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No. 64892-6-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

CAMANO GAHAGAN,

Appellant.

2016 APR 01 11:56 AM
COURT OF APPEALS
DIVISION ONE

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

The Honorable Ellen J. Fair

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in instructing the jury that it must be unanimous in order to answer “no” to the special verdict.

2. The trial court erred in denying Mr. Gahagan’s motion to suppress the evidence obtained as a result of the unlawful seizure. Supp. CP __ Sub No. 109.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. In order for a trial court to impose a sentencing enhancement increasing the range of penalties to which a defendant is exposed, the jury must unanimously find that the State has proven all required elements of the enhancement beyond a reasonable doubt. However, unanimity is not required to find that the State has not satisfied this burden of proof, and an instruction requiring unanimity for a “no” answer on a special verdict is reversible error. Where the trial court erroneously instructed the jury that unanimity was necessary to answer “no” on the special verdicts, should the two firearm enhancements and special verdicts be vacated?

2. Under Article I, section 7, an informant’s tip may support a Terry stop only if (1) the source of the information is reliable, and (2) there is a sufficient factual basis for the informant’s tip or police

observation corroborates the informant's tip. Here, police stopped Gahagan solely as a result of a tip from two anonymous people who informed several grocery store employees that a man had a gun pointed to their friend's head, and who then disappeared for two days. Did the officers violate Mr. Gahagan's constitutional right to privacy by stopping him based on this tip, which lacked sufficient reliability to justify a Terry stop?

C. STATEMENT OF THE CASE

On December 29, 2008 at approximately 5:16 a.m., Stephanie Riegger, an employee at a grocery store in Everett called 911 and relayed information reported to her by an unknown female customer. Supp. CP __ Sub No. 109, Finding of Fact (hereinafter "FF") 1.¹ The female customer told Riegger an unknown person was in her car and had grabbed her friend. FF 1. A minute later, another employee at the grocery store, Tanya Schmidt, called 911 and reported that the female customer had come into the store screaming that a person had a gun pointed at her friend's head. FF 2. Schmidt informed the 911 operator that she had exited the grocery store with the female customer and watched a white car drive out of the parking lot. FF 2. Schmidt

¹ The trial court's findings of fact and conclusions of law following the CrR 3.6 hearing are attached at Appendix A.

also reported that a male customer got into his own vehicle and followed the white car. FF 2.

At 5:19 a.m., John Gelzer called 911 from his vehicle and reported that he was following the white car, which he identified as a Dodge Intrepid. FF 4. He told the 911 operator that the female customer, as well as an unknown male customer, had informed him that a man had a gun to their friend's head in the Intrepid. FF 4. Gelzer followed the Intrepid and reported its location to the 911 operator until the police surrounded the Intrepid. FF 4, 5.

Snohomish County Sheriff's Deputy Arthur Wallin received the reported information and drove to the location of the Intrepid. RP 148-49.² He observed the vehicle waiting at a red light. FF 6. He could not see the interior of the vehicle because the windows were darkly tinted. FF 6. He did not observe the vehicle commit any traffic infractions. FF 6. Deputy Wallin requested additional police officers to help him initiate a "high risk" stop. FF 7.

Meanwhile, Everett Police Department Officers Maryjane Hacker and Brian Caldart drove separately to the grocery store,

² There are three volumes of consecutively paginated transcripts of trial testimony, including Volume 1 (11/2/09, 11/3/09), Volume 2 (11/4/09), and Volume 3 (11/5/09, 11/6/09), which are herein referred to as "RP." The non-consecutively paginated transcripts are referred to as follows: 10/15/09RP (CrR 3.6 hearing), 1/11/10RP (Sentencing hearing).

and were instructed by Officer Klocker to search for the two informants. RP 178, 200-01. Officer Klocker informed them that, after the grocery store employees had called 911, the two informants ran away from the grocery store toward the motel across the street. RP 178. Officers Hacker and Caldart were unable to locate the informants, and decided to help with the stop. RP 178-79, 201-02.

