

67077-8

67077-8

NO. 67077-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,
Respondent,

v.

SHAQUILLE V. POLK,
Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE HELEN HALPERT

BRIEF OF RESPONDENT

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 FEB 24 11:10:48

DANIEL T. SATTERBERG
King County Prosecuting Attorney

MARI ISAACSON
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000

TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u>	1
B. <u>STATEMENT OF FACTS</u>	1
1. PROCEDURAL FACTS	1
2. SUBSTANTIVE FACTS	2
C. <u>ARGUMENT</u>	5
1. A HAND TO HAND EXCHANGE IN A HIGH CRIME AREA WITH "LOTS OF DRUG ACTIVITY" GAVE OFFICER BUCK REASONABLE, ARTICULABLE SUSPICION TO JUSTIFY DETAINING POLK.....	5
D. <u>CONCLUSION</u>	16

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Arkansas v. Sanders, 442 U.S. 753,
99 S. Ct. 2586, 62 L. Ed. 2d 235 (1979)..... 6

Brendlin v. California, 551 U.S. 249,
127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007)..... 6

Terry v. Ohio, 392 U.S. 1,
88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)..... 6, 8, 10-15

Washington State:

State v. Armenta, 134 Wn.2d 1,
948 P.2d 1280 (1997)..... 14, 15

State v. Biegel, 57 Wn. App. 192,
787 P.2d 577 (1990)..... 11, 12

State v. Doughty, 170 Wn.2d 57,
239 P.3d 573 (2010)..... 6

State v. Ferguson, 3 Wn. App. 898,
479 P.2d 114 (1970), review denied,
78 Wn.2d 996 (1971)..... 7

State v. Gatewood, 163 Wn.2d 534,
182 P.2d 426 (2008)..... 6

State v. Glover, 116 Wn.2d 509,
806 P.2d 760 (1991)..... 7, 8

State v. Hill, 123 Wn.2d 641,
870 P.2d 313 (1994)..... 6

State v. Hobart, 94 Wn.2d 437,
617 P.2d 429 (1980)..... 7

<u>State v. Kennedy</u> , 107 Wn.2d 1, 726 P.2d 445 (1986).....	7
<u>State v. Lee</u> , 147 Wn. App. 912, 199 P.3d 445 (2008).....	7
<u>State v. Little</u> , 116 Wn.2d 488, 806 P.2d 749 (1991).....	8
<u>State v. Mendez</u> , 137 Wn.2d 208, 970 P.2d 722 (1999).....	6
<u>State v. Mercer</u> , 45 Wn. App. 769, 727 P.3d 676 (1986).....	7
<u>State v. Pressley</u> , 64 Wn. App. 591, 825 P.2d 749 (1992).....	7, 12, 13, 14
<u>State v. Rodriguez-Torres</u> , 77 Wn. App. 687, 893 P.2d 650 (1995).....	8, 9, 10
<u>State v. Rowe</u> , 63 Wn. App. 750, 822 P.2d 290 (1991).....	7
<u>State v. Samsel</u> , 39 Wn. App. 564, 694 P.2d 670 (1985).....	7
<u>State v. Tijerina</u> , 61 Wn. App. 626, 811 P.2d 241 (1991).....	14, 15
<u>State v. White</u> , 76 Wn. App. 801, 888 P.2d 169 (1995), <u>aff'd</u> , 129 Wn.2d 105, 915 P.2d 1099 (1996).....	8, 9

Constitutional Provisions

Federal:

U.S. Const. amend. IV..... 6

Washington State:

Const. art. I, § 7..... 6

Rules and Regulations

Washington State:

CrR 3.5..... 1

CrR 3.6..... 1, 5

A. ISSUES PRESENTED

1. Officers may conduct an investigatory stop when they have a reasonable, articulable suspicion that a suspect is involved in criminal activity. When assessing whether a stop is proper, courts examine the totality of the circumstances known to the officer at the time of the stop. Here, Polk conducted a quick hand to hand transaction from within a van during hours of darkness in a high crime area known for drug activity. Did officers have articulable suspicion to detain Polk?

