

NO. 40380-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW LAURO,

Appellant.

COURT OF APPEALS
DIVISION II
11/17/2010 PM 1:43
STATE OF WASHINGTON
BY _____
DEPUTY

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 10-1-00001-0

BRIEF OF RESPONDENT

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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED December 28, 2010, Port Orchard, WA _____
Original **AND ONE COPY** filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

I. COUNTERSTATEMENT OF THE ISSUES.....1

II. STATEMENT OF THE CASE.....1

III. ARGUMENT11

 A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE MOTION TO SUPPRESS BECAUSE SUBSTANTIAL EVIDENCE SUPPORTED THE COURT’S FINDINGS OF FACT AND THOSE FINDINGS, IN TURN, SUPPORTED ITS CONCLUSIONS OF LAW.11

IV. CONCLUSION.....15

TABLE OF AUTHORITIES
FEDERAL CASES

Terry v. Ohio,
392 U.S. 1, 88 S. Ct. 18688, 12

STATE CASES

State ex rel. Carroll v. Junker,
79 Wn. 2d 12, 482 P.2d 775 (1971).....11

State v. Doughty,
__ Wn.2d __, 239 P.3d 573, 575 (2010).....12

State v. Glover,
116 Wn. 2d 509, 806 P.2d 760 (1991).....13

State v. Guloy,
104 Wn. 2d 412, 705 P.2d 1182 (1985).....11

State v. Harrington,
167 Wash. 2d 656, 222 P.3d 92 (2009).....14

State v. Hill,
123 Wn. 2d 641, 870 P.2d 313 (1994)..... 11-12

State v. Kinzy,
141 Wn. 2d 373, 5 P.3d 668 (2000).....12

State v. Ladson,
138 Wn. 2d 343, 979 P.2d 833 (1999).....12

State v. Mendez,
137 Wn. 2d 208, 970 P.2d 722 (1999).....12

State v. O'Neill,
148 Wn. 2d 564, 62 P.3d 489 (2003).....12

State v. Pressley,
64 Wn. App. 591, 825 P.2d 749 (1992)..... 14-15

State v. Rice,
59 Wn. App. 23, 795 P.2d 739 (1990).....12

State v. Watkins,
76 Wn. App. 726, 887 P.2d 492 (1995).....12

I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court abused its discretion in denying the motion to suppress when substantial evidence supported the court's findings of fact and those findings, in turn, supported its conclusions of law?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Matthew Lauro was charged by amended information filed in Kitsap County Superior Court with one count of felony violation of a court order and one count of making a false or misleading statement to a public servant (a gross misdemeanor). CP 47. A jury found the defendant guilty of the charged offenses and the trial court imposed a standard range sentence. CP 93, 98. This appeal followed.

B. FACTS

On January 1, 2010, Officer Martin Garland of the Bremerton Police Department responded to the R&H Market in the City of Bremerton in response to a 911 call from an anonymous caller who had reported that a male and a female were in a heated argument and that it appeared that the female might have been assaulted. RP (2/16/10) 8-9, 11. The called explained that they had not seen a physical assault, but they were concerned that there may have been one because the female had a bloody lip. RP (2/16/10) 49. Officer Garland pulled into the parking lot of the store and saw the defendant

and a female outside of the store and it appeared that they were in a “heated discussion.” RP (2/16/10) 11. The defendant was facing away from Officer Garland and was “leaning into” the female, and the two were within six inches to a foot of each other. RP (2/16/10) 12. Officer Garland, however, could not hear what the two were saying. RP (2/16/10) 12. Officer Garland then got out of his patrol car and walked towards the male and the female and, as he did so, the Defendant turned and saw the officer approaching and then immediately started walking in the opposite direction. RP (2/16/10) 12-13.

As Officer Garland approached the female he could see that it appeared that she had been crying and that she had dried blood around her mouth. RP (2/16/10) 13. Officer Garland testified that he called out to the Defendant and “asked him to return to where I was so that I could talk to him.” RP (2/16/10) 13. Officer Garland was asked if he recalled the exact words that he used, and Officer Garland then explained:

I don’t remember specifically, but I remember phrasing it in the form of a question. In other words, it wasn’t a command to come back to where I was at. It was along the lines of: Hey, can I talk to you for a second.

RP (2/16/10) 13.