Seven officers participated in the stop of the Intrepid. RP 152. The Intrepid pulled over immediately. RP 152, 161. The officers directed the driver, Laura Pearson, from the car at gun point, and she immediately complied. RP 153, 161. The officers then ordered the two passengers, Robert Koppel and Camano Gahagan from the car. RP 183-84. Each immediately complied, and the officers put each man in a separate patrol car. RP 154, 185, 216-17. During a pat-down search of Gahagan, an expended shell casing fell to the ground. RP 217.

Pearson told an officer that one of the men in the car had fired a gun near her head. RP 187. Pearson consented to a search the vehicle. RP 188. The search yielded a semi-automatic pistol in the back seat and a bullet hole in the windshield. RP 204.

Later DNA testing revealed the presence of Koppel's, but not Gahagan's, DNA on the gun. RP 399.

Pearson identified Koppel as the person who had been directly behind her in the car and who had fired a gun near her head. RP 193-94. Pearson claimed that, before Koppel fired the gun, Gahagan told Koppel to shoot her at the count of three. RP 194.

The police were unable to locate the two informants until January 1, 2009. RP 94, 132. The informants were only then identified as Devin Durand and Mallory Brixey. RP 94, 132.

The State charged Gahagan and Koppel with First Degree Kidnapping with a Firearm, Second Degree Assault with a Firearm, and two counts of Attempted First Degree Robbery with a Firearm (of Pearson and Durand). CP 137-38. Koppel pled guilty to one count of Attempted First Degree Robbery and Second Degree Assault, both with firearm enhancements. RP 321.

Gahagan moved to suppress the evidence obtained as a result of the stop, arguing that the informants' tips did not establish reasonable suspicion to stop the vehicle. CP 163-72; 10/15/09RP 3-18. The trial court denied the motion, reasoning that the police

had the right to conduct a Terry stop. Supp. CP __ Sub No. 109;
10/15/09RP 19.

At trial, the court instructed the jury, in relevant part:

You will also be given special verdict forms for the crimes charged in counts I, II, III, and IV. If you find the defendant not guilty of these crimes, do not use the special verdict forms. If you find the defendant guilty of these crimes, you will then use the special verdict forms and fill in the blank with the answer "yes" or "no" according to the decision you reach. Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms. In order to answer the special verdict forms "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no."

CP 68.

The jury acquitted Gahagan of Attempted First Degree Robbery of Pearson and could not reach a verdict on the First Degree Kidnapping charge. RP 521, 524. The jury, however, convicted Gahagan of Attempted First Degree Robbery of Durand and Second Degree Assault of Pearson, and answered "yes" to the special verdicts for each of those charges. CP 33-37, 39; RP 524. The trial court imposed 36 months for each firearm enhancement. CP 6; 1/11/10RP 17-18.

D. ARGUMENT

1. THE FIREARM ENHANCEMENTS MUST BE VACATED BECAUSE THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY THAT UNANIMITY WAS REQUIRED TO RETURN A “NO” ANSWER TO THE SPECIAL VERDICTS

a. It is reversible error for a trial court to require the jury to reach unanimity in order to answer “no” on a special verdict.

It is well established that the State must prove to a jury beyond a reasonable doubt any “facts that increase the prescribed range of penalties to which a criminal defendant is exposed.” Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) (citing United States v. Jones, 526 U.S. 227, 252-53, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999)); Blakely v. Washington, 542 U.S. 296, 303, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); U.S. Const. amend VI; Const. art. I, § 21. Thus, in order for a trial court to impose a sentencing enhancement, the jury must be unanimous in its finding that the State has proven the elements required for the enhancement beyond a reasonable doubt. State v. Goldberg, 149 Wn.2d 888, 893, 72 P.3d 1083 (2003); State v. Bashaw, 169 Wn.2d 133, 147, 234 P.3d 195 (2010).

However, the jury need not be unanimous in order to return an answer of “no” to the special verdict. Goldberg, 149 Wn.2d at

894-95; Bashaw, 169 Wn.2d at 147. “A nonunanimous jury decision is a final determination that the State has not proved the special finding beyond a reasonable doubt.” Bashaw, 169 Wn.2d at 146. In other words, when the jury is deadlocked as to the special verdict, the answer to the special verdict is “no.” Goldberg, 149 Wn.2d at 893. Therefore, it is reversible error for a court to instruct the jury that unanimity is required to return an answer of “no” on the special verdict. Goldberg, 149 Wn.2d at 893; Bashaw, 169 Wn.2d at 147.

