wn.2d 133, 977 P.2d 582 (1999) 23

State v. Walker, 157 Wn.2d 307, 138 P.3d 113 (2006) 13

State v. White, 97 Wn.2d 92, 640 P.2d 1061 (1982)..... 8

State v. Young, 123 Wn.2d 173, 867 P.2d 593 (1994)..... 26

DECISIONS OF THE WASHINGTON COURT OF APPEALS

City of Sunnyside v. Lopez, 50 Wn. App. 786, 751 P.2d 313 (1988)... 28

State v. Alcantara, 79 Wn. App. 362, 901 P.2d 1087 (1995).... 20, 24, 25

State v. Dearman, 92 Wn. App. 630, 962 P.2d 850 (1998).....	26
State v. Friederick, 34 Wn. App. 537, 663 P.2d 122 (1983).....	21
State v. Goble, 88 Wn. App. 503, 945 P.2d 263 (1997).....	23
State v. Laursen, 14 Wn. App. 692, 544 P.2d 127 (1976).....	16
State v. Lee, 147 Wn.App. 912, 199 P.3d 445 (2008).....	15
State v. Moreno, 21 Wn. App. 430, 585 P.2d 481 (1978)	19
State v. Rangitsch, 40 Wn. App. 771, 700 P.2d 382 (1985).....	18, 25
State v. Valdez, 137 Wn. App. 280, review pending, 2008 Wash. Lexis 74 (Wash. Feb. 6, 2008).....	26
State v. Watkins, 76 Wn. App. 726, 887 P.2d 492 (1995)	20
State v. Whitaker, 58 Wn. App. 851, 795 P.2d 182 (1990), Review denied, 116 Wn.2d 1028 (1991).....	21

FEDERAL DECISIONS

Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964).....	15
Arkansas v. Sanders, 442 U.S. 753, 61 L.Ed.2d 235, 99 S.Ct. 2586 (1979)	19
Florida v. Royer, 460 U.S. 491, 75 L.Ed.2d 229 103 S.Ct. 1319 (1983)	24
Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969)	15
Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).....	1, 3-5, 12, 15, 19, 20, 24, 29
U.S. v Grigg, 498 F.3d 1070 (9 th Cir. 2007).....	11-14

**Whiteley v. Warden, 401 U.S. 560, 91 S.Ct. 1031,
28 L.Ed.2d 306 (1971) 22**

WASHINGTON CONSTITUTION

Article 1, section 7 2, 8, 19, 25, 27, 29

UNITED STATES CONSTITUTION

Fourth Amendment 8, 9

STATUTES

RCW 10.31.100..... 1-3, 8-10, 12, 14, 27, 29

COURT RULES

CrRLJ 2.1(b)(1)..... 1, 12, 27, 29

OTHER AUTHORITY

**Note, Policing the Fourth Amendment: The Constitutionality
Of Warrantless Investigatory Stops For Past
Misdemeanors, 109 Colum. L. Rev. 309 (March 2009) 11**

A. SUMMARY OF ARGUMENT

A store employee called police to report that a customer had speculated that Mr. Wallace or his companion may have dropped a drug pipe in the store. Based on this, police stopped Mr. Wallace and his companion, allegedly to investigate the crime of possession of drug paraphernalia. Although both occupants denied possessing the pipe and no contraband or weapons were visible to police, the officer questioned both suspects extensively about general drug use, then waited for a canine drug unit to sniff Mr. Wallace's vehicle.

Police had no authority to stop and investigate this crime since they lacked arrest authority under RCW 10.31.100 and could not send a citation pursuant to CrRLJ 2.1(b)(1); even if they had such authority, the double hearsay tip did not provide authority for a Terry investigative stop. There was no nexus between the dropped drug pipe and the vehicle searched. Additionally, the detention exceeded the proper scope of a Terry stop as it quickly turned into a general investigation for drugs. No additional facts were adduced during the investigation that justified prolonging the detention to apply a drug canine to the vehicle. Finally, to the extent that a drug canine sniff is a search of the vehicle, such a search was conducted without a warrant or probable cause that evidence of criminal activity would be located inside the vehicle.

B. ASSIGNMENTS OF ERROR

1. The seizure of Mr. Wallace violated the Fourth Amendment of the United States Constitution and article 1, § 7, Washington Constitution.

2. The Superior Court erroneously concluded that the seizure of Mr. Wallace was a lawful Terry investigatory detention that did not violate article 1, § 7, Washington Constitution.

3. The Superior Court erroneously concluded that the officer had lawful authority to seize Mr. Wallace for a misdemeanor other than those listed in RCW 10.31.100(1)-(10), committed outside the officer's presence.

4. The Superior Court erroneously concluded that officers had lawful authority to expand the initial scope of the seizure into a general investigation for possession of controlled substances.

