

68694-1

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NO. 68694-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

PEDRO PADILLA,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BARBARA MACK

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**BRIEF OF RESPONDENT**

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FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2019 JAN 21 PM 2:56

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**A. ISSUE PRESENTED**

Did the trial court properly rule that the officer performed a lawful Terry stop based on a reasonable suspicion that the defendant had been engaged in criminal conduct?

**B. STATEMENT OF THE CASE**

On September 28, 2011, Seattle Police Officer Gregorio began his patrol shift at 7 p.m. RP 7-8, 34. Prior to beginning his shift, Officer Gregorio had been briefed about a drive-by shooting that had occurred earlier that evening around 6 p.m. in the 9100 block of Rainier Avenue South. RP 7-8, 34. At approximately 8:40 p.m., Officer Gregorio was dispatched to a domestic violence related call at the Lake Washington Apartments located at 9061 Seward Park Avenue South. RP 8. Officer Gregorio noted that the address of the domestic violence related call was located one block away from the drive-by shooting incident. RP 9.

Dispatch advised Officer Gregorio that the suspect identified in the domestic violence call was Reggie Barren. RP 9. Officer Gregorio knew Barren because he had arrested Barren many times in the past for domestic violence related offenses. RP 9. Officer Gregorio knew that Barren frequently attempted to leave the

apartment building after the police had been called by exiting the complex through a back fence. RP 9. Officer Gregorio responded to the 911 call by driving straight to this back fence area. RP 9.

Officer Gregorio arrived at the back fence area in his patrol vehicle without his emergency lights or sirens activated. RP 12-13. It was starting to get dark outside during the "dusk hour." RP 13. When Officer Gregorio drove up to the back fence area he observed two people. RP 12. One individual sat on some steps right by the gate. RP 12. The other individual was hunched over next to some bushes along a fence line. RP 12. Officer Gregorio later identified the hunched over person as Pedro Padilla. RP 13. However, when Officer Gregorio first arrived at the back fence area, he believed Padilla was suspect Barren because Barren "from time to time will make motions just like that as he's trying to conceal a beer or something that he's consuming." RP 13-14, 42-43. Officer Gregorio described Padilla as "kind of hunched over and he wasn't completely in the bushes." RP 13. Padilla was maybe six inches off the fence facing towards the sticker bushes with his back towards Officer Gregorio. RP 14.

Officer Gregorio was unable to see Padilla's face while Padilla faced the bushes. RP 14. Officer Gregorio informed

dispatch that he had made contact with suspect Barren. RP 15. Officer Gregorio exited his patrol car, stood by his patrol car, and used his vehicle flashlight to spotlight Padilla—the person he thought was suspect Barren. RP 14. It took Padilla less than five seconds to turn around after Officer Gregorio had shined his flashlight on Padilla. RP 15. Officer Gregorio immediately realized that he was not looking at suspect Barren. RP 15. However, Officer Gregorio still remained suspicious of Padilla because it appeared as if Padilla was hiding in the bushes. RP 15. Officer Gregorio asked Padilla, “Hey, what are you doing?” RP 15-16. Padilla did not respond to the officer’s question. RP 16. Instead, Officer Gregorio saw Padilla had “quickly” and “automatically turned around and flicked a dark object kind of off to his right and behind him.” RP 16. Officer Gregorio saw the dark object leave Padilla’s hands. RP 16.

Officer Gregorio then heard “a big clink,” which he described as the sound that metal makes after hitting other metal. RP 16. Officer Gregorio believed the dark object hit the fence behind Padilla. RP 17. Officer Gregorio, during his almost 16 years of experience working as a civilian and military police officer, heard people throw guns that hit various objects like concrete, fences,

and metal poles. RP 6, 17. The sound Officer Gregorio heard after Padilla tossed the object sounded "very similar" to these sounds. When Padilla tossed the dark object behind him he had a "deer-in-the-headlights" look on his face. RP 17. This series of events lasted a few seconds. RP 17.