The Defendant then “paused” and looked back at the officer as if he was “considering his options” and then walked over to where the officer was

standing. RP (2/16/10) 13-14. Officer Garland then spoke to the Defendant and the female to try to ascertain what was going on. RP (2/16/10) 14. The Defendant was cooperative. RP (2/16/10) 15. The female seemed “intimidated” and “uncomfortable.” RP (2/16/10) 15. Officer Garland asked the Defendant what was going on and the Defendant stated that he had been trying to borrow a cigarette from the female and said that he did not know her. RP (2/16/10) 15-16.

Officer Garland also looked at the dried blood around the female’s mouth and explained that it appeared that the blood had been there for some time and that it didn’t appear that it didn’t appear that the blood was from an injury that had just occurred. RP (2/16/10) 16. Officer Garland asked the female about the blood and she explained that it was a result of a fight that she had had were her sister overnight. RP (2/16/10) 16. Officer Garland suspected that the female was intimidated by the presence of the Defendant and was not being truthful about what had been going on. . RP (2/16/10) 18, 30. Officer Garland explained that this suspicion was based on the female’s demeanor and that the fact that she kept looking at the Defendant before she would answer the officer’s questions and because she would not volunteer any information and “seemed to defer” to the Defendant as the officer was talking to the two together. RP (2/16/10) 18, 30. Officer Garland also suspected that the Defendant was not being truthful about attempting to

borrow a cigarette from the female since the officer had seen the two in what appeared to be a “heated conversation.” RP (2/16/10) 18-19.

Sergeant Wendy Davis of the Bremerton Police Department also arrived on the scene, and the two officers then separated the Defendant and the female so that they could speak to each independently. RP (2/16/10) 18-19. Sergeant Davis spoke with the Defendant while Officer Garland spoke to the female. RP (2/16/10) 19.

The female told Officer Garland her name and explained that the Defendant was her former boyfriend and that they had spent the previous several days together and had walked to the store together from the Defendant’s home a few blocks away. RP (2/16/10) 19-20. She also explained that they had been in an argument that morning and that she had wanted to leave but the Defendant was holding on to some of her clothing and demanding that she pay him \$80 that she owed him. RP (2/16/10) 20. The two had then come to the store with the intent of getting \$80 from her Washington State assistance debit card (also known as a Qwest card) so that she could pay him the \$80 so that he would release her clothing and she could then leave. RP (2/16/10) 20. The female also stated that the Defendant actually had her Qwest card and was going to get the \$80 before he would release the clothing. RP (2/16/10) 20. The female also had a cell phone belonging to the Defendant and she gave the phone to Officer Garland who

then went back to talk to the Defendant. RP (2/16/10) 21. Officer Garland also asked her several times about the cause of her injury and the female said, "All I want to do is leave him, and he won't allow me to leave." RP (2/16/10) 32.

While Officer Garland was talking to the female, Sergeant Davis spoke with the Defendant. RP (2/16/10) 39. Sergeant Davis asked the Defendant if he had any identification and the Defendant said that he did not. RP (2/16/10) 40. He also stated that he could not remember his address. RP (2/16/10) 40. Sergeant Davis also asked the Defendant about the female, and the Defendant again stated that he did not know her and that he had only been waiting in line behind her to use an ATM and had asked her for a cigarette. RP (2/16/10) 41. Sergeant Davis found this suspicious since as she was speaking to the Defendant she had seen him pull a pack of cigarettes from his pocket (and he then began smoking one of the cigarettes). RP (2/16/10) 42.

Officer Garland then came back over and presented the cell phone to the Defendant and asked if it was his, and the Defendant continued to say that he did not know the female and said that the phone was not his. RP (2/16/10) 21. Officer Garland then asked the Defendant if he had the female's Qwest card, and the Defendant then admitted that he did in fact know the female, that the phone was his, and that he did have her Qwest card. RP (2/16/10) 21, 44.