B. STATEMENT OF FACTS

1. PROCEDURAL FACTS

The State charged juvenile respondent Shaquille Polk by information with possession of forty grams or less of marijuana, a violation of the Uniform Controlled Substances Act. CP 1. The case proceeded by way of a bench trial. CP 2. The trial court consolidated testimony for the CrR 3.5 and CrR 3.6 hearing with trial testimony. Polk made a motion to suppress the drugs, arguing that his detention was unlawful. CP 6-8. Following testimony, the trial court denied Polk's motion to suppress and dismiss and found

him guilty as charged. CP 19-22. At sentencing, the court imposed a standard range sentence. CP 31-36.

2. SUBSTANTIVE FACTS

At around 8:30 p.m. on February 14, 2010, Officer David Buck and Officer Autumn Majack were on bicycle patrol in the downtown area of Kent. RP 31.¹ Officer Buck had 16 years of experience as a police officer and Officer Majack had worked in law enforcement for 11 years. RP 11, 30.

They saw a van sitting in the parking lot of a gas station in a high-crime area known for drug activity. RP 32; CP 24. The van was parked in a handicapped spot and there was a "No loitering" sign posted on the side of the gas station. RP 32. There was a group of three people on the curb in front of the van. RP 34.

Officer Buck and Officer Majack generally made five or six stops a night in that area for drug and alcohol-related offenses. RP 32. The area where the van was parked adjoined an alley that led to the bus station. RP 34. It was common for Officer Buck to

¹ The Verbatim Report of Proceedings consists of a total of one volume, referred to in this brief as RP, including the proceedings on September 21, 2010, and October 8, 2010.

see people buy alcohol at the gas station, roll marijuana blunts, and drink and use drugs where the van was parked and in the adjacent alley. RP 34.

While there on February 14, 2010, the officers saw a person approach the passenger side of the van from the curb and make a quick exchange with Polk through the window of the van. RP 33. At that point, Officer Buck and Officer Majack approached the van because they believed they had observed a drug transaction. RP 33-34. Because the only windows were in the front of the van on the driver and passenger side, Officer Buck could not see inside the back of the van.² RP 35. Officer Buck moved toward the passenger side of the van, where Polk was seated, and Officer Majack went to the driver's side. RP 35. At that point, Officer Buck got off his bike and told the occupants of the van to put their hands up where he could see them. RP 35. He saw Polk reaching

² Officer Buck testified the van did not have windows in the back. RP 35. Officer Majack testified the van had windows, but the windows were covered. RP 17. Although it is not clear whether the van had windows in the back or if there were windows that were covered, both officers testified that it was not possible to see into the back of the van.

around between the seats and between the door and the seat, as if trying to reach something behind the seat. RP 35-36. Concerned, Officer Buck repeatedly told Polk to put his hands up, but he did not comply. RP 36. For safety reasons, the officer opened the passenger side door and noticed Polk's hands were still between the front seats and behind the front passenger seat. RP 36. Officer Buck removed Polk from the van. RP 37.

Officer Buck placed Polk in handcuffs and patted him down to check for weapons. RP 37. During the initial pat down of Polk, Officer Buck discovered prescription pills in a small bag that was sticking out of Polk's pocket. RP 38. During a subsequent search incident to arrest, Officer Buck found seven or eight bags of marijuana in Polk's coat pocket. RP 41-42. The results of a field test were positive for marijuana. RP 43. The lab report, marked as an exhibit for trial, established that it was, indeed, marijuana. RP 96.

C. ARGUMENT

1. A HAND TO HAND EXCHANGE IN A HIGH CRIME AREA WITH “LOTS OF DRUG ACTIVITY” GAVE OFFICER BUCK REASONABLE, ARTICULABLE SUSPICION TO JUSTIFY DETAINING POLK.

Polk argues that the trial court erred by denying his motion to suppress evidence under CrR 3.6.³ Polk's argument should be rejected. Officer Buck approached the van after he witnessed a hand-to-hand exchange during hours of darkness in a high crime area. He told Polk to put his hands where he could see them, but Polk did not comply. Polk was reaching around between the seats and between the door and the seat, as if trying to access or conceal something behind the seat. The trial court found that Polk was detained once he was removed from the vehicle. Considering the totality of the circumstances, there were sufficient specific and articulable facts, coupled with rational inferences from those facts, to provide Officer Buck with a basis to conduct an investigatory stop.

