

40347-1-II

**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II**

State of Washington
Respondent

v.

JAMES WILLIAM HOPKINS
Appellant

40347-1

FILED
COURT OF APPEALS
10 JUN 20 PM 12:19
STATE OF WASHINGTON
BY WJ

On Appeal from the Superior Court of Clallam County

Cause No. 09-1-00460-1

The Honorable George L. Wood

REPLY BRIEF OF APPELLANT

Jordan B. McCabe, WSBA No. 27211
Law Office Of Jordan McCabe
P.O. Box 7212, Bellevue, WA 98008
425-746-0520~jordan.mccabe@yahoo.com
Attorney for Appellant

CONTENTS

Authorities cited i

Summary of the Case 1

Arguments in Reply 1

Conclusion 6

AUTHORITIES CITED

Beck v. Ohio, 379 U.S. 89
85 S. Ct. 223, 13 L. Ed. 2d 142 (1964) 3

State v. France, 129 Wn. App. 907
120 P.3d 654 (2005) 5

State v. Heritage, 152 Wn.2d 210
95 P.3d 345 (2004) 4

State v. Young, 89 Wn.2d 613
754 P.2d 1171 (1978) 5

Terry v. Ohio, 392 U.S. 1
88 S. Ct. 1868, 1873 (1968) 1

Union Pac. R. Co. v. Botsford, 141 U.S. 250
11 S. Ct. 1000, 35 L. Ed. 734 (1891) 1

SUMMARY OF THE CASE

The questions presented in this appeal are whether the evidence used to convict Hopkins of attempted delivery of a controlled substance to a citizen informant in a Walgreen's parking lot is subject to the exclusionary rule. Hopkins contends he was unlawfully stopped and that all evidence derived from the stop should have been excluded under the Fourth Amendment. Alternatively, Hopkins contends his incriminating statements were obtained in violation of the Fifth Amendment.

ARGUMENTS IN REPLY

1. **Fourth Amendment Violation.** The State does not claim Officer Nutter stopped Hopkins merely to engage in a social contact. Rather, the State claims the stop was lawful under *Terry*.¹ Respondent's Brief (RB) at 8. This is wrong.

'No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.'

Terry, 392 U.S. at 9, quoting *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251, 11 S. Ct. 1000 35 L. Ed. 734 (1891). This is equally true on the street

¹ *Terry v. Ohio*, 392 U.S. 1, 9, 88 S. Ct. 1868, 1873 (1968).

as in the home. *Terry*, 392 U.S. at 9. Accordingly, Hopkins was protected by the Fourth Amendment while walking down the street. *See Id.*

It is undisputed that Hopkins was seized. “[W]henver a police officer accosts an individual and restrains his freedom to walk away, he has ‘seized’ that person.” *Terry*, 392 U.S. at 16. The question presented is whether the seizure was reasonable, based on the particular circumstances. *Terry*, 392 U.S. at 9. The “inquiry is a dual one — whether the officer’s action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.” *Terry*, 392 U.S. at 19-20. The 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*, 392 U.S. at 21. The “facts” are limited to the information “available to the officer at the moment of the seizure.” *Terry*, 392 U.S. at 21-22. This inquiry demands “specificity in the information upon which police action is predicated.” *Terry*, 392 U.S. at 22, n. 18. Subjective “good faith on the part of the arresting officer is not enough.’ Otherwise, “the protections of the Fourth Amendment would evaporate, and the people would be ‘secure in their persons, houses, papers and effects, only in the discretion of the police.’” *Terry*, 392 U.S. at 22, quoting

Beck v. State of Ohio, 379 U.S. 89, 97, 85 S. Ct. 223, 13 L.Ed.2d 142 (1964).

Hopkins contends the stop was not justified at its inception. Nutter neglected to conduct even a cursory inquiry of the informant to determine whether criminal activity occurred. The proper procedure would have been simply to ask the informant what kind of pain pills and whether they were even were prescription pills. Without this, Nutter lacked articulable facts to support a stop. Accordingly, all evidence obtained as the result of the stop was subject to the Fourth Amendment exclusionary rule.