In this case, as in Bashaw, the trial court instructed the jury, “Since this is a criminal case, all twelve of you must agree on the answer to the special verdict.” Bashaw, 169 Wn.2d at 139; CP 68.

The trial court in this case continued:

In order to answer the special verdict forms “yes,” you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. *If you unanimously have a reasonable doubt as to this question, you must answer “no.”*

CP 68 (emphasis added).³ This instruction erroneously required the jury to reach unanimity in order to answer “no” to the special

³ This instruction is based on WPIC 160.00. The Note on Use for WPIC 160.00 reads in relevant part:

verdicts. Because this instruction misstates the law, and the trial court imposed two firearm enhancements based on the jury's special verdicts for the Assault 2 and Attempted Robbery 1 counts, the two firearm enhancements must be reversed. CP 34, 36.

b. This error requires reversal of the firearm enhancements. An instructional error requires reversal unless the appellate court “conclude[s] beyond a reasonable doubt that the jury verdict would have been the same absent the error.” Bashaw, 169, Wn.2d at 147 (quoting State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002); Neder v. United States, 527 U.S. 1, 19, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)).

The Bashaw Court, in evaluating whether the instructional error was harmless, concluded it was impossible to “say with any confidence what might have occurred had the jury been properly instructed.” Id. at 148. The Court looked to the flawed deliberative process in Goldberg, where the jury originally returned a non-unanimous answer of “no” on the special verdict, but returned a unanimous answer of “yes” after the trial court instructed them to

This instruction will need to be modified in light of State v. Bashaw, __ Wn.2d __, __ P.3d __, 2010 WL 2615794 (slip op. filed July 1, 2010, No. 81633-6) (reversing the Court of Appeals, and holding that jurors do not need to be unanimous to answer “no” on a special verdict relating to penalty enhancements). The committee is considering a revised pattern instruction.

reach a unanimous verdict. *Id.* at 147 (citing *Goldberg*, 149 Wn.2d at 891-93). The Bashaw Court was concerned that the Goldberg jury changed their verdict because the unanimity requirement caused the holdout jurors to let go of their reservations and questions, which would otherwise have caused them to change the outcome of the special verdict. *Id.* at 148. Because the Bashaw Court had no way of knowing whether the same process occurred during deliberations where the jury was preemptively instructed to reach unanimity, it could not determine beyond a reasonable doubt that the error was harmless. *Id.* at 147-48.

The error in this case is exactly the same as that in Bashaw, except the court's instructions here even more unequivocally require unanimity for an answer of "no" on the special verdict. Therefore, the firearm enhancements must be reversed.

2. THE SEIZURE AND SEARCH OF THE CAR VIOLATED GAHAGAN'S RIGHTS UNDER ARTICLE I, SECTION 7 BECAUSE THE INFORMANTS' TIP LACKED SUFFICIENT RELIABILITY TO JUSTIFY A TERRY STOP

a. The *Terry* stop is an exception to the warrant requirement, and as such must be jealously and carefully drawn.

Article I, section 7 of the Washington Constitution prohibits government invasion of private affairs absent authority of law.

Const. art. 1, § 7. “Authority of law” means a warrant, unless one of the few “jealously and carefully drawn” exceptions applies. State v. Martinez, 135 Wn. App. 174, 179, 143 P.3d 855 (2006).

One narrow exception to the warrant requirement is the investigatory stop. Terry, 392 U.S. at 21; State v. Duncan, 146 Wn.2d 166, 174-75, 43 P.3d 513 (2002). Under Terry, an officer may briefly detain a person if the officer harbors a reasonable suspicion, based on specific articulable facts, that the individual is engaging in criminal activity. Id. When the “reasonable suspicion” standard is not strictly enforced, the exception swallows the rule and “the risk of arbitrary and abusive police practices exceeds tolerable limits.” Brown v. Texas, 443 U.S. 47, 52, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979).