When reviewing the denial of a motion to suppress, appellate courts review findings of fact for substantial evidence.

³ Polk assigns error to one Conclusion of Law. He does not assign error to any of the trial court's Findings of Fact.

State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999),
overruled on other grounds by Brendlin v. California, 551 U.S. 249,
127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007). Unchallenged findings
are verities on appeal. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d
313 (1994). A trial court's conclusions of law are reviewed de novo.
Mendez, 137 Wn.2d at 214.

Under the Fourth Amendment to the United States
Constitution and article I, section 7 of the Washington Constitution,
warrantless seizures are per se unreasonable, unless they fall
under one of the "jealously and carefully drawn exceptions" to the
warrant requirement. State v. Doughty, 170 Wn.2d 57, 61,
239 P.3d 573 (2010) (quoting Arkansas v. Sanders, 442 U.S. 753,
759, 99 S. Ct. 2586, 62 L. Ed. 2d 235 (1979)). An investigatory
stop is one such exception to the warrant requirement. Doughty,
170 Wn.2d at 61 (citing Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868,
20 L. Ed. 2d 889 (1968)). An investigatory stop must be supported
by reasonable suspicion of criminal activity based on objective,
articulable facts. State v. Gatewood, 163 Wn.2d 534, 539,
182 P.2d 426 (2008) (citing Terry, 392 U.S. at 21). Because a stop
is considerably less intrusive than an arrest, less than probable

cause is required to justify an investigatory detention. State v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445, 448 (1986).

In evaluating whether reasonable suspicion exists justifying an investigatory detention, courts examine the totality of the circumstances known to the officer at the time of the stop. State v. Lee, 147 Wn. App. 912, 916, 199 P.3d 445 (2008) (citing State v. Rowe, 63 Wn. App. 750, 753, 822 P.2d 290 (1991)). The "ultimate test" for an investigative stop is "reasonableness, which involves weighing the degree of invasion of personal liberty against the public interest to be advanced." State v. Samsel, 39 Wn. App. 564, 570, 694 P.2d 670 (1985) (citing State v. Hobart, 94 Wn.2d 437, 443, 617 P.2d 429 (1980); State v. Ferguson, 3 Wn. App. 898, 901, 479 P.2d 114 (1970), review denied, 78 Wn.2d 996 (1971)).

Reasonableness is measured by probabilities, not exactitudes. State v. Mercer, 45 Wn. App. 769, 774, 727 P.3d 676 (1986) (citing Samsel, 39 Wn. App. at 571). Courts engage in a fact specific inquiry while evaluating the reasonableness of a detention. State v. Pressley, 64 Wn. App. 591, 596, 825 P.2d 749 (1992). In reviewing such circumstances, courts may properly consider factors such as the officer's training and experience, the location of the stop, and the conduct of the person detained. State v. Glover, 116 Wn.2d

509, 514, 806 P.2d 760, 762 (1991) (citing State v. Little, 116 Wn.2d 488, 806 P.2d 749 (1991)).

Observing a suspected narcotics transaction gives rise to reasonable suspicion justifying an investigatory stop. Courts have upheld warrantless arrests where officers witnessed a suspected drug transaction, but did not see exactly what passed between the suspects. For example, in State v. Rodriguez-Torres, an officer saw Rodriguez-Torres exchange an object in his hand for money from another man. 77 Wn. App. 687, 689, 893 P.2d 650 (1995). The incident occurred in an area of high narcotic sales. Id. Rodriguez-Torres and the other man left the scene quickly when an unknown person shouted "Police" as an officer approached. Id. Rodriguez-Torres was subsequently arrested. Id. at 690. This Court held that there was probable cause to arrest Rodriguez-Torres—a higher standard than what is required for a Terry detention in the case at hand—for the crime of possession with intent to deliver a controlled substance, even though the officer could not tell what object Rodriguez-Torres had in his hand. Id. at 694.

Similarly, in State v. White, this Court found probable cause to arrest White when he appeared to be acting as a lookout for a

drug transaction. 76 Wn. App. 801, 804-05, 888 P.2d 169 (1995), aff'd, 129 Wn.2d 105, 915 P.2d 1099 (1996). In that case, the officer saw White and Murray walking together before separating to stand several feet apart. Id. at 802. Another man approached and White directed him to Murray. Id. at 803. While Murray and the other man spoke, White walked a few feet behind them. Id. White looked over his shoulder after Murray and the man exchanged an unknown object for money. Id. After the man left, the officer saw hand movements between White and Murray but did not know what, if anything at all, passed between the two men. Id.

