

66727-1

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NO. 66727-1-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

LYLE ELMER ESTEP,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE REGINA CAHAN

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

JEREMY T. LAZOWSKA  
Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
Norm Maleng Regional Justice Center  
401 Fourth Avenue North  
Kent, Washington 98032-4429

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2011 DEC 7 PM 2:01

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**A. ISSUES PRESENTED**

A person may be detained if the totality of the circumstances give police a reasonable suspicion that the person was involved in criminal activity that has occurred or is about to occur. Where police receive information, at one o'clock on a rainy morning, that a person wearing a dark hooded sweatshirt is suspiciously prowling the area, are they justified, ten minutes later, in detaining an individual wearing a dark hooded sweatshirt, within a mile of that location?

A frisk for weapons is lawful if circumstances are present leading police reasonably to conclude that a detained person is armed and presently dangerous. Are police justified in conducting a weapons frisk, when, responding to a report of a possible burglar, they encounter someone wearing dark, baggy clothing, and, upon contact, the person does not keep his hands out of his pockets, despite specific police requests?

**B. STATEMENT OF THE CASE**

On March 26, 2010, at approximately one o'clock in the morning, Deputies Jeff Barden and Koby Hamill, of the King County Sheriff's Office, were patrolling in the City of Federal Way, as part

of a mutual aid agreement in response to the municipal police mourning the loss of one of their number. 1RP 7-8; 1RP 54; CP 67. The deputies were working in a single car, with Deputy Barden driving, because Deputy Hamill was not familiar with the area. 1RP 55. Deputy Barden, in contrast, was intimately acquainted with the area, as a result of both living there and formerly patrolling there. 1RP 8-10; CP 68. It was raining that night, quite hard at times. 1RP 17-18; 1RP 58.

At 1:08 AM, Federal Way dispatch communicated a report of a suspicious person in the 1100 block of Southwest 308th Street. 1RP 9; 1RP 56; CP 67. The person was described as an unknown-race male, wearing dark clothing, including a hood covering his head, carrying a flashlight and possibly a backpack. 1RP 12; 1RP 56-57; CP 68. The deputies were also told that the caller had communicated that there had been a number of recent theft and prowling incidents in the area. 1RP 13; 1RP 57; CP 68.

Deputies Hamill and Barden responded to the call; however, it took them approximately ten minutes to arrive in the area, as they stopped briefly on the way. 1RP 13; 1RP 57. As they were driving up First Avenue South, having just passed 304th Street, they observed the defendant. 1RP 16-17; 1RP 58; CP 68. The

defendant was wearing a dark hooded jacket, with the hood pulled up. 1RP 17; 1RP 58; CP 68. His hands were thrust into his pockets. 1RP 59; CP 68. He was walking south along the east side of First Avenue. 1RP 17; 1RP 58; CP 68. Not surprisingly, given the weather and the late hour, the deputies had observed no other pedestrians or vehicles on the road. 1RP 19; 1RP 58; CP 68.

As they drove by the defendant, Deputy Barden remarked that he appeared to match the description of the prowler subject. 1RP 19; 1RP 59; CP 68. Deputy Barden, familiar with the area, knew that they were in approximately the same neighborhood as that from which the call came in. 1RP 49-50. In retrospect, he knew he was under a mile from the point of origin. 1RP 19. Deputy Barden continued north a short distance, before conducting a U-turn for the purpose of contacting the defendant. 1RP 19; 1RP 59. Without activating emergency equipment, the deputies pulled directly behind the defendant, thus driving south along the east side of the street (against traffic). 1RP 20. The defendant looked slowly over his shoulder, then turned around to continue walking. 1RP 20-21; CP 68.

Deputy Barden activated his emergency lights, both to get the defendant to stop, and to alert any oncoming vehicles of their

location. 1RP 21; 1RP 60. The defendant turned and walked back toward the patrol car, and the deputies exited their vehicle.

1RP 22; 1RP 60. As he walked toward the patrol car, the defendant removed his hood from his head. 1RP 60; CP 68. He then moved his hands toward his pockets, hesitated, and put them to his sides briefly before slipping them back into his pockets.

1RP 60-61; CP 68. The deputies contacted the defendant in front of the patrol car. 1RP 22.

Deputy Hamill spoke with the defendant, and Deputy Barden took a cover position over Hamill's left shoulder. 1RP 22.

Concerned with the previous movements, Deputy Hamill asked the defendant to remove his hands from his pockets. 1RP 23; 1RP 61; CP 68. While the defendant initially complied, he put his hands back into his pockets shortly thereafter. 1RP 23; CP 68. In response to this movement, and to the time, place, and situation, Deputy Hamill indicated to the defendant that Deputy Barden was going to frisk him for weapons. 1RP 24; 1RP 42; 1RP 48-49; 1RP 61-62; CP 68.