The level of articulable suspicion required to justify a Terry stop is 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). “[A] hunch does not rise to the level of a reasonable, articulable suspicion.” State v. O’Cain, 108 Wn. App. 542, 548, 31 P.3d 733 (2001). “Innocuous facts do not justify a stop.” State v. Martinez, 135 Wn. App. 174, 180, 143 P.3d 855 (2005); State v. Armenta, 134 Wn.2d 1, 13, 948 P.2d 1280 (1997). The State bears

the burden of proving the reasonableness on an investigatory stop.

State v. Hopkins, 128 Wn. App. 855, 862, 117 P.3d 377 (2005).

b. An informant's tip can only provide reasonable suspicion to support a stop if (1) the informant is reliable, and (2) there is a sufficient factual basis for the tip. Although Terry involved a stop based on the personal observations of police officers, in some circumstances an informant's tip may create the required reasonable suspicion. Adams v. Williams, 407 U.S. 143, 146-47, 32 L.Ed.2d 612, 92 S.Ct. 1921 (1972). This occurs only if the tip exhibits sufficient indicia of reliability. Alabama v. White, 496 U.S. 325, 326-27, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990); State v. Sieler, 95 Wn.2d 43, 47, 621 P.2d 1272 (1980).

Whether a tip provides sufficient indicia of reliability to support reasonable suspicion is evaluated differently under the state and federal constitutions. Under the Fourth Amendment, a tip's reliability is analyzed by reviewing the totality of the circumstances. Alabama v. White, 496 U.S. at 328-29. In contrast, under article I, section 7, the State must prove that both (1) the *informant* is reliable, and (2) the informant's *tip* is reliable. State v. Jackson, 102 Wn.2d 432, 435-36, 688 P.2d 136 (1984). State v. Hart, 66 Wn. App. 1, 8, 830 P.2d 696 (1992) (citing Sieler, 95

Wn.2d at 48) (emphasis in original).⁴ Unlike under the federal totality-of-circumstances test, *both* prongs must be satisfied; a strong showing under one prong will not make up for a deficiency in the other. Jackson, 102 Wn.2d at 435-36.

Article I, section 7 provides greater protection for automobiles, and greater protection for passengers, than the Fourth Amendment. State v. Parker, 139 Wn.2d 486, 494, 987 P.2d 73 (1999). The Terry exception, therefore, is more narrowly construed under our state constitution than under the Fourth Amendment. See State v. Gatewood, 163 Wn.2d 534, 539, 182 P.3d 426 (2008).

A brief historical review confirms that article I, section 7 requires application of the two-pronged test in determining whether an informant's tip provides reasonable suspicion to support a Terry stop. The Washington Supreme Court adopted the two-part standard for the Terry-stop context in Sieler. 95 Wn.2d at 46-49. The Sieler Court followed the U.S. Supreme Court's decision in Adams v. Williams to an extent, but adopted Professor LaFave's criticism of that decision to the extent that it did not require a showing of *both* the informant's reliability *and* a factual basis for the

⁴ The two-pronged test originated from Spinelli v. United States, 393 U.S. 410, 413, 21 L.Ed.2d 637, 89 S.Ct. 584 (1969) and Aguilar v. Texas, 378 U.S. 108, 12 L.Ed.2d 723, 84 S.Ct. 1509 (1964).

tip. Id. at 48, 50-51 (citing 3 W. LaFave Search & Seizure, s 9.3 at 100 (1978)). The Court of Appeals then followed Sieler and applied its two-pronged test in many subsequent cases. E.g., Hopkins, 128 Wn. App. at 862-63; Hart, 66 Wn. App. at 8; State v. Jones, 85 Wn. App. 797, 799-800, 934 P.2d 1224 (1997); State v. Vandover, 63 Wn. App. 754, 822 P.2d 784 (1992); State v. Wakeley, 29 Wn. App. 238, 241, 628 P.2d 835 (1981).

Three years after Sieler, the U.S. Supreme Court abandoned the two-part test for evaluating whether an informant's tip provided probable cause to support a warrant in Illinois v. Gates, 462 U.S. 213, 230, 76 L.Ed.2d 527, 103 S.Ct. 2317 (1983). There, the Court adopted the totality-of-circumstances test instead. Id. Later, the Court approved the totality-of-circumstances test in the context of a Terry stop as well, following its prior reasoning in Gates. Alabama v. White, 496 U.S. at 328-29.