Like Rodriguez-Torres and White, Officer Buck witnessed a suspected narcotics transaction taking place in a high crime area known for drug activity. Just as in those cases, Officer Buck did not see what passed between Polk and the person at the side of the van. In fact, the officer in White saw the suspect acting in a way that was consistent with a lookout, but did not know if anything at all had passed between the suspect and Murray. Although the officers in Rodriguez-Torres and White saw money involved in the exchanges, those instances also involved exchanges where the suspects were standing on the street. Here, the transaction was conducted from within a van with limited visibility. The late hour,

combined with the lack of visibility inside the van, add to the reasonable suspicion calculus. Moreover, just as in Rodriguez-Torres, the case at hand occurred in a high crime area. A suspected drug transaction is enough for probable cause to arrest, even without knowing that narcotics were the items exchanged. Therefore, the same facts are certainly enough to support a Terry detention.

In addition, Polk's furtive hand movements, which continued after repeated orders to show his hands, confirmed Officer Buck's initial suspicion. Like the suspect's reaction to police approaching in Rodriguez-Torres, Polk's apparent reaction to Officer Buck presented additional suspicion of wrongdoing. His continued furtive movements indicated an effort to conceal evidence or reach for a weapon, thereby verifying Officer Buck's initial belief that Polk was involved in illegal activity.

Further, Officer Buck's experience must be considered in evaluating the Terry detention. The quick hand-to-hand exchange occurred in a high crime area known for drug activity, where Officer Buck made five to six stops each night for drug and alcohol-related offenses. He testified that the area where the van was parked adjoins an alley that connects to the bus station. In his experience,

he has seen people engage in drug use where the van was parked and in the alleyway adjacent to that spot.

These pieces of information known to Officer Buck combine to provide reasonable, articulable suspicion based on specific facts that Polk was engaged in a narcotics transaction. This stop was not based on an "inarticulate hunch." Terry, 392 U.S. at 22. Considering the totality of the circumstances, including the hand to hand exchange from within the van, the location of the incident in a high crime area, the hour of darkness, the covered windows in the van, and Polk's furtive hand movements, Officer Buck reasonably believed he had witnessed a drug transaction. Therefore, the investigatory detention was eminently reasonable.

Even if this Court were to find that Polk was detained before he was removed from the van, the detention was justified based on the circumstances described above. A Terry detention for a suspected drug transaction is lawful even if officers do not witness an exchange. State v. Biegel, 57 Wn. App. 192, 194-95, 787 P.2d 577 (1990). In Biegel, the court found that sufficient articulable facts were present to justify a Terry detention where officers did not observe a hand-to-hand exchange of any kind. Id. In that case, officers saw Biegel talk with a person in a group on a street corner

for about thirty seconds before entering an apartment building in a high crime area. Id. at 193. One officer testified that this was "the normal mode of conduct for a drug transaction; however, he did not know that this particular person was a drug dealer." Id. The suspect was contacted by officers when he left the building after three or four minutes. Id. at 194. The court upheld the Terry detention, noting that the officers did not see the suspect involved in a drug deal, but that they "merely suspected he might have made a drug purchase." Id. at 194-95. Like the officer in Biegel, Officer Buck relied on his experience with that area of Kent when detaining Polk. Not only did he suspect Polk had conducted a drug deal, his belief stemmed from the hand to hand exchange he just witnessed. Consequently, Polk was lawfully detained even if the actual point of detention was earlier than the trial court found.