While Officer Garland spoke to the Defendant, Sergeant Davis went over and spoke to the female. RP (2/16/10) 45. She asked her about what was going on and specifically asked her about her injury and who had caused it. RP (2/16/10) 51. The female responded by saying that she just wanted to get away from the Defendant. RP (2/16/10) 52. The female asked if she had to make a statement, and Sergeant Davis told her “no.” RP (2/16/10) 52. Eventually, however, the female told Sergeant Davis that the Defendant had assaulted her and that she didn’t need to take this type of abuse from him. RP (2/16/10) 52. Specifically, she female explained that she had been with the Defendant at a nearby home earlier in the day and that the Defendant had left to go visit a friend in the hospital. RP (2/16/10) 45. When the Defendant returned she had locked herself in a bathroom due to an “issue” which the female said was between her and the Defendant. RP (2/16/10) 46. The female wouldn’t tell Sergeant Davis anything else regarding this “issue.” RP (2/16/10) 46. The female, however, did explain that the Defendant pounded on the bathroom door and told her to come out. RP (2/16/10) 46. She was fearful of doing that, but she eventually did open the door and when she did so the Defendant punched her in the mouth. RP (2/16/10) 46. Sergeant Davis then informed Officer Garland that there was probable cause to arrest the Defendant for the assault, and Officer Garland arrested the Defendant. RP (2/16/10) 33.

Both officers testified that (prior to the arrest) during their conversations with the Defendant they never told him that he was not free to leave nor did they otherwise restrain the Defendant. RP (2/16/10) 24, 48, 53. Furthermore, the Defendant was not handcuffed nor was he placed in a patrol car during the conversations, and Officer Garland never threatened the Defendant nor raised his voice in any manner. RP (2/16/10) 23, 48. Officer Garland also testified that the Defendant was free to leave the scene even when he had asked him to come back and talk to him, and that if the Defendant had just continued walking away he would not have done anything to stop him. RP (2/16/10) 24. Officer Garland further explained that during the time that he was trying to figure out what had been going on that the Defendant could have left anytime he wanted to. RP (2/16/10) 33.

When Sergeant Davis was writing her report about the events she looked up the previous history between the Defendant and the female and discovered that there was a no contact order prohibiting the Defendant from contacting the female. RP (2/16/10) 47.

Prior to trial the Defenant filed a CrR 3.5 motion and a CrR 3.6 motion to suppress, arguing that the officer's unlawfully detained the Defendant. CP 7-11, 12-15. At the hearing on the motions the defense argued that the central issue was whether the Defendant was unlawfully detained when Officer Garland "hailed" the Defendant and had him come

back to talk, and whether a reasonable person under those circumstances would believe that they were free to terminate the contact and leave. RP (2/16/10) 71-74. The State filed a written response arguing that the Defendant was not seized prior to the arrest, and that even if he had been seized the seizure was lawful since it was an investigative detention based on “specific articulable facts [that gave] rise to a reasonable suspicion that the person stopped is, or is about to be, engaged in criminal activity.” CP 36 (quoting *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 1880). The State also argued that Miranda warnings were not required because the Defendant’s freedom was not curtailed to the degree associated with a formal arrest. CP 36.

The trial court denied the motion to suppress and gave an oral ruling stating, among other things, that:

Well, what I am finding is that there was a contact made on January 1st of 2010. Officer Garland was the first to the location following a call from – through the dispatch, 911 dispatch, and it turned out that it was an anonymous call.

What the officer immediately observed was a heated verbal argument, and the officer also observed soon after that an injury that the female had on her mouth, or her lip.

What’s also important in this analysis, which hasn’t been mentioned very much or touched upon, is the fact that when the officer approached the female Mr. Lauro started to walk away. And I think that’s significant when we look at the totality of the circumstances and whether or not it was reasonable for the officer to believe maybe there had been a crime afoot, or something, some type of crime that needed to

be investigated.

At the point in time when the officer first approached he would not have been aware of any crime being committed, but with these three aspects of the heated discussion, a verbal discussion – and it should be noted when I say a heated discussion, it was also observed that the female was upset, and the officer described her demeanor as being upset as well. So we have the heated discussion with the female being upset. She has an injury, albeit an older injury, but also, we have the defendant walking away.

Then it is important as to what the officer says to the defendant at this time. According to his testimony, he said words to the effect of – although he couldn't quote himself – he said the effect of the words were essentially can I talk to you. I need – can I talk to you, would you stop, something of that nature. He specifically described it as a request and a question, as opposed to a command

...

[T]he way in which it's portrayed by the officer, I don't believe we have a situation of a custodial interrogation. Rather, we have a situation where the defendant was requested to come and talk. He chose to do so. And in fact, when we consider the testimony from the officer, he stated the defendant paused, considered his options, and walked back to me, was what the officer testified to.

