

NO. 43310-9-II

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

STATE OF WASHINGTON, Respondent

v.

JOSEPH MICHAEL LEVINE, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.11-1-00808-8

BRIEF OF RESPONDENT

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A. RESPONSE TO ASSIGNMENT OF ERRORS

I. THE SEIZURE OF THE DEFENDANT WAS LAWFUL AND THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE DISCOVERED AS A RESULT OF THE SEIZURE

B. STATEMENT OF THE CASE

Prior to the afternoon of May 17, 2011, Camas police received complaints of drug activity occurring in the back alley of a shopping center located on the 3300 block on NE 3rd Avenue in the city of Camas, Clark County, State of Washington. RP 7-9; CP 11. On May 17, 2011, Detective Brett Robison and Sergeant Charles Nadgwick were in the area of the back alley of the shopping center to look for drug activity. RP 7-9. This back alley is behind the one-stop shopping center that has loading docks where trucks come to make deliveries and employee access doors, but no store fronts. RP 8. Detective Robison and Sergeant Nadgwick were in an unmarked patrol vehicle parked in the alley so they could see traffic coming and going. RP 9. It was a clear, sunny afternoon. RP 9. The officers observed two males walking towards them down the alley way. RP 10. The two males were obviously together. RP 10. One of the males was later identified as Joseph Levine, the defendant. There was

nothing in Levine's or his companion's behavior to suggest that either one was involved with any of the businesses or activity at the loading docks in the back of the shopping center. RP 11. No other person was in the area and the officers had not seen anyone else in the back alley way in the prior 45 minutes. RP 12.

The officers observed Levine pull what appeared to be a silver and blue Red Bull drink can out of his pocket. RP 10. They then observed the defendant screw the lid off the top of it, shake the can like he was shaking something out of the can and into his hand, and then turn and offer or show what he had in his hand to the other male. RP 10. A Red Bull can is designed to have a pull tab and not a screw-on lid. CP 11. Both officers were surprised at what they saw with the container the defendant possessed because of the screw off lid. RP 11, 49. Sergeant Nadgwick had never seen anything like that before and exclaimed to Detective Robison, "isn't that odd!?" CP 11. Detective Robison found the use of a fake Red Bull can suspicious. RP 11. Further, Red Bull is a beverage and when the defendant shook the can upside there was no liquid coming out. RP 12-13. Levine shook the can as though he was trying to get something solid out into his hand. RP 13. The officers then exited the vehicle and stated, "Stop. What is in your hand?" RP 13; CP 12. Levine opened his hand. RP 14; CP 12. Levine was holding a small bindle of a black tarry substance

that based on the officers' training, knowledge and experience they believed to be heroin. RP 14. After observing suspected heroin in Levine's possession, Detective Robison questioned him outside the presence of his companion, and he admitted to possessing and trying to sell heroin. RP 20-21; CP 12. Detective Robison found approximately ten additional bindles of heroin inside the fake Red Bull can. RP 22; CP 12.

Prior to trial, defense counsel filed a motion to suppress the evidence and the court held a hearing pursuant to CrR 3.6 and 3.5. The court heard testimony of Detective Brett Robison, Sergeant Charles Nadgwick, the defendant, and witness for defense, Cory Strunk. RP 5-73. The trial court denied defense's motion to suppress and entered findings of fact and conclusions of law. CP 11-14. The case then proceeded as a stipulated facts trial and the defendant waived his right to a jury trial RP 115; CP 15. The State and defense entered stipulations and attached reports for the court to consider. RP 116; CP 16-27. The judge found Levine guilty of Possession of a Controlled Substance with Intent to Deliver-Heroin under RCW 69.50.401(1), (2)(a), and found this crime was committed within 1,000 feet of a school bus route stop. RP 120-21; CP 28-30.

C. ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN DENYING LEVINE'S MOTION TO SUPPRESS

The trial court correctly ruled in denying Levine's motion to suppress evidence. The police had reasonable, articulable suspicion of criminal activity which warranted a *Terry* stop of the petitioner. As the initial seizure was lawful, the trial court properly denied the petitioner's motion to suppress and properly admitted the evidence obtained as a result of the seizure in trial.