Relying primarily on State v. Pressley, Polk contends that Officer Buck did not have reasonable, articulable suspicion to conduct an investigatory detention. Pressley, 64 Wn. App. 591. Polk's reliance on Pressley is misplaced. In that case, an officer saw two young women standing next to each other, holding their hands at chest height, in a high crime area. Id. at 593. Pressley was pointing to something in her hand and may have been counting

items in her hand, while the other person carefully looked at the items. Id. at 594. When the officer drove up to Pressley, she closed the hand that had the items in it, said "Oh Shit," and both women walked away in different directions. Id. The officer believed he had interrupted a drug transaction and conducted a Terry stop. Pressley challenged the legality of the detention on appeal. This Court upheld the trial court's finding that there were sufficient articulable facts to justify the stop, because the suspect's behavior created additional inferences necessary for believing illegal activity was afoot. This Court found that the officer "articulated a series of observations, which, when seen in the light of his experience and training, establish a well founded suspicion based on objective fact that he was observing illegal drug activity." Id. at 597.

Polk contends that Pressley requires additional suspicious behavior to justify a Terry stop, because this Court held that the officer's initial observations were insufficient to justify a stop. However, Polk's actions are qualitatively different from the suspects' behavior in Pressley; therefore, Polk's case is distinguishable. Here, Officer Buck saw a hand-to-hand exchange from within a van with covered windows, where Pressley involved no exchange. In these circumstances, an exchange is strongly

indicative of criminal activity. As a result, nothing additional is needed to support the stop. Nonetheless, even if Pressley requires something more in the way of behavior from a suspect, Polk's furtive hand movement is the evidence suggestive of a guilty conscience that Polk argues is necessary.

Polk further relies on State v. Armenta, 134 Wn.2d 1, 948 P.2d 1280 (1997), and State v. Tijerina, 61 Wn. App. 626, 811 P.2d 241 (1991), for the proposition that innocuous facts contribute minimally to the reasonable suspicion calculus. However, neither of those cases involved a suspected drug transaction. Rather, Armenta dealt with a suspect who approached an officer asking for the name of an auto mechanic. Armenta, 134 Wn.2d at 4-5. Armenta had bundles of cash and could not name the place where he worked. Id. at 5. The court found the Terry stop was not justified because Armenta was not doing anything inherently suspicious when he was detained; he approached an officer, asked for an auto mechanic, and was carrying money. Id. at 13.

In Tijerina, a state trooper stopped the suspect's car for weaving over the fog line on the highway. Tijerina, 61 Wn. App. at 628. The trooper noticed several small bars of soap in the glove

box when Tijerina opened it to get his registration. Id. Although the trooper knew of investigations involving Hispanics selling drugs from hotel rooms, the court found the search of the car was not justified because soap in the glove box was not inherently suspicious. Id. at 628-29. In finding the facts of Armenta and Tijerina did not amount to reasonable suspicion, the courts noted the innocuous nature of having money or soap in one's possession. Armenta, 134 Wn.2d at 13.

In contrast, here there was a specific reason to believe Polk was involved in a narcotics exchange because of the hand-to-hand transaction from within the van. Further, this incident took place in a high crime area at a late hour. Finally, Polk's furtive movements in the van confirmed Officer Buck's suspicions that illegal drug activity was afoot. Considering the totality of the circumstances, Officer Buck's basis for the stop was supported by sufficient articulable facts and rational inferences from those facts. Because the Terry detention was lawful, this court should affirm the conviction.

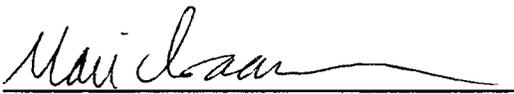
D. CONCLUSION

For the foregoing reasons, the State asks this Court to affirm the juvenile court's conviction of Polk for the crime of possession of forty grams or less of marijuana, a violation of the Uniform Controlled Substances Act.

DATED this 23rd day of February, 2012.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

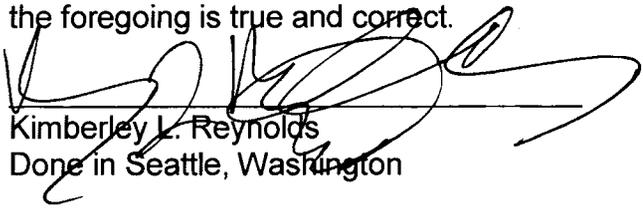
By: 
MARI ISAACSON, WSBA #42945
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 FEB 24 AM 10:49

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 Andrew Peter Zinner, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. SHAQUILLE V. POLK, Cause No. 67077-8-1, 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.



Kimberley L. Reynolds
Done in Seattle, Washington

2/23/12
Date