From behind the defendant, Deputy Barden reached with his left hand around the left side of the defendant's waistband. 1RP 24; CP 68. When he got to the front of the waistband, he felt a

hard object, which he believed to be a gun. 1RP 24; CP 68. He held his hand on the object, informed Deputy Hamill what he felt, then asked the defendant if he was feeling a gun. 1RP 25. The defendant affirmed the deputy's suspicion. 1RP 25. The defendant was placed in handcuffs without incident, and a fully-loaded, nine-millimeter, semi-automatic pistol was removed from his waistband. 1RP 25-26; 1RP 63; CP 68. While Deputy Barden secured the firearm, Deputy Hamill asked the defendant if he had any other weapons on his person; the defendant responded that he did, and gestured to his right hip, where Hamill located a buck knife with a six-inch blade. 1RP 64.

Because the defendant had previously been convicted of a felony, the State charged him with one count of unlawful possession of a firearm in the second degree. CP 66. At trial on February 8, 2011, the defendant moved to suppress evidence, pursuant to CrR 3.6. CP 4-17. After hearing testimony from the two deputies, and the arguments of counsel, the trial court took the issue under advisement. 1RP 97. On February 9, 2011, the court denied the defendant's motion to suppress evidence. 2RP 7.

The defendant proceeded by way of a bench trial on stipulated facts, and the court found the defendant guilty as

charged. 2RP 14; CP 70-72. On February 11, 2011, the defendant was sentenced, CP 73-79, and written findings of facts and conclusions of law were entered as to the CrR 3.6 hearing. 3RP 2-11; CP 67-69. The defendant now appeals the denial of his motion to suppress.

**C. THE COURT SHOULD REJECT ESTEP'S CHALLENGE TO THE TRIAL COURT'S DENIAL OF HIS MOTION TO SUPPRESS**

Article I, section 7, of the Washington State Constitution provides, in relevant part, "No person shall be disturbed in his private affairs... without authority of law." This provision carries more privacy protections than its federal counterpart. State v. Bailey, 154 Wn. App. 295, 300, 224 P.3d 852 (2010). Both require that evidence obtained as a result of an unlawful seizure be suppressed. State v. Pressley, 64 Wn. App. 591, 596, 825 P.2d 749 (1992). Because the seizure in the instant case was supported by the authority of law, the defendant's motion to suppress was properly denied.

1. THE DEFENDANT WAS LAWFULLY SEIZED.

To justify an investigative detention of an individual, an officer must be able to “point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” Terry v. Ohio, 392 U.S. 1, 21, 88 S. Ct. 1868 (1968). Probable cause is not required, because the degree of intrusion is less than formal arrest. State v. Mendez, 137 Wn.2d 208, 223, 970 P.2d 722 (1999). Rather, the suspicions must support “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). Reasonable suspicion is not a scientific calculus; rather, “a determination of reasonable suspicion must be based on common sense judgments and inferences about human behavior.” State v. Lee, 147 Wn. App. 912, 917, 199 P.3d 445 (2008) (quoting Illinois v. Wardlow, 528 U.S. 119, 120 S. Ct. 673 (2000)).

The test is one of reasonableness, which weighs the degree of intrusion into the suspect’s individual liberty against in interests of the public advanced by that intrusion. State v. Samsel, 39 Wn. App. 564, 570, 694 P.2d 670 (1985). Presence in a high crime area alone is not sufficient to support reasonable suspicion of criminal activity. State v. Ellwood, 52 Wn. App. 70, 74, 757 P.2d

554 (1988). A seizure is reasonable if the totality of the circumstances known to the officer at the inception of the stop would lead a reasonable officer to have suspicion of criminal activity. Lee, 147 Wn. App. at 916-17. Some of the facts in the officer's knowledge could be consistent with innocent conduct, but those same factors may also appear incriminating based on an officer's experience. See Samsel, 39 Wn. App. at 570-71. "An officer is not required to rule out all possibilities of innocent behavior before initiating" an investigative detention. State v. Anderson, 51 Wn. App. 775, 780, 755 P.2d 191 (1998).

The defendant correctly cites State v. Gatewood, 163 Wn.2d 534, 182 P.3d 426 (2008), for the proposition that furtive movements upon seeing police, without more, is insufficient to support reasonable suspicion. He also correctly cites State v. Doughty, 170 Wn.2d 57, 239 P.3d 573 (2010), for the proposition that presence in a high-crime area late at night, without more, is insufficient to support reasonable suspicion of criminal activity. Both of these cases are inapposite, however, as they lack an important distinguishing fact: in neither case was specific suspicious activity reported to police at or around the time that the subject was observed; this absence was an important factor in the

Supreme Court ruling that evidence should have been suppressed in each case. Gatewood, 163 Wn.2d at 540-41; Doughty, 170 Wn.2d at 64.