On appeal, this court should accept as verity the trial court's findings of fact that the petitioner does not challenge, *see State v. Ross*, 106 Wn. App. 876, 880, 26 P.3d 298 (2001), and review those challenged for substantial evidence. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). The court should review conclusions of law de novo and the constitutionality of a warrantless stop de novo as well. *State v. Armenta*, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997); *State v. Rankin*, 151 Wn.2d 689, 694, 92 P.3d 202 (2004). Levine does not challenge any findings of fact. However, Levine assigns error to the trial court's entry of conclusions of law numbers 4, 5, and 6 if they are to be construed as findings of fact. The State urges this court to accept as verities the findings of fact as set forth

in CP 11-12 in the absence of any challenge to them. All conclusions of law should be reviewed de novo.

II. THE POLICE HAD LAWFUL AUTHORITY TO SEIZE THE DEFENDANT

The State agrees with Levine and the trial court below, that when the police ordered the Levine to stop he was seized.

A seizure for investigative purposes is permissible when a police officer can point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion. *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed.2d 889 (1968); *State v. Armenta*, 134 Wn.2d 1, 20, 948 P.2d 1280 (1997). Probable cause is not required for this type of seizure because it is significantly less intrusive than an arrest. *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986); *Brown v. Texas*, 443 U.S. 47, 50, 99 S. Ct. 2637, 61 L. Ed.2d 357 (1979). When reviewing a police officer's seizure of an individual for an investigatory reason, the reviewing court should look at the "whole picture" to determine whether the police officer's suspicion of criminal activity was reasonable. *State v. Lee*, 147 Wn. App. 912, 917, 199 P.3d 445 (2008), *review denied*, 166 Wn.2d 1016 (2009) (quoting *State v. Randall*, 73 Wn. App. 225, 229, 868 P.2d 207 (1994)). The reasonableness of the officer's suspicion is determined by the totality of

the circumstances known to the officer at the inception of the stop. Not only should a reviewing court evaluate the totality of the circumstances presented to the investigating officer, but it should also take into account the officer's training and experience when determining the reasonableness of the *Terry* stop, as well as other factors such as the location of the seizure and the conduct of the person detained. *State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 760 (1991). Under this test, an officer may rely on a combination of otherwise innocent observations to briefly stop a suspect. *U.S. v. Arvizu*, 534 U.S. 266, 277, 122 S. Ct. 744, 151 L. Ed. 2d 740 (2002). The investigative detention must last no longer than is necessary to verify or dispel the officer's suspicion, and the investigative methods employed must be the least intrusive means reasonably available to effectuate the purpose of the detention. *State v. Williams*, 102 Wn.2d 733, 738-40, 689 P.2d 1065 (1984).

Circumstances which appear innocuous to the average person may appear incriminating to a police officer. *State v. Keller-Deen*, 137 Wn. App. 396, 400, 153 P.3d 888 (2007) (citing *State v. Samsel*, 39 Wn. App. 564, 694 P.2d 670 (1985)). In *State v. Samsel*, the court noted "while an inchoate hunch is insufficient to justify a stop, circumstances which appear innocuous to the average person may appear incriminating to a police officer in light of past experience. The officer is not required to

ignore that experience.” *State v. Samsel*, 39 Wn. App. 564, 570-71, 694 P.2d 670 (1985). The court in *Samsel* also indicated other factors to consider in determining whether the intrusion was reasonable are the purpose of the stop, the amount of physical intrusion and the length of time of the stop. *Id.* at 572 (quoting *State v. Williams*, 102 Wn.2d 733, 740, 689 P.2d 1065 (1984)). The reasonableness of a stop is a matter of probability, not a matter of certainty. *State v. Mercer*, 45 Wn. App. 769, 774, 727 P.2d 676 (1986).

In Levine’s case, two police officers observed an exchange which raised their suspicions of criminal activity given the location of the observation, the recent reports of drug activity in the area, the lack of legitimate basis to be in the location, and the use of a fake beverage container to conceal a non-liquid item. The seizure of the petitioner following this observation was reasonable given those factors observed by police combined with their training and experience.