Officer Gregorio's instincts told him immediately that the metal object Padilla discarded might be a gun. RP 17. Officer Gregorio was still by himself, as backup officers had not yet arrived. RP 18. The other individual, who had been sitting on the stairs wearing a backpack, was only about seven yards away from Padilla. RP 18. Officer Gregorio drew his service weapon and ordered Padilla and the other individual to show their hands and get down on the ground. RP 17-18. Padilla and the other individual followed the officer's orders. RP 18.

Padilla remained on the ground for approximately 30 to 60 seconds before other police units arrived. RP 18. Two patrol cars with three or four officers arrived at the scene. RP 19. Officer Gregorio and another officer worked together to detain Padilla in handcuffs for officer safety and community safety reasons. RP 19-20. After detaining Padilla with handcuffs, the officers frisked Padilla for weapons and found none. RP 20. Officer

Gregorio immediately turned his attention to the area where he saw Padilla toss the dark object. RP 20. Officer Gregorio then found a small .380-caliber semi-automatic handgun with a loaded magazine on the ground three feet from Padilla's foot. RP 20, 24. Officer Gregorio placed Padilla under arrest. RP 25. Padilla was subsequently charged and convicted of the crime of Unlawful Possession of a Firearm in the First Degree. RP 94.

**C. ARGUMENT**

**THE TRIAL COURT PROPERLY RULED THAT OFFICER GREGORIO PERFORMED A LAWFUL TERRY STOP OF PADILLA BECAUSE OFFICER GREGORIO FORMED A REASONABLE SUSPICION THAT PADILLA HAD BEEN ENGAGED IN CRIMINAL CONDUCT.**

The trial court's ruling that law enforcement lawfully stopped Padilla during a Terry stop is reviewed de novo. See State v. Siers, 174 Wn.2d 269, 274, 274 P.3d 358 (2012) (All alleged constitutional violations are reviewed de novo). Padilla is arguing that the trial court violated his rights under the Fourth Amendment of the United States Constitution and Article I, Section 7 of the Washington State Constitution by admitting evidence obtained as a result of an unconstitutional seizure. Padilla asserts that Officer Gregorio could not have formed a reasonable suspicion

that Padilla was in *unlawful* possession of a firearm simply based on the officer's suspicion that Padilla may have possessed a firearm. In other words, because possessing a firearm is not necessarily a crime, Officer Gregorio lacked the reasonable suspicion to seize Padilla. However, Padilla's argument is flawed because Officer Gregorio did not form a reasonable suspicion solely on the officer's belief that Padilla may have had a firearm in his possession.

The permissible scope of an investigatory stop is determined by all the circumstances facing the officer at the time of the stop. State v. Mitchell, 80 Wn. App. 143, 146, 906 P.2d 1013 (1995). Officer Gregorio considered the totality of the circumstances when he seized Padilla in a lawful Terry stop. Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868 (1968). Officer Gregorio had a reasonable suspicion that Padilla had been engaged in criminal conduct because of Padilla's suspicious actions in the context of the surrounding circumstances.

To justify a Terry stop under the Fourth Amendment of the United States Constitution and Article I, Section 7 of the Washington State Constitution, a police officer must be able to "point to specific and articulable facts which, taken together with rational inferences

from those facts, reasonably warrant that intrusion.” State v. Armenta, 134 Wn.2d 1, 20, 948 P.2d 1280 (1997) (quoting Terry, 392 U.S. at 21). If a law enforcement officer has a well-founded suspicion that a person is engaged in criminal activity, the officer may stop the individual for investigative purposes. Armenta, 134 Wn.2d at 20; see also State v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1986) (“When the activity is consistent with criminal activity, although also consistent with noncriminal activity, it may justify a brief detention.”). In evaluating the reasonableness of such an investigative stop, the inquiry is whether the totality of the circumstances confronting the law enforcement officer indicates a substantial possibility criminal conduct has occurred or would occur. State v. Garcia, 125 Wn.2d 239, 242, 883 P.2d 1369 (1994).