5. The Superior Court erroneously concluded that officers had lawful authority to prolong the duration of the seizure to apply a drug canine to Mr. Wallace's vehicle.

6. The Superior Court erroneously concluded that the canine search of Mr. Wallace's vehicle was not a search.

7. The Superior Court erroneously concluded that there was lawful authority for the post-impoundment search of Mr. Wallace's vehicle.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. RCW 10.31.100(1)-(10) provides an exclusive list of those misdemeanors for which officers may arrest when committed outside the officers' presence. In addition, officers must have lawful authority to seize an individual. Does suspicion that a misdemeanor other than those listed in RCW 10.31.100(1)-(10) may have been committed outside the presence of an officer provide lawful authority to seize an individual? (Assignments of Error 1-3, 7.)

2. A lawful Terry seizure occurs where officers have a well founded suspicion, based on specific, objective facts, that the person seized has committed or is about to commit a crime. Here, Mr. Wallace was seized based on a double hearsay tip from a citizen who lacked personal knowledge of the alleged facts forming the basis for suspicion. Does such a tip support a lawful Terry stop and seizure? (Assignments of Error 2, 7.)

3. A lawful Terry seizure occurs where officers have a well founded suspicion, based on specific, objective facts, that the person seized has committed or is about to commit a crime. Here, officers received a tip alleging that Mr. Wallace or his companion may have dropped a drug pipe on the ground, although they were not seen doing so.

Does the governmental interest in pursuing this allegation provide lawful authority for seizing Mr. Wallace? (Assignments of Error 1-3, 7.)

4. General exploratory searches are unconstitutional. A nexus must exist between illegal activity and the place searched. Here, a witness speculated that Mr. Wallace or his companion may have dropped a drug pipe in a Kinko's store. Mr. Wallace and his companion then drove away. Do these facts provide a sufficient nexus to search Mr. Wallace's vehicle for drugs? (Assignments of Error 1, 2, 4, 7.)

5. A Terry inquiry asks (1) whether the officer's action was justified at its inception and (2) whether it was reasonably related in scope to the circumstances which justified the interference in the first place. Here, a citizen reported hearsay speculation that Mr. Wallace or a companion may have dropped a drug pipe at a Kinko's. Police Terry stopped Mr. Wallace to investigate the matter of the dropped pipe. There was no visible contraband or weapon associated with either suspect during the encounter. Both denied the pipe was theirs. After questioning, both admitted to having occasionally used drugs.

(a) Do these facts justify the continuing detention of Mr. Wallace and his passenger? (Assignments of Error 1, 2, 4, 7.)

(b) Do these facts justify the expansion of the encounter into a general search for drugs? (Assignments of Error 1, 2, 4, 5, 7.)

(c) Do these facts justify prolonging the encounter to apply a canine drug detector to the vehicle? (Assignments of Error 1, 2, 4-7.)

6. Was there probable cause for the warrantless canine search of the vehicle? (Assignments of Error 1, 2, 4-7.)

7. The Terry stop of Mr. Wallace was pretextual and therefore lacked lawful authority under article 1, § 7 of the Washington Constitution. (Assignments of Error 1-5, 7.)

D. STATEMENT OF THE CASE

The essential facts in this case are undisputed. At a Kinko's copy shop, a clerk reported to police that although no one had seen it happen, another customer ("Gretchen") had told the clerk that she had concluded that two other customers, a male and female, must have just dropped a crack pipe in the store. RP 4-5. She deduced this partly because the customers looked to her like "drug addicts." RP 6. Officer Chissus received this information along with a description of Mr. Wallace and his companion and their vehicle as he was driving toward the Kinko's to respond to the call. RP 17. At this time, Officer Chissus believed that the clerk was the person who had originally seen the drug pipe. RP 28. Before he reached the Kinko's, Officer Chissus was informed that the suspects were leaving the store, and he was given their description and that of their vehicle. RP 18-19.

Officer Chissus located the car, followed it as it pulled into Taco Time, briefly flashed his emergency lights, and got out to talk to the couple. RP 18-23. He testified that “at this point in time I was just investigating what – what exactly was going on.” RP 23. He added, “[y]ou know, was this person in, you know, possession of a narcotics pipe? Was – I wasn’t behind the vehicle long enough to know if their – their driving was affected, if there was actually narcotics use, whether this was a DUI situation [inaudible]. A couple different things I was looking at.” Id.

According to Officer Chissus, the occupants of the car were not free to leave at this point. “I was going to contact them and – and make sure that, you know, like I said, investigate what I had at this point in time, what was – what was happening.” RP 24. Officer Chissus had the male driver stand with his hands placed on the roof of the car while Chissus spoke with the female. RP 24-25. She denied dropping a narcotics pipe at Kinko’s. RP 26. Officer Chissus instructed the female to exit the car and began asking both of them questions about the pipe found at Kinko’s. RP 25-26. While Officer Chissus was interrogating Mr. Wallace and his companion, he learned from his dispatch that Gretchen had told the clerk at Kinko’s that the female of the couple had said to Gretchen “oh my god, is that mine?” when Gretchen showed her the pipe. RP 8.