But Washington declined to follow Gates. In Jackson, the Washington Supreme Court adhered to Aguilar-Spinelli, and held that under Article I, section 7, an informant's tip does not provide probable cause to support a warrant unless the affidavit establishes both (1) the credibility of the informant and (2) the basis of the information. Jackson, 102 Wn.2d at 433. The Jackson Court

reasoned that the totality test was too nebulous, and that the two-pronged test was better *both* for protecting privacy and for providing guidance to law enforcement. This reasoning applies equally to the Terry context. Indeed, in rejecting the reasoning of Gates, the Jackson Court cited Sieler extensively, which was a Terry stop case. See Jackson, 102 Wn.2d at 439 (citing Sieler, 95 Wn.2d at 46-47) and 444-45 (citing Sieler, 95 Wn.2d at 48-49). Thus, in Jackson, the Washington Supreme Court reaffirmed the two-pronged test for evaluating the reliability of an informant's tip for *both* the probable cause and reasonable suspicion contexts.

The Washington Supreme Court has never overruled Sieler. Other states that apply the two-pronged test in the warrant context also apply it in the Terry-stop context. See, e.g., State v. Eskridge, 947 P.2d 502, 508-09 (N.M. 1997); Commonwealth v. Lyons, 564 N.E.2d 390, 391-93 (Mass. 1990). This Court, too, has applied the two-pronged test to the Terry context. See, e.g., Hart, 66 Wn. App. at 6-7; Hopkins, 128 Wn. App. at 862-63; Jones, 85 Wn. App. at 799-800. In Jones, for example, the Court ruled:

"Indicia of reliability" requires: (1) knowledge that the source of the information is reliable, and (2) a sufficient factual basis for the informant's tip or corroboration by independent police observation.

Jones, 85 Wn. App. at 799-800 (citing Sieler, 95 Wn.2d at 47-49).

This long-standing application of the two-pronged requirement bolsters Washington's commitment to protecting privacy and preventing racial profiling. See Orrin S. Shifrin, Protection Against Unreasonable Search and Seizure: The Inadequacies of Using an Anonymous Tip to Provide Reasonable Suspicion for an Investigatory Stop, 81 J. Crim. L. & Criminology 760 (1990) ("the Court's application of the totality of the circumstances approach, as opposed to the two-pronged test, inadequately protects privacy rights"); David S. Rudstein, White on White: Anonymous Tips, Reasonable Suspicion, and the Constitution, 79 Ky. L.J. 661 (1991) (same); Gregory Howard Williams, The Supreme Court and Broken Promises: The Gradual but Continual Erosion of Terry v. Ohio, 34 How. L.J. 567, 583-588 (1991) (describing Alabama v. White as "this Court's version of Plessy v. Ferguson" because it improperly "opened the way for the use of 'personal characteristics such as race' in the reasonable suspicion analysis").

Despite this established precedent, this Court has, on occasion, applied the federal totality-of-circumstances standard in the Terry context. Randall, 73 Wn.App. at 228-29; State v. Lee,

147 Wn.App. 912, 916, 199 P.3d 445 (2008); State v. Marcum, 149 Wn.App. 894, 904, 205 P.3d 969 (2009). However, these cases fail to apply the Washington Supreme Court's binding precedent – precedent that properly protects privacy rights under Article I, section 7 – in favor of the U.S. Supreme Court's less protective Fourth Amendment rule. The Randall Court reasoned,

[S]ince a finding of probable cause entails a different inquiry than a finding of reasonable suspicion, we are not bound to follow Jackson and apply the Aguilar-Spinelli test where the validity of an investigatory stop is at issue.

Randall, 73 Wn.App. at 228. Because Randall and the decisions following it contradict Washington Supreme Court precedent, this Court must return to the proper two-prong test under Jackson and Sieler.

c. The stop violated Article I, section 7 because the informant's tip failed the two-pronged reliability test. The informants in this case were not reliable because they were completely anonymous and took active measures to avoid questioning by the police about their disclosures. "It is difficult to conceive of a tip more 'completely lacking in indicia of reliability' than one provided by a completely anonymous and unidentifiable informer, containing no more than a conclusionary assertion that a certain individual is

engaged in criminal activity.” Sieler, 95 Wn.2d at 47 (quoting State v. Lesnick, 84 Wn.2d 940, 944, 530 P.2d 243 (1975)). Unlike an ordinary citizen informant, the informants here faced no consequences for fabricating a story, and therefore had little incentive to tell the truth. See Hopkins, 128 Wn. App. at 866-71 (Quinn-Brintnall, C.J., dissenting) (concluding that 911 calls have heightened reliability because the citizen informants (1) are taking the initiative to contact the authorities, (2) are reporting dangerous situations that require immediate attention, and (3) are traceable so they may be held accountable later for untruthful tips). Accordingly, the seizure fails the first prong of the Sieler test, and reversal is required.