The permissible scope of an investigatory stop is determined by all the circumstances facing the officer at the time of the stop. State v. Mitchell, 80 Wn. App. 143, 146, 906 P.2d 1013 (1996). The court held that “the existence of such reasonable suspicion is determined based on an objective view of the known facts, and is not dependent upon the officer’s subjective belief or upon the officer’s ability to correctly articulate his or her suspicion in reference to a particular crime.” Id. at 147. Probable cause is not

required for a Terry stop because a stop is significantly less intrusive than an arrest. Kennedy, 107 Wn.2d at 6. The policy of Washington law has been to encourage law enforcement officers to investigate suspicious situations. Armenta, 134 Wn.2d at 20. Courts want law enforcement officers to scrutinize suspected criminal activity. Id.

In this case, when Officer Gregorio began his night shift he learned of an earlier drive-by shooting that took place a block away from the apartment complex where he stopped Padilla. CP 62-65. The shooting occurred less than three hours earlier in the late afternoon. CP 62-65. Officer Gregorio was responding to a domestic violence related incident when he first observed Padilla standing near the back exit gate of the Lake Washington apartment complex. CP 62-65. Officer Gregorio focused his attention on Padilla because at first he believed Padilla was the suspect in the domestic violence call. CP 62-65. Officer Gregorio found it suspicious that Padilla was hunched over partially hidden in some bushes near the gate. CP 62-65. It was dusk outside. CP 62-65. Officer Gregorio testified that the defendant's suspicious body position, alone, would not have provided a basis to detain Padilla. RP 51. Officer Gregorio also observed another person sitting on some steps right next to the gate. RP 12.

Officer Gregorio turned on his vehicle's spotlight, shined the spotlight on Padilla, and then exited his patrol car. CP 62-65. Padilla looked back at Officer Gregorio. CP 62-65. Officer Gregorio then asked Padilla what he was doing. CP 62-65. Padilla quickly turned and threw a dark object that caused a metallic clink sound when it struck the chain link fence. CP 62-65. Officer Gregorio recognized this sound as being consistent with a metal gun hitting a chain link fence. CP 62-65. Officer Gregorio then saw Padilla's "deer-in-the-headlights look." CP 62-65. Such suspicious circumstances combined with the knowledge of the shooting about two hours and forty minutes earlier a block away caused Officer Gregorio to draw his firearm and detain Padilla. Officer Gregorio had a reasonable suspicion that Padilla had been engaged in criminal conduct.

The court considered a nearly identical fact pattern in State v. Mitchell, 80 Wn. App. at 144-45. In Mitchell, an officer observed the defendant and a companion walking down the street at night in a residential area. Id. at 144. As the officer passed the defendant on the street, the officer saw the defendant tuck a handgun into his waistband. Id. The officer stopped his vehicle behind the defendant and his companion, turned on his vehicle's flashing lights, and

illuminated his vehicle's spotlight on the individuals. Id. The two individuals were walking away and had their backs to the officer. Id. The officer then drew his gun and ordered both individuals to stop and put their hands up. Id. at 144-45. The defendant tossed the gun into the bushes as he raised his hands. Id. at 145. The officer then ordered the two individuals to lie face down on the ground for approximately two to three minutes as he waited for other officers to arrive. Id. The officer arrested the defendant after determining that the defendant was underage and had previous convictions that barred him from possessing a firearm. Id.

Similar to the argument in the instant case, the defendant in Mitchell argued that the seizure was not justified because the officer could not articulate a reasonable suspicion, based on objective facts, that the defendant had been engaged in criminal activity. Id. at 147. The officer even testified that he saw nothing that in and of itself would constitute a crime. Id. at 147-48. However, the Mitchell court still held that the facts of the case supported a reasonable suspicion of criminal activity. Id. at 147. The court reached this holding because "the existence of a reasonable suspicion does not depend on the officer's subjective beliefs, but is determined based on an objective standard." Id. at 148.