Officer Chissus expanded the scope of his questioning and asked the occupants about their general narcotics use, what types of drugs they had tried, and the nature of their relationship. RP 34. He obtained an admission from the female passenger that they had come from Kinko's and from both occupants that they had used drugs in the past. RP 27. After Officer Chissus finished speaking with the female, he spoke to the male, Robert Wallace. RP 33. At first, Mr. Wallace declined to talk with Officer Chissus, but then he admitted he had a history of drug use and was friends with his female passenger. Id. Then Officer Potts arrived and, at Officer Chissus' request, went to Kinko's to interview Gretchen and the clerk. Id. When Officer Potts returned, he brought the pipe with him. RP 28. At this time, he informed Officer Chissus that the party who saw the suspects enter and leave the Kinko's was not the party who had called in the tip to the police. RP 28.

Officer Chissus estimated that from initial contact to this point was ten minutes. RP 30. Because neither party had admitted dropping the pipe, Officer Chissus decided he needed to continue investigating the crime. RP 36. Accordingly, Officer Chissus asked Mr. Wallace to consent to a search of his vehicle, which Mr. Wallace did not provide. RP 36. Officer Chissus did not arrest either of the occupants; instead he requested a drug dog be sent to the scene. RP 36-37. Approximately ten

minutes later, Officer Lobe arrived with his drug dog, which alerted to the vehicle. RP 37. Officer Chissus then impounded the vehicle and told the occupants they were free to go. Id. Neither occupant was arrested or cited. RP 36. Controlled substances were located in the vehicle.

Mr. Wallace unsuccessfully contested the forfeiture of his vehicle in Bothell Municipal Court and King County Superior Court. CP 148-155. This appeal timely followed. CP 156.

E. ARGUMENT

1. SUSPICION THAT A MISDEMEANOR OTHER THAN THOSE LISTED IN RCW 10.31.100(1)-(10) MAY HAVE BEEN COMMITTED OUTSIDE THE PRESENCE OF AN OFFICER DOES NOT PROVIDE LAWFUL AUTHORITY TO SEIZE AN INDIVIDUAL

1. Officer Chissus had no lawful authority to seize Mr. Wallace to investigate a misdemeanor other than those listed in RCW 10.31.100(1)-(10) committed outside his presence. Article I, § 7 provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." This provision differs from the Fourth Amendment in that article I, § 7 "clearly recognizes an individual's right to privacy with no express limitations." *State v. White*, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982). Accordingly, while article I, § 7 necessarily encompasses those legitimate expectations of privacy protected by the Fourth Amendment, its scope is not limited to subjective expectations of privacy but, more

broadly, protects "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant." *State v. Mendez*, 137 Wn.2d 208, 219, 970 P.2d 722 (1999); *State v. Johnson*, 128 Wn.2d 431, 446, 909 P.2d 293 (1996); *State v. Boland*, 115 Wn.2d 571, 577, 800 P.2d 1112 (1990).

It is by now axiomatic that article I, § 7 provides greater protection to an individual's right of privacy than that guaranteed by the Fourth Amendment. *State v. Ferrier*, 136 Wn.2d 103, 111, 960 P.2d 927 (1998); *State v. Hendrickson*, 129 Wn.2d 61, 69, n.1, 917 P.2d 563 (1996); "Any analysis of article I, § 7 in Washington begins with the proposition that warrantless searches are unreasonable per se." *State v. White*, 135 Wn.2d 761, 769, 958 P.2d 982 (1998). This is a strict rule. *White*, 135 Wn.2d at 769. Exceptions to the warrant requirement are limited and narrowly drawn. *Id.*; *Hendrickson*, 129 Wn.2d at 70-71. The State, therefore, bears a heavy burden to prove the warrantless searches at issue fall within the exception it argues for. See *State v. Johnson*, 128 Wn.2d 431, 447, 909 P.2d 293 (1996).

The stop and seizure in this case were found by lower courts to be justified by Terry.¹ CP 148-55. Under RCW 10.31.100, Officer Chissus could not arrest either suspect for the crime of possessing drug

¹ 392 U.S. 1, 88 S.Ct. 1868, 1880, 20 L.Ed.2d 889 (1968).

paraphernalia because that crime was not committed in his presence. RCW 10.31.100 provides that “. . . [a] police officer may arrest a person without a warrant for committing a misdemeanor or gross misdemeanor only when the offense is committed in the presence of the officer, except as provided in subsections (1) through (10) of this section.” Possession of drug paraphernalia is not one of the listed exceptions in subsections (1) – (10).