Although the failure on the first prong of the Sieler test is dispositive, it is worth noting that the second prong is not satisfied in this case either, because the informants’ tip was not corroborated by police observation of suspicious conduct. Neither the officers nor any of the grocery store customers or employees observed any suspicious behavior corroborating the tip.

Moreover, the alleged danger posed to the public does not render the illegal stop reasonable. Vandover is instructive. 63 Wn. App. 784. In that case, officers responded to an anonymous

d. This Court must reverse and order suppression.

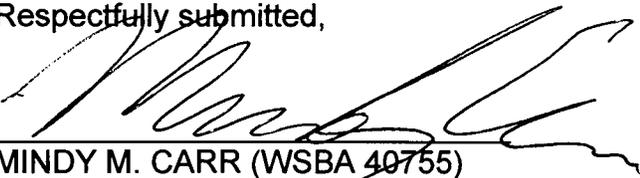
“All evidence obtained as a result of an unlawful seizure is inadmissible.” State v. Reichenbach, 153 Wn.2d 126, 135, 101 P.3d 80 (2004). Thus, where officers obtain evidence as a result of an improper Terry stop, the evidence must be suppressed. Armenta, 134 Wn.2d at 17. “[T]he right of privacy shall not be diminished by the judicial gloss of a selectively applied exclusionary remedy. . . . [W]henver the right is unreasonably violated, the remedy must follow.” State v. Winterstein, 167 Wn.2d 620, 220 P.3d 1226, 1231 (2009) (quoting State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982)). Accordingly, all evidence obtained as a result of the illegal stop, including statements and testimony by Pearson and Koppel, must be suppressed.

E. CONCLUSION

For the above reasons, Mr. Gahagan respectfully requests this Court to reverse his convictions for Second Degree Assault with a Firearm and Attempted First Degree Robbery with a Firearm. Alternatively, he requests that this Court reverse the two firearm enhancements.

DATED this 31st day of August 2010.

Respectfully submitted,



MINDY M. CARR (WSBA 40755)
Washington Appellate Project (91052)
Attorneys for Appellant

Appendix A



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10 MAR 17 PM 7:35

SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH

SUPERIOR COURT OF WASHINGTON
FOR SNOHOMISH COUNTY

THE STATE OF WASHINGTON,

Plaintiff,

v.

GAHAGAN, CAMINO ORION

Defendant.

No. 09-1-00092-6

CERTIFICATE PURSUANT TO
CrR 3.6 OF THE CRIMINAL RULES
FOR SUPPRESSION HEARING

On October 15, 2009 a hearing was held on the defendant's motion to suppress evidence. The court considered the testimony of the witnesses at the hearing and the arguments and memoranda of counsel. Being fully advised, the court now enters the following findings of fact and conclusions of law:

I. FINDINGS OF FACT

On stipulated facts the Court finds:

1) On 12/29/08 at approximately 5:16 am Stephanie Riegger, an employee of Top Foods, located at 1605 Everett Mall Way, called 911 and reported that an unknown female customer had reported that an unknown third party was in the customer's car and had grabbed her friend. Ms Riegger indicated that she had not actually seen any of this herself, and was only reporting what the unknown female customer had stated.

2)At approximately 5:17 am Tanya Schmidt, another Top Food employee, got on the phone with 911 dispatch and reported that that the unknown woman customer had come "screaming" into the store, describing how a gun was pointed at the head of her friend. Ms Schmidt described how she had exited Top Foods with the unknown female customer and had watched as a white car exited the Top Foods parking lot and drive away. Ms Schmidt also described how another unknown customer, a "good Samaritan", had got into his own car and was following the white car out of the Top Foods lot.