The instant case, however, has what those cases lack: a suspect who matched the description of an individual said to be involved in specific, criminally suspicious behavior. The defendant was present in an area that had had a large amount of recent crime. It was after one o'clock in the morning on a rainy night. The defendant was within a one-mile radius of the location where the moving suspect had been reported ten minutes prior, and there were no other pedestrians around.

While each of these facts, taken separately, would not justify an intrusion into the individual's private affairs, together they would place suspicion of criminal activity in the minds of experienced officers. That is precisely what happened on March 26, 2010. The totality of the circumstances led Deputies Hamill and Barden to believe that the defendant had been or was about to be involved in criminal activity. At its outset, the intrusion was fairly minimal, and such a seizure on this information was reasonable.

2. THE DEPUTIES WERE JUSTIFIED IN FRISKING THE DEFENDANT FOR WEAPONS.

An officer who “observes conduct which leads him reasonably to conclude [that a person he has detained] may be armed and presently dangerous [may] conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.” Terry, 392 U.S. at 30-31, 88 S. Ct. 1868. “The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.” Id. at 27. Accord State v. Harvey, 41 Wn. App. 870, 874-75, 707 P.2d 146 (1985); State v. Harper, 33 Wn. App. 507, 511, 655 P.2d 1199 (1982).

A number of factors may support the reasonableness of the determination that a particular suspect may be armed and dangerous. Among these is the nature of the crime in which the suspect is alleged to have been involved. See Harvey, 41 Wn. App. at 875 (holding that a burglary suspect can be subjected to a weapons frisk). Another is the movements of the suspect’s hands relative to places where weapons could be found. See State v.

Harper, 33 Wn. App. at 509 (holding that a suspect's refusal to keep hands in view justified a frisk). Other factors that may be calculated include more common-sense items, such as the time of night, the neighborhood, and whether the suspect's clothing could conceal weapons.

In Harvey, the officers had no information except that their suspect had been identified as being involved in a burglary where a door was kicked in. 41 Wn. App. at 875. In allowing a frisk for weapons on that information, the court reasoned, "It is well known that burglars carry weapons." Id. In Harper, in responding to the radio call of a colleague who indicated a suspect had fled, an officer stopped a subject nearby who matched the description. 33 Wn. App. at 509. In holding that a frisk was justified, the court cited the defendant's nervous movements with his hands, and lack of eye-contact. Id.

The defendant cites no authority for the proposition central to his argument on this issue: that a subject with a cooperative demeanor creates a legal barrier to a frisk for weapons. Brief of Appellant at 13. A subject's demeanor can be relevant to the inquiry into whether he or she is armed. Cf. State v. Xiong, 164

Wn.2d 506, 513, 191 P.3d 1278 (2008). However, it is far from dispositive of the issue. Id.

The instant case is an analogical composition of Harvey and Harper. At one o'clock in the morning, Deputies Barden and Hamill responded to a report of an individual who was lurking around the neighborhood, shining a flashlight down the driveways of residents. In short, the person was acting distinctly like a burglar. Additionally, the reporting party informed police that there had been a recent rash of crime in the area, including car prowling and gasoline theft. As the deputies arrived in the area about ten minutes later, they observed the defendant in the neighborhood. The defendant matched the description of the area prowler. When they initially went to contact the defendant, he made nervous movements toward his pockets with his hands. All of these factors combined to give the deputies a specific fear for their safety.

This is precisely the type of situation contemplated in Harvey, 41 Wn. App. 870, and Harper, 33 Wn. App. 507. The deputies reasonably believed that they were contacting someone who either had committed or was about to commit a burglary. The defendant subsequently made furtive movements with his hands. Individually, each of these factors would support a limited frisk of

the defendant for weapons. Here, the deputies had both, in addition to facts that the defendant's clothes were sufficiently baggy to conceal a weapon and that it was one o'clock in the morning in a high-crime area. There was more reason for concern in this case than in either Harvey or Harper; thus, a frisk for weapons was reasonable.

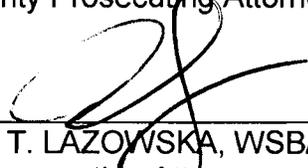
**D. CONCLUSION**

The State respectfully requests that this Court affirm the trial court's denial of the defendant's motion to dismiss. The deputies conducted a lawful seizure of the defendant. The limited weapons frisk of the defendant was reasonable under the circumstances presented. The trial court acted correctly in refusing to suppress the evidence seized as a result of that frisk.

DATED this 6th day of December, 2011.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
JEREMY T. LAZOWSKA, WSBA #39272  
Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jan Trasen, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. LYLE ESTEP, Cause No. 66727-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Mary Heinzen  
Name: Mary Heinzen  
Done in Kent, Washington

12/6/11  
Date