Strangely, the Superior Court decision analyzed this issue solely with reference to State v. Kennedy, a case in which police had probable cause to believe a felony was being committed (delivery of marijuana). 107 Wn.2d 1, 726 P.2d 445, 447 (1986). While noting that Kennedy reminds us that the crime suspected need not be a “felony or serious offense” the Superior Court’s abbreviated ruling on this issue fails entirely to analyze minor misdemeanors, and neglects to distinguish between misdemeanors listed in RCW 10.31.100(1)-(10) and those not listed. As this distinction forms the crux of Mr. Wallace’s argument, the Superior Court’s analysis is bereft of useful guidance on this issue.

Employing this severely truncated analysis, the Superior Court ruled that even though police may not arrest for such misdemeanors, they may still stop, seize, search, and subsequently file criminal charges against persons for such misdemeanors. According to this logic, RCW 10.31.100

is a purely cosmetic statute prohibiting only the indignity of immediate arrest for certain past misdemeanors.

This point of view is belied by the attention this issue is currently receiving on a national level. According to a recent Columbia Law Review article, this issue “cuts to the heart of the proper scope of police power under the Fourth Amendment.” Note, *Policing the Fourth Amendment: The Constitutionality of Warrantless Investigatory Stops For Past Misdemeanors*, 109 Colum. L. Rev. 309 (March, 2009). As the article explains, there is widespread disagreement among courts nationally regarding investigation for past misdemeanors. *Id.* at 310-11. Many courts conclude that such stops can be constitutional if they pass a reasonableness inquiry, while others conclude that such stops are categorically unconstitutional. *Id.*

The Sixth Circuit has held that such stops are always unconstitutional, as do Minnesota and Florida state courts. *Id.* at 324-24. The Ninth Circuit has adopted a middle ground, articulated in United States v. Grigg, 498 F.3d 1070, 1072-73 (9th Cir. 2007). Grigg’s rule focuses on a balancing of the nature of the misdemeanor offense and the degree of ongoing danger present in the particular circumstances:

We adopt the rule that a reviewing court must consider the nature of the misdemeanor offense in question, with particular attention to the potential for ongoing or repeated

danger (e.g., drunken and/or reckless driving), and any risk of escalation (e.g., disorderly conduct, assault, domestic violence). An assessment of the “public safety” factor should be considered within the totality of the circumstances, when balancing the privacy interests at stake against the efficacy of a Terry stop, along with the possibility that the police may have alternate means to identify the suspect or achieve the investigative purpose of the stop.

Id. at 1081. Since our legislature has already made a determination in RCW 10.31.100 that some misdemeanors are more serious than others, the Grigg rule would work well in Washington. A Grigg - oriented assessment of the nature of the misdemeanor offense in question should be made with reference to that statute. This approach also harmonizes well with our state court rules:

(b) Citation and Notice to Appear

(1) *Issuance* Whenever a person is arrested or could have been arrested pursuant to statute for a violation of law which is punishable as a misdemeanor or gross misdemeanor the arresting officer, or any other authorized peace officer, may serve upon the person a citation and notice to appear in court.

CrRLJ 2.1(b)(1) (Emphasis added.) Washington cases also harmonizes well with the Grigg rule. Our Supreme Court has held that there is a higher burden placed on law enforcement to justify intrusions to investigate lesser crimes:

This court has cited favorably the common law rule requiring a warrant prior to arresting an individual

for the commission of a misdemeanor. State v. Hornaday, 105 Wn.2d 120, 123, 713 P.2d 71 (1986). "[A] police officer, *even with probable cause*, may not arrest a person for a misdemeanor committed *outside the presence of the officer, unless* the officer has a warrant." Id. (citing State v. Bonds, 98 Wn.2d 1, 9-10, 653 P.2d 1024 (1982), cert. denied, 464 U.S. 831, 78 L. Ed. 2d 112, 104 S. Ct. 111 (1983)). This rule illustrates the higher burden this court imposes upon officers when investigating lesser crimes. Accepting the presumption that more serious crimes pose a greater risk of harm to society, we place an inversely proportional burden in relation to the level of the violation. Thus, society will tolerate a higher level of intrusion for a greater risk and higher crime than it would for a lesser crime.

State v. Duncan, 146 Wn.2d 166, 172-77, 43 P.3d 513 (2001)

(Emphasis in original).

State v. Walker, 157 Wn.2d 307, 138 P.3d 113 (2006) is consistent with this rule, and further supports the principle that seizure must be analyzed with reference to RCW 10.31.100: "[i]t is for the legislature to extend the authority of law enforcement to arrest for misdemeanors not committed in their presence." Id. at 315. Adoption of the Grigg rule for investigation of completed misdemeanors, therefore, would comport well with preexisting Washington law, and be easily applied.