Moreover, detaining Hopkins with so many officers for half an hour is not within the lawful scope of a *Terry* stop. The State argues this was a reasonable time because it took than long to get the witness to the scene. RB at 12. The more pertinent question, however, is whether it was reasonable to take half an hour to transport the informant two blocks by car. It was not. Therefore, the stop exceeded the lawful parameters of *Terry* based on the duration alone.

2. **Fifth Amendment.** While conceding that Hopkins was “seized” for Fourth Amendment purposes, the State nevertheless argues that he was not “in custody” for Fifth Amendment analysis. RB at 7, 9-10. But the same factors apply. If a reasonable person would not feel free to

leave, Hopkins was in custody for Fifth Amendment purposes. *State v. Heritage*, 152 Wn.2d 210, 218, 95 P.3d 345 (2004).

The Fifth Amendment issue is not whether Hopkins was in custody when Nutter elicited an incriminating statement without benefit of *Miranda*. The issue is whether the *Miranda* exception for *Terry* stops applies. As argued above, this was not a lawful *Terry* stop. Therefore, Hopkins's statement in response to Nutter's pre-*Miranda* question whether he had tried to sell his prescription pills — a question with no conceivable purpose other than to elicit an incriminating response — is inadmissible on Fifth Amendment grounds as well as under the Fourth Amendment as poisoned fruit of the unlawful stop.

3. **Inquiry Is Fact-Specific.** The State claims Hopkins must produce case law as authority for the argument that Nutter lacked sufficient grounds for a *Terry* stop. RB 13. But no bright-line rule exists. The Court must make a case-by-case inquiry based on our particular facts. *Terry*, 392 U.S. at 21. Hopkins argues rests on the objective, verifiable fact that Nutter had absolutely no evidence that Hopkins offered the informant a controlled substance, because the officer neglected to inquire.

The State contends the term “pain pills” often is used as a “criminal term of art” to mean “controlled substance” and therefore

the informant's statement was sufficient to support a seizure. RB at 14. As the State correctly points out, however, without supporting authority, the Court may safely assume that a diligent search produced none. *Id.*, citing *State v. Young*, 89 Wn.2d 613, 625, 754 P.2d 1171 (1978). Certainly, the record contains no evidence of such usage.

4. **Grounds Must Exist Before the Stop.** The State implies that establishing after the fact that Hopkins was trying to sell his prescription medication makes the stop lawful. RB 14. This is wrong. The stop must be evaluated based on the facts known at the time to determine whether it was justified at its inception. *Terry*, 392 U.S. at 19-20.

5. **France is On Point.** Finally, the State's attempt to distinguish *State v. France* fails.² There, as here, an officer who knew the suspect told him he "needed" to clear things up before he could leave and then asked specific questions directed at eliciting an incriminating response. *France*, 129 Wn. App. at 908-09. This constituted a *Miranda* violation. *Id.*

In summary, Hopkins does not argue, as the State suggests, that police must positively identify a substance before they can stop someone on suspicion of possessing it. RB at 14. Rather, Hopkins

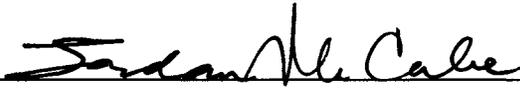
² 129 Wn. App. 907, 120 P.3d 654 (2005).

asserts that an officer must have “individualized suspicion of criminal activity” based on articulable facts. Nutter did not have that. He had only the informant’s second-hand hunch that Hopkins had not just bought the so-called pain pills over the counter at Walgreens.

CONCLUSION

For these reasons, the Court should vacate the judgment and sentence and dismiss the prosecution.

Respectfully submitted this 19th day of July, 2010.


Jordan B. McCabe, Counsel for James W. Hopkins

CERTIFICATE OF SERVICE:

Jordan McCabe, WSBA No. 27211, certifies that she deposited this day in the U.S. mail, first class postage prepaid, copies of this Reply Brief addressed to:

(1) Deborah Snyder Kelly
(2) Brian P. Wendt
Clallam County Prosecutor’s Office
223 East 4th Street, Suite 11
Port Angeles, WA 98362-3015

James W. Hopkins
General Delivery
Port Angeles, WA 98362

July 19, 2010


Jordan B. McCabe, Bellevue, Washington