3)Deputy Wallin of the Snohomish County Sheriffs Office heard over the police radio that Everett Police were responding to a possible kidnapping near the Everett Mall. In an effort to assist EPD Deputy Wallin began driving in that direction.

4)At approximately 5:19 am witness John Gelzer called 911 from his vehicle and stated that he was leaving the Top Foods parking lot, and was following a white car he described as a Dodge Intrepid. Gelzer indicated the reason he was following the Intrepid was that while he was at Top Foods an unknown female had come into the store stating that a guy had a gun to her friend's head in the Intrepid. Gelzer also indicated he had spoken to an unknown male associated with the female customer and that this person had also described a gun being held to his friend's head. Gelzer gave 911 the location of the white Intrepid and its direction of travel.

5)At approximately 5:20 am Gelzer called 911 back a second time and updated them on the location and path of travel of the white Intrepid. A short time later Gelzer saw various police cars starting to converge on the Intrepid and he stopped following it.

6)At approximately 5:22 am Deputy Wallin spotted the white Intrepid. When Deputy Wallin initially saw the Intrepid it was stopped at the intersection of 112th St. and Hwy 99, waiting on a red light. The deputy reported he could not see into the interior of the Intrepid due to the tinting of its windows. The deputy did not see the vehicle commit any traffic infractions.

7)At approximately 5:25 am Deputy Wallin initiated a "high risk" stop of the Intrepid. Wallin had waited until he had two other backing officers prior to initiating the stop. A "high risk" stop consists of the various police officers drawing their weapons, aiming them at the white Intrepid, and ordering the occupants out one at a time.

8)The three occupants of the Intrepid, including the defendant, were removed from the car, placed in hand restraints, and ultimately put into separate police squad cars.

9)Police subsequently did a protective sweep of the Intrepid, locating a .45 Glock handgun, a .45 magazine, and a bullet hole in the front windshield of the car.

II. CONCLUSIONS OF LAW

1)The Court concludes that the police made a valid Terry stop of the white Intrepid based on the information that they had. The Court finds that the police had information that a violent felony crime, Kidnapping, had just occurred at gunpoint, and were justified in investigating further.

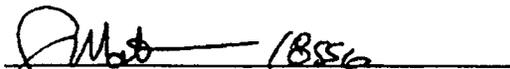
2)The Court finds that the information relayed by Tanya Schmidt (Top Foods employee) and John Geizer (the "good Samaritan") was specific as to the vehicle involved, and as to what had occurred inside the car. This information gave the police specific and articulable facts, which taken together with rational inferences drawn on those facts, warranted the investigatory stop of the white Intrepid.

DONE IN OPEN COURT this 17 day of March, 2010.



JUDGE

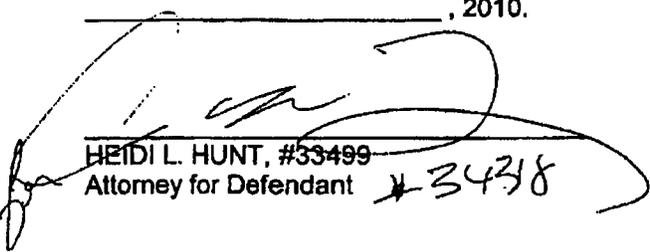
Presented by:



18556

CRAIG S. MATHESON, #18556
Deputy Prosecuting Attorney

Copy received this _____ day of
_____, 2010.


HEIDI L. HUNT, #33499
Attorney for Defendant *3438

CAMINO ORION GAHAGAN
Defendant

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

STATE OF WASHINGTON,)
)
 Respondent,)

NO. 64892-6-I

CAMANO GAHAGAN,)
)
 Appellant.)

2010 AUG 31 PM 4:51

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 31ST DAY OF AUGUST, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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EVERETT, WA 98201 | (X) U.S. MAIL
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() _____ |
| [X] | CAMANO GAHAGAN
793198
CLALLAM BAY CC
1830 EAGLE CREST WAY
CLALLAM BAY, WA 99326 | (X) U.S. MAIL
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SIGNED IN SEATTLE, WASHINGTON, THIS 31ST DAY OF AUGUST, 2010.

X _____ 

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