The second prong of the Grigg balancing test, evaluation of the potential for ongoing or repeated danger or escalation, is one

that courts must assess in the context of analyzing challenges to Terry stops, and thus presents no additional burden or difficulty in a Grigg – like context. For these reasons, adoption of the Grigg rule is workable and consistent with Washington law. Put another way, in any situation where the Grigg balancing tips in favor of police intervention, authority of law would be present to intrude on a suspect’s privacy, i.e., to investigate the past misdemeanor. Grigg should be applied to Mr. Wallace’s case.

Performing the Grigg analysis in this case, it is clear that the balancing results in a conclusion that the intrusion in this case was not a product of lawful authority. Here, according to RCW 10.31.100, possession of drug paraphernalia is not a misdemeanor offense whose nature implicates particularly grave governmental concerns. Accordingly, neither Mr. Wallace nor his female passenger could have been arrested for the misdemeanor since it had been committed outside the officer’s presence. As a result, the officer had no authority upon which to issue a citation or to investigate. There was no particular ongoing danger presented by the dropping of a drug pipe, and no evidence of DUI or poor driving; there was no evidence of current intoxication of substance

use. Applying the Grigg balancing, there was no lawful authority to intrude on Mr. Wallace's privacy.

2. THE SEIZURE OF MR. WALLACE WAS NOT A
LAWFUL TERRY STOP BECAUSE THERE
WAS NOT WELL FOUNDED SUSPICION
BASED ON SPECIFIC, OBJECTIVE FACTS
THAT HE OR HIS PASSENGER HAD
COMMITTED A CRIME

a. The double hearsay tip lacks reliability and does not support the Terry stop. The tip in this case involves double hearsay and is unreliable. Although a formal Aguilar-Spinelli² analysis is not applied to investigatory vehicle stops, in Washington the two prongs of Aguilar-Spinelli must be addressed nonetheless to determine whether a tip resulting in such a stop was reliable and factually based. State v. Lee, 147 Wn. App. 912, 916, 199 P.3d 445 (2008). See also State v. Seiler, 95 Wn.2d 43, 47, 621 P.2d 1272 (1980)(an informant's tip cannot constitutionally provide police with suspicion unless it possesses sufficient 'indicia of reliability.'" To determine this, the court will primarily consider (1) whether the informant is reliable, (2) whether the information was obtained in a reliable fashion, and (3) whether the officers can corroborate any details of the informant's tip).

² Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964), and Spinelli v. United States, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969)

The need for reliability applies to both Gretchen and the unnamed “clerk.” A tip is predicated on double hearsay when, as in this case, the accusatory statements made by an informant to the officer or affiant are based on the allegations of yet another hearsay declarant. In these circumstances, the case of State v. Laursen requires that each individual declarant – not simply the individual who speaks with the law enforcement officer – must be separately evaluated for reliability. State v. Laursen, 14 Wn. App. 692, 695, 544 P.2d 127 (1976) (discussing this as the “twice-removed” rule).

Here, there was no first hand basis of knowledge possessed by the unnamed clerk. The clerk only knew what she was told by Gretchen. This case closely resembles State v. Sieler. In Sieler, a citizen reported to school officials that he concluded he had seen a drug deal taking place on school grounds, and provided his own name along with the suspect’s license number and other identifying information to a school official, who called the police. Id. Police stopped the car and ultimately obtained a conviction. Id. Our Supreme Court held that the informant's tip which formed the basis for the detention and arrest of defendants lacked

sufficient indicia of reliability to provide police with a well founded suspicion based on objective facts that defendants were connected to actual or potential criminal activity. Id. The court determined that absent circumstances that suggested the informant's reliability or some corroborative observation which suggested either the presence of criminal activity or that the informant's information was obtained in a reliable fashion, a forcible stop based solely upon such a tip, which contained only conclusory assertions of criminal activity, was not permissible. Id. In other words, a tip cannot be "laundered" to accrue reliability as it passes along the chain of communication:

The reliability of an anonymous telephone informant is not significantly different from the reliability of a named but unknown telephone informant. Such an informant could easily fabricate an alias, and thereby remain, like an anonymous informant, unidentifiable.

Id. at 48. Mr. Wallace's case is very similar to Seiler. Here, Officer Chissus admits that when he seized Mr. Wallace he knew only that someone had concluded that the suspects dropped the pipe; he did not even know who was doing the concluding. "It wasn't necessarily the – the reporting party, the store employee wasn't necessarily saying I saw this." RP 42-43. Accordingly, the

clerk's tip is unreliable and could not provide the officer with the well-founded suspicion constitutionally required to invade Mr. Wallace's privacy.

Gretchen had some limited first hand knowledge, but she did not see either customer drop the drug pipe; instead she concluded that one of them must have dropped the pipe based on when and where she saw the pipe and her belief that they looked like "addicts." See State v. Rangitsch, 40 Wn. App. 771, 700 P.2d 382 (1985)(status as a drug user does not provide lawful authority for invading the drug user's private areas).