The court in Mitchell identified the crime of unlawful display of a weapon. Id. at 147-48. Although the officer in Mitchell did not name this particular crime, the court examined the objective facts and reached its own conclusion that the officer's suspicion was based on the very factors that constitute this crime. Under RCW 9.41.270, it is illegal to carry and display a weapon "in a manner, under circumstances, and at a *time* and *place* that either manifests an intent to intimidate another or *that warrants alarm for the safety of other persons.*" (Emphasis added). The court found that the facts of the case supported a reasonable suspicion of criminal activity because the defendant "was openly carrying a semi-automatic weapon while walking down a street in an urban, residential area at night. When ordered to stop and raise his hands, he tossed his weapon into nearby shrubbery." Id. at 147. The Mitchell court further held that "[o]penly carrying such a weapon at that time and place was sufficient to warrant reasonable suspicion that this statute was being violated." Id.

Like the holding in Mitchell, this Court should rule that it is immaterial whether Officer Gregorio named a particular crime for which he could articulate a reasonable suspicion. Padilla's argument

fatally focuses on the conclusion that Officer Gregorio lacked reasonable suspicion that Padilla *unlawfully* possessed the firearm. As case law makes clear, the existence of reasonable suspicion is determined by an objective analysis of the known facts and not the name of a particular crime. An objective analysis of the known facts in this case provides a basis for a reasonable suspicion. Here, Officer Gregorio confronted a scene in which it was dusk outside, there had been a drive-by shooting one block away earlier in the evening, and an individual later identified as Padilla stood hunched over partially hidden in the bushes. CP 62-65. Officer Gregorio testified that these observations alone did not warrant detaining Padilla. RP 50-51. However, the gravity of the situation quickly escalated after Officer Gregorio asked Padilla what he was doing. CP 62-65. Padilla flicked a dark object off to his right and behind him. RP 16. Officer Gregorio heard a “big clink” and, based on his training and experience, recognized the sound as a gun striking a metal fence. CP 62-65. Like the defendant in Mitchell, Padilla was in a residential neighborhood during the evening handling a suspected firearm in a manner that warranted alarm for the safety of the officer and other persons. Officer Gregorio’s actions throughout the encounter with Padilla were largely consistent with the actions found

to be lawful in Mitchell. Thus, this Court's ruling should mirror the ruling in Mitchell by holding that Officer Gregorio performed a lawful stop.

Moreover, the facts of Terry, supra, 392 U.S. at 7, are instructive to reviewing the instant case. In Terry, an experienced patrol officer observed two men at 2:30 p.m. standing together on a street in downtown Cleveland, repeatedly and alternatively walking a short distance to peer in a store window, and then walking back to the other and conferring. After observing this behavior for 10 to 12 minutes, the officer became suspicious that the men were "casing" the store to commit a robbery. Id. The officer approached the men, asked their names, and frisked Terry. Id. The officer felt a pistol in Terry's pocket and removed it. Id. Terry was charged with carrying a concealed weapon. Id. The Court held that the officer acted reasonably in light of the "specific reasonable inferences which he is entitled to draw from the facts in light of his experience." Id. at 27. The facts in Terry further demonstrate that it is not necessary for an investigating officer to articulate a specific crime that is being committed. It is not illegal to repeatedly peer inside a store window and it is not illegal to lawfully carry a firearm. However, like the Court held in Terry, this Court should find that Officer Gregorio acted

reasonably in light of the totality of the circumstances that confronted him and based on reasonable inferences in light of his training and experience.