And the fact that there was a pausing, the fact that there was an apparent consideration of what the options were, according to the observations of the officer, that reinforces the officer's testimony that his request was, in fact, a request. It was not a command, and Mr. Lauro was acting reasonably in considering his options. He was not compelled to return. At least his demeanor and his actions following the request didn't suggest that he perceived it to be a direct command where he could not exercise any discretion.

...

And certainly, I am persuaded that it was reasonable and rational for the officer to make the inquiry, given the totality of the circumstances, where he saw this woman, Ms. Dragoo,

who was apparently perplexed in her demeanor. She was upset. There had been a verbal confrontation. She had an injury, and the defendant was walking away at the time that the police arrived.

That, I believe, under all the circumstances was enough for the officer to believe that perhaps maybe a crime was afoot, and that needed to be investigated or at least inquired into.

So based upon all of the foregoing, I'm finding that the stop was appropriate as an investigatory stop under all of the totality of the circumstances.

I do not find that the defendant was in custody at the time of the inquiry, and therefore, Miranda was not required. And the officer was asking questions to which there was voluntary involvement and answers provided by Mr. Lauro. So the request to suppress under a 3.5 or 3.6 analysis is denied.

RP (2/16/10) 78-82

The trial court entered written findings of fact and conclusions of law finding that: (1) Officer Garland had a reasonable belief that a crime may be afoot; (2) that Officer Garland's contact with the defendant was not based on a command to stop but rather a request for the defendant to do so; that the contact was a permitted *Terry* stop; and (4) that because the contact was a appropriate investigatory stop and because the defendant was not in custody, Miranda warnings were not required. CP 95-97.

III. ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE MOTION TO SUPPRESS BECAUSE SUBSTANTIAL EVIDENCE SUPPORTED THE COURT'S FINDINGS OF FACT AND THOSE FINDINGS, IN TURN, SUPPORTED ITS CONCLUSIONS OF LAW.

The Defendant argues that the trial court erred in denying the motion to suppress because there were insufficient facts to show a reasonable suspicion of criminal activity and that the Defendant's actions were "innocuous and more consistent with innocent rather than criminal activity." App.'s Br. at 13, 18. This claim is without merit because the trial court's finding that Officer Garland had a reasonable belief that a crime may be afoot was supported by substantial evidence.

An appellate court reviews a trial court's decision to deny a motion to suppress evidence for abuse of discretion. *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986). A court abuses its discretion when it exercises it on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Furthermore, the appellate court reviews a trial court's order denying suppression to determine whether substantial evidence supports its findings of fact and whether they, in turn, support its conclusions of law. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Substantial evidence

is that sufficient to persuade a fair-minded, rational person of a finding's truth. *Hill*, 123 Wn.2d at 644.

Warrantless searches and seizures are generally unconstitutional. *State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833 (1999). One exception to this general rule is an investigatory or *Terry* stop.¹ A police officer may conduct a *Terry* stop based on a reasonable suspicion, grounded in specific and articulable facts, that criminal activity is afoot. *State v. Kinzy*, 141 Wn.2d 373, 384-85, 5 P.3d 668 (2000). During a *Terry* stop, an officer may “briefly detain and question a person reasonably suspected of criminal activity.” *State v. Watkins*, 76 Wn. App. 726, 729, 887 P.2d 492 (1995) (quoting *State v. Rice*, 59 Wn. App. 23, 26, 795 P.2d 739 (1990)).

Stated another way, if an officer's conduct rises to the level of a seizure, that seizure is valid only if the officer has a well-founded suspicion based on specific, objective, articulable facts that suggest the individual is engaged in or about to engage in criminal activity. *State v. Doughty*, ___ Wn.2d ___, 239 P.3d 573, 575 (2010); *State v. O'Neill*, 148 Wn.2d 564, 576, 62 P.3d 489 (2003). The level of articulable suspicion required to justify the seizure is “a substantial possibility that criminal conduct has occurred or is about to occur.” *State v. Mendez*, 137 Wn.2d 208, 223, 970 P.2d 722 (1999)

¹ See, *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

In the present case, the Defendant contends that Officer Garland stopped him without reasonable suspicion that he was involved in criminal activity. When reviewing the justification for a *Terry* stop, an appellate court is to evaluate the totality of the circumstances presented to the officer, taking into considering the location of the stop and the conduct of the person detained. *State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 760 (1991).