To possess an acceptable basis of knowledge, an informant must have fact-based grounds, beyond mere suspicion or guess, to believe the defendant is engaged in particular criminal activity. State v. Jackson, 102 Wn.2d at 433. A loose deduction combined with a belief that someone looks like an addict is not a "fact-based ground beyond mere suspicion or guess."

Moreover, Gretchen was in the position of an anonymous informant regarding this tip; she did not speak directly with police to provide the tip, she was not available to police before they detained Mr. Wallace, and police did not know her name. According to Seiler, a person in this position is an anonymous

tipster. And under Seiler, a forcible seizure based upon such an anonymous tip is unconstitutional. 95 Wn.2d at 48. See also State v. Moreno, 21 Wn. App. 430, 433, 585 P.2d 481 (1978) (an anonymous tip, when not corroborated by an officer's independent investigation or observation, is insufficient to justify a warrantless detention.) Accordingly, neither Gretchen's anonymous tip nor the unnamed clerk who passed along the anonymous tip provided lawful authority for intruding on Mr. Wallace's privacy.

b. Even if the informants' tip were reliable, it did not provide a basis upon which to seize Mr. Wallace and his companion. Under the Fourth Amendment to the United States Constitution and article 1, § 7 of the Washington Constitution, warrantless searches and seizures are *per se* unreasonable unless the State demonstrates they fall within one of the "jealously and carefully drawn exceptions" to the warrant requirement. State v. Hendrickson, 129 Wn.2d 61, 70, 917 P.2d 563 (1996) (quoting Arkansas v. Sanders, 442 U.S. 753, 759, 61 L.Ed.2d 235, 99 S.Ct. 2586 (1979)).

One of these narrow exceptions is the "Terry investigatory stop," discussed in detail in Terry v. Ohio, 392 U.S. 1, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968). During a Terry stop, an "officer may

briefly detain and question a person reasonably suspected of criminal activity.” State v. Watkins, 76 Wn. App. 726, 729, 887 P.2d 492 (1995). To justify an intrusion, however, an officer must be able to point to “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion.” Terry, 392 U.S. at 21. Specific and articulable facts means that the circumstances must show “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). Circumstances equally consistent with innocence as with guilt will not give rise to a reasonable suspicion. State v. Hobart, 94 Wn.2d 437, 444, 617 P.2d 429 (1980).

When police have reasonable suspicion of criminal activity, they may stop the person, ask for identification, and ask the individual to explain his or her activities. State v. Alcantara, 79 Wn. App. 362, 365, 901 P.2d 1087 (1995). But the scope of any search during a Terry stop is limited to the discovery of potential weapons. Terry, 392 U.S. at 29. Any search – beyond a search for weapons – is limited to circumstances where the “plain view” doctrine or probable cause justifies it. Alcantara, 79 Wn. App. At 366.

In Mr. Wallace's case, certain facts are beyond dispute. Officer Chissus did not have a warrant. Moreover, Mr. Wallace was certainly seized. A person is seized "when, by means of physical force or a show of authority, his or her freedom of movement is restrained and a reasonable person would not have believed he or she is (1) free to leave, given all the circumstances, or (2) free to otherwise decline an officer's request and terminate the encounter." State v. O'Neill, 148 Wn.2d 564, 574, 62 P.3d 490 (2003). Statements such as "halt," "stop, I want to talk to you," "wait right here," and the like qualify as seizures. See State v. Whitaker, 58 Wn.App. 851, 854, 795 P.2d 182 (1990) review denied, 116 Wn.2d 1028 (1991); State v. Friederick, 34 Wn. App. 537, 541, 663 P.2d 122 (1983). Officer Chissus' command that Mr. Wallace place his hands on the outside of his vehicle falls within this category.

Here, no one observed the drug pipe being dropped. A customer smoking a cigarette outside the store saw the pipe on the ground and concluded that Mr. Wallace or his companion must have dropped it, in part because they looked to her like drug addicts. RP 6. At the time the seizure occurred, Officer Chissus did not know that the female passenger had said to the Kinko's

customer “oh my god, is that mine?” when shown the drug pipe.
RP 9. Consequently, that statement cannot be considered when
evaluating probable cause to seize Mr. Wallace. See Whiteley v.
Warden, 401 U.S. 560, 91 S. Ct. 1031, 28 L. Ed. 2d 306 (1971)
(holding that an otherwise insufficient affidavit cannot be
rehabilitated by testimony concerning information possessed by
the affiant when he sought the warrant but not disclosed to the
issuing magistrate.) Id., 401 U.S. at 565. An objective standard is
used to determine whether the officer's suspicion of criminal
activity was reasonable in light of the specific facts and
circumstances known to the officer at the time of seizure.
Kennedy, 107 Wn.2d at 5-8. Even if this Court finds that Officer
Chissus had authority to investigate for the past misdemeanor of
possession of drug paraphernalia given well-founded suspicion that
such conduct had occurred, well-founded suspicion is absent here.
These facts do not give rise to such suspicion based on objective
facts from a reliable informant.