Padilla has wrongly relied on the facts in State v. Almanza-Guzman, 94 Wn. App. 563, 568, 972 P.2d 468 (1999), for his argument that Officer Gregorio lacked the requisite reasonable suspicion to conduct a Terry stop. In Almanza-Guzman, off-duty United States border patrol agents were working at a gun show. Id. at 565. The defendant approached the agents because he wanted to buy a magazine clip for his pistol. Id. The agents observed that the defendant's pistol had not been disabled by a procedure required at the gun show's entrance. Id. The agents spoke with the defendant in Spanish and they formed the opinion that the defendant was a Mexican national rather than a U.S. citizen based on the defendant's accent and choice of words. Id. The agents also knew that Washington State rarely issued permits allowing aliens to carry weapons. Id. As such, the agents concluded that the defendant was an alien carrying a weapon without a license. Id. The agents stopped the defendant as he drove away from the gun show and inquired whether he was a U.S. citizen or national. Id. The agents subsequently learned that the defendant was an alien

and did not have an alien firearm license. Id. at 566. The agents arrested the defendant and he was convicted of unlawful possession of a firearm following a stipulated facts trial. Id.

Padilla has wrongly relied on Almanza-Guzman for his argument because (1) the facts in that case are distinguishable from the facts in the instant case and (2) the common sense that the Almanza-Guzman court implored in its ruling actually strengthens the trial court's ruling in this case. First, unlike Officer Gregorio in this case, the border patrol agents in Almanza-Guzman wrongly assessed the defendant's race and nationality, which they believed to be a substantial basis for forming a reasonable suspicion in the context of unlawfully possessing a firearm. Id. at 567-68. The Almanza-Guzman court held that the fact that the defendant's primary language was Spanish, or that he spoke with an accent, was insufficient to justify an investigative stop. Id. at 567. "Race or color alone is not a sufficient basis for making an investigatory stop." Id., quoting United States v. Bautista, 684 F.2d 1286, 1289 (9<sup>th</sup> Cir. 1982). In the instant case, Officer Gregorio did not wrongly or impermissibly consider race as the basis for his investigative stop.

Second, like the court did in Almanza-Guzman, this Court should implore common sense when it assesses the facts before it. The Almanza-Guzman court assessed the circumstance that the defendant had a pistol at a gun show. The defendant was “carrying a gun *at a gun show*. Certainly, a gun show is one of the least suspicious places to tote a gun.” Id. The Almanza-Guzman court then went on to hold that “[w]hat we are left with is a man who failed to check his gun at the gun show entrance, approached a gun dealer’s table, and then took out the gun to show the gun dealer the replacement part he needed. These facts alone, without anything more, are insufficient to provide a basis for reasonable suspicion of criminal activity.” Id. at 567-68. The use of common sense in the instant case strengthens the State’s argument that Officer Gregorio formed a reasonable suspicion regarding Padilla’s conduct. If Padilla lawfully possessed the firearm, then he would not attempt to discard the firearm the moment after being contacted by law enforcement. The reasonable inference is that Padilla did not want the police to know or find out that he had a firearm in his possession. Attempting to discard a firearm in front of a police officer is one of the most suspicious things a person can do. Padilla was not at a gun show when this incident happened.

Rather, he was hunched over in some bushes at the dusk hour in a residential neighborhood when he attempted to discard a suspected firearm as police confronted him. This Court should therefore affirm the trial court's ruling that Officer Gregorio performed a lawful Terry stop because Officer Gregorio formed a reasonable suspicion that Padilla had been engaged in criminal conduct.

**D. CONCLUSION**

The State requests that this Court affirm the trial court's ruling that Officer Gregorio had a reasonable suspicion to lawfully detain Padilla during a Terry stop.

DATED this 30<sup>th</sup> day of January, 2013.

Respectfully submitted,

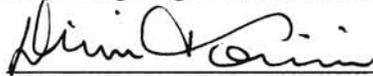
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Lila Silverstein, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the <sup>a certificate of mailing</sup> Brief of Respondent, in STATE V. PEDRO PADILLA, Cause No. 68694-1-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.



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