In the present case the evidence showed that an anonymous caller had reported that a male and a female were in a heated argument and that the caller was concerned that there may have been an assault because the female had a bloody lip. RP (2/16/10) 8-9, 11, 49. When Officer Garland arrived he saw the Defendant and a female engaged in a heated argument and saw the Defendant “leaning into” the female and the two were within six inches to a foot of each other. RP (2/16/10) 12. Furthermore, as Officer Garland got out of his car and approached the two, the Defendant turned and saw the officer approaching and then immediately started walking in the opposite direction. RP (2/16/10) 12-13. In addition, Officer Garland could see that it appeared that the female had been crying and that she had dried blood around her mouth. RP (2/16/10) 13.

Given all of these circumstances Officer Garland had a reasonable suspicion, grounded in specific and articulable facts, that the Defendant was engaged in or about to engage in criminal activity. A brief *Terry* stop or

seizure, therefore, was warranted.² The trial court, therefore, did not err in concluding that Officer Garland's contact with the Defendant was a permitted *Terry* stop based on the officer's reasonable belief that a crime was afoot.

The Defendant, however, cites to *State v. Pressley*, 64 Wn. App. 591, 825 P.2d 749 (1992) and claims that in that the case "the Court determined that a *Terry* stop was not supported by the evidence" when the suspects actions could have had an innocent explanation. App.'s Br. at 15. The Defendant's citation to *Pressley*, however, is misplaced and mischaracterizes the actually holding in *Pressley*. In *Pressley*, an officer saw two girls huddling together examining something on a street corner in an area known for narcotics transactions and gang activity. *Pressley*, 64 Wn. App. at 593. The girls' hands were chest high, and Pressley appeared to be pointing to objects in her hand while the other girl was looking intently at them. *Id.* at 593-94. As the officer drove toward them, Pressley exclaimed, "Oh Shit" and

² The trial court below did not specifically state whether or not the Defendant had actually been seized. The trial court did find, however, that Officer Garland did not command the Defendant to return and talk to him but rather asked the Defendant to do so. CP 96. As the Washington Supreme Court has recently reiterated, not every public street encounter between a citizen and the police rises to the stature of a seizure, and a police officer's conduct in engaging a defendant in conversation in a public place (and even asking for identification) does not, alone, raise the encounter to a seizure or an investigative detention. *State v. Harrington*, 167 Wash.2d 656, 664-65, 222 P.3d 92 (2009)(citations omitted). Furthermore, Washington courts have not set in stone a definition for so-called "social contact." Rather, "It occupies an amorphous area in our jurisprudence, resting someplace between an officer's saying 'hello' to a stranger on the street and, at the other end of the spectrum, an investigative detention (i.e., *Terry* stop)." *Id.* at 664. Thus, in the present case it is questionable whether the Defendant was even "seized" at all prior to his arrest. Resolution of this issue, however, is unnecessary because even if the Defendant was "seized," the seizure was justified under *Terry*.

immediately closed her hand as she walked off in separate direction from the other girl. *Id.* at 594. The Court held that the girls' reaction to the officer's presence, combined with the officer's experience and knowledge of crime in the area, provided an adequate basis for him to stop Pressley and investigate further. *Id.* at 597-98.

Pressley, therefore supports the trial court's finding in the present case since, as in *Pressley*, the trial court here found that the Defendant's actions in walking away as soon as he saw Officer Garland was a factor that supported Officer Garland's reasonable suspicion that a crime had been or was about to be committed. Furthermore, the Court in *Pressley* found that the trial court in that case correctly concluded that there were sufficient articulable facts to reasonably justify the stop. *Id.* at 597. This Court should reach the same conclusion.

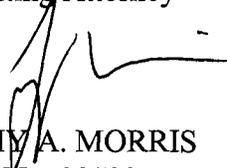
IV. CONCLUSION

For the foregoing reasons, Lauro's conviction and sentence should be affirmed.

DATED December 28, 2010.

Respectfully submitted,

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Prosecuting Attorney

A handwritten signature in black ink, appearing to read 'J. Morris', is written over the name 'JEREMY A. MORRIS'.

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