3. THERE WAS NO NEXUS BETWEEN THE
ALLEGED CRIMINAL ACTIVITY AND
THE PLACE SEARCHED

“Probable cause requires a nexus between criminal activity
and the item to be seized, and also a nexus between the item to be

seized and the place to be searched." State v. Goble, 88 Wn. App. 503, 509, 945 P.2d 263 (1997) (cited in State v. Thein, 138 Wn.2d 133, 977 P.2d 582 (1999)). Absent a sufficient basis in fact from which to conclude evidence of illegal activity will likely be found at the place to be searched, a reasonable nexus is not established as a matter of law. *See, e.g.,* Smith, 93 Wn.2d at 352 ("if the affidavit or testimony reveals nothing more than a declaration of suspicion and belief, it is legally insufficient"); Helmka, 86 Wn.2d at 92 ("Probable cause cannot be made out by conclusory affidavits."); State v. Patterson, 83 Wn.2d 49, 52, 61, 515 P.2d 496 (1973) (record must show objective criteria going beyond the personal beliefs and suspicions of the applicants for the warrant).

Here, there was no particular reason to believe evidence of criminal activity would be found in Mr. Wallace's car. He and his companion were suspected of having dropped a pipe while in a Kinko's store. Both he and the passenger were cooperative and denied possessing the pipe. No contraband or paraphernalia was in plain view. While Mr. Wallace and his companion did admit to past drug use, that adds nothing to the probable cause calculus, nor does it create a nexus with Mr. Wallace's vehicle. There was no nexus between the alleged criminal activity and the place searched.

4. THE TERRY STOP WAS NOT REASONABLY RELATED IN SCOPE TO THE CIRCUMSTANCES WHICH PROMPTED THE STOP.

It is well settled that:

An investigative detention must be temporary, lasting no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed must be the least intrusive means reasonably available to confirm or dispel the officer's suspicion in a short period of time.

State v. Williams, 102 Wn.2d at 738. A Terry stop may not be indefinite without violating a suspect's constitutional right to be free from unwarranted government intrusion; once police have failed to confirm their suspicion of criminal activity, the suspect must be released and the encounter terminated. Florida v. Royer, 460 U.S. 491, 500, 75 L.Ed.2d 229, 103 S.Ct. 1319 (1983).

In determining whether an intrusion exceeds the permissible scope of a valid investigative stop, Washington Courts take three factors into consideration; (1) the purpose of the stop, (2) the amount of physical intrusion upon the suspect's liberty, and (3) the length of time the suspect is detained. Williams, 102 Wn.2d at 740. As previously noted, reasonable suspicion authorizes police to stop the person, ask for identification, and ask the individual to explain his or her activities. Alcantara, 79 Wn.

App. At 365. But where, as here, the officer is not concerned about weapons and is only concerned about evidence, any further search is limited to where it is justified under the “plain view” doctrine or by probable cause to arrest. Alcantara, 79 Wn. App. At 366.

Officer Chissus testified to no fear that the suspects were armed. He saw no drugs or drug paraphernalia. There was no evidence of impaired driving, nor was there any evidence that the suspects were currently under the influence of drugs. Mr. Wallace and his companion, while cooperative, denied dropping the pipe in Kinko’s. They admitted to occasional or past drug use, but this provides no authority for further invading their privacy. State v. Rangitsch, 40 Wn. App. 771. Under these circumstances, there was no basis for prolonging or expanding the detention. These circumstances gave rise to no justification for expanding the encounter into a general search for drugs.

Neither was there authority for the expansion of the search to include a trained drug canine sniff of Mr. Wallace’s vehicle. Our courts have held that using a trained dog to sniff for narcotics outside a dwelling constitutes a search that, absent a warrant, violates both the Fourth Amendment and article 1, § 7 of the

Washington Constitution. State v. Young, 12 Wn.2d 173, 181, 867 P.2d 593 (1994). According to State v. Dearman, 92 Wn.App. 630, 635, 962 P.2d 850 (1998), using a trained narcotics dog constitutes a search for purposes of article 1 § 7 and lawful authority is required for this search. This issue is currently before our Supreme Court; See State v. Valdez, 137 Wn. App. 280, review pending, State v. Valdez, 2008 Wash. Lexis 74 (Wash. Feb. 6, 2008).

Whether or not our Supreme Court rules that a canine sniff of a vehicle requires a warrant or other authority of law, there was no authority for the canine sniff in this case. It is not possible that a canine sniff could have added to the investigation of whether Mr. Wallace or his companion had dropped a drug pipe in Kinko's. And, as discussed above, there was no basis for expanding the investigation into a general search of Mr. Wallace's activities and possession. Accordingly, there was no basis for prolonging the detention to include a canine sniff of the vehicle.

5. THE STOP TO INVESTIGATE FOR EVIDENCE OF POSSESSING DRUG PARAPHERNALIA WAS PRETEXTUAL BECAUSE THE TRUE PURPOSE OF THE STOP WAS TO CONDUCT A GENERAL INVESTIGATION FOR DRUGS

Pretext stops violate article 1, § 7 of the Washington Constitution. State v. Ladson, 138 Wn.2d 343, 358, 979 P.2d 833 (1999). “When determining whether a given stop is pretextual, the court should consider the totality of the circumstances, including both the subjective intent of the officer as well as the objective reasonableness of the officer’s behavior.” Ladson, at 358-59. Ladson requires the court to look beyond the formal justification for the stop and determine the actual one. Id. at 353.

In this case, Officer Chissus all but admitted that his subjective intent was to conduct a general investigation into “what was going on.” RP 23. “I wasn’t behind the vehicle long enough to know if their – their driving was affected, if there was actually narcotics use, whether this was a DUI situation [inaudible]. A couple different things I was looking at.” Id.

Although the State claims that the justification for the stop was to investigate the crime of possession of drug paraphernalia, this claimed justification lacks objective reasonableness. According to RCW 10.31.100 and CrRLJ 2.1(b)(1), Officer Chissus had no authority to arrest Mr. Wallace or his companion for possession of drug paraphernalia, nor could he have sent them a citation for this crime in the mail. See City of Sunnyside v. Lopez,

50 Wash. App. 786, 751 P.2d 313 (1988) It is therefore not objectively reasonable to believe that Officer Chissus would have chosen to direct scarce law enforcement resources toward investigation of an alleged crime for which he could neither arrest nor cite.

Officer Chissus used suspicion of past possession of drug paraphernalia as a pretext for stopping Mr. Wallace and his companion and conducting a general investigation for controlled substances. By definition, nothing that Mr. Wallace or his companion might disclose to Officer Chissus would render the past possession of drug paraphernalia an arrestable crime. There was no purpose relating to that crime that could be served by interrogating Mr. Wallace and his companion at length about general drug use, or even about whether they had been in Kinko's a few minutes before. Because it was literally not possible to conduct an investigation that would result in any action on that crime, conducting an investigation for that crime was not objectively reasonable.

Instead, it is reasonable to conclude that Officer Chissus simply wanted to conduct a general investigation for criminal activity – in his own words, “I was just investigating what – what

exactly was going on.” The drug paraphernalia was merely a pretext for launching that general investigation. As such, the investigation lacked lawful authority under article 1, § 7 of the Washington Constitution.

F. CONCLUSION

Police had no authority to stop and investigate this crime since they lacked arrest authority under RCW 10.31.100 and could not send a citation pursuant to CrRLJ 2.1(b)(1); even if they had such authority, the double hearsay tip did not provide authority for a Terry investigative stop. There was no nexus between the dropped drug pipe and the vehicle searched. Additionally, the detention exceeded the proper scope of a Terry stop as it quickly turned into a general investigation for drugs. No additional facts were adduced during the investigation that justified prolonging the detention to apply a drug canine to the vehicle. Finally, to the extent that a drug canine sniff is a search of the vehicle, such a search was conducted without probable cause that evidence of criminal activity would be located inside the vehicle. Reversal is required.

DATED this 5th day of June, 2009.

Respectfully submitted:

JEFFREY STEINBORN, PLLC



Jeffrey Steinborn, WSBA # 1958

Sharon J. Blackford, WSBA #25331

Attorneys for Claimant Robert Wallace

FILED
COURT OF APPEALS DIVISION I
STATE OF WASHINGTON
2009 JUN -5 PM 4:28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

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

CITY OF BOTHELL,

Plaintiff,

v.

1982 MERCEDES BENZ 240, LICENSE
NO. 532TOP, VIN
WDBAB23AXCB334543,

Defendant In Rem,

ROBERT WALLACE,

Claimant.

No. 62734-1--I

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the Opening Brief of Appealant was served on June 05, 2009 and this Certificate of Service were served on June 05, 2009, via first class U.S. mail, postage prepaid, upon:

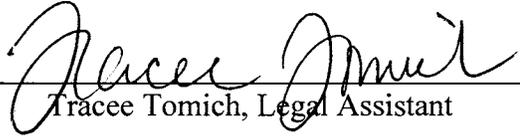
Attorney for Plaintiff/Appellant
Rhonda Giger, Prosecuting Attorney/City of Bothell
18410 – 101st Avenue NE
Bothell, Washington 98011

ORIGINAL

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

DATED this 5th day of June, 2009.

JEFFREY STEINBORN, PLLC


Tracee Tomich, Legal Assistant