Levine compares the facts at hand to those in *State v. Gleason*, 70 Wn. App. 13, 851 P.2d 731 (1993), *State v. Doughty*, 170 Wn.2d 57, 239 P.3d 573 (2010), and *State v. Diluzio*, 162 Wn. App. 585, 254 P.3d 218 (2011) and asks this court to rule as those courts did and find the police had no lawful authority to seize Levine for a short investigatory period. Levine’s reliance on these cases is misplaced.

In *Gleason, supra*, the police executed a stop of the defendant because he was a Caucasian male in an apartment complex known for drug activity and for having a predominately Hispanic population. The court in *Gleason* noted that the defendant was not acting suspiciously, not carrying an unusual object and was not loitering, suggesting if any of those factors were present the analysis of the seizure may have been different. *Gleason, supra* at 18. In *Doughty, supra*, the police stopped a defendant who visited a house that was suspected to be involved in drug transactions for less than two minutes and then left. The police officer gave no other articulable facts on which to base his suspicion of criminal activity and the court found this stop to be unlawful. In *Diluzio, supra*, a police officer stopped the defendant after observing the defendant, driving a vehicle, pull over, speak to a woman who then got in the vehicle and drove away. The officer noted this occurred in an area known for prostitution. In finding the stop unlawful, the court noted that the officer did not see money change hands, did not overhear conversations between the two individuals, and did not know either individual to have been previously involved in prostitution activities and therefore there was no basis for a *Terry* stop. *Diluzio, supra* at 593. These three cases are examples of an officer lacking sufficient facts to justify an investigative

stop. However the facts involved with petitioner go well beyond the observations the police had in *Doughty, Gleason* and *Diluzio*.

The trial court heard testimony from the two police officers involved in the seizure of the petitioner. RP 5-54. The trial court heard that there had been reports of drug activity occurring in the alley where the petitioner was contacted, that the officers were there that day to investigate reports of drug activity, and that the alley where this occurred was a back alley of a commercial shopping center and no store entrances were accessible. CP 11. After observing Levine unscrew the top of a counterfeit can of Red Bull, shake out the contents of the can into his hand and show them to a companion, the police approached Levine, said, “stop” and asked what was in his hand. CP 11-12. These observations clearly set forth sufficient facts to justify a brief, investigatory stop of the petitioner to confirm or dispel the officer’s suspicions. In *Doughty, Gleason* and *Diluzio*, the courts did not extend police’s authority to stop individuals for being in a suspicious place, or having a conversation with another person in a suspicious place. If the officer had merely seen Levine walking down the back alley with another individual, unknown to the police, then the State would agree, there would not have been sufficient facts to justify a stop. However, the police observed significantly more than that – the use of a fake beverage can to conceal items, the removal of such an item from

the fake can and showing it to the companion when coupled with the location, the recent reports of drug activity in the area, when put together, as they were in this case, give enough to justify a brief stop to investigate. Further, when looking at these facts, the trial court noted that the amount of intrusion was minimal, and took but a few moments to confirm the officer's suspicions. CP 12. The instant the officer saw the contents of the Levine's hand, which he immediately recognized as suspected heroin, his suspicion was confirmed and he had cause to arrest Levine. The officer also used unobtrusive means to investigate- by approaching Levine and asking him what was in his hand, the officer used the least intrusive means reasonably available to effectuate the purpose of the seizure. An officer would be hard pressed to find any other less intrusive means than telling a person to stop and asking what was in his hand. The investigative detention must last no longer than is necessary to verify or dispel the officer's suspicion and the investigative methods employed must be the least intrusive means reasonably available to effectuate the purpose of the detention. *State v. Williams*, 102 Wn.2d 733, 738-40, 689 P.2d 1065 (1984).

This case is more factually comparable to *State v. Pressley*, 64 Wn. App. 591, 825 P.2d 749 (1992) and *State v. Bray*, 143 Wn. App. 148, 177 P.3d 154 (2008). In *Bray*, the court held police were justified in stopping

the defendant, who had been seen by police in the area on two other occasions, and was spotted inside enclosed storage units that were within 1,000 feet of recent burglaries, at 2:30a.m., driving slowly with his car lights off, checking doors. *Bray, supra* at 155. In *State v. Pressley, supra*, the court upheld a *Terry* stop where police observed two females in public, huddled together, examining an item in the defendant's hand. The officer involved indicated that based on his experience with drug transactions and the area that he believed he may be observing a narcotics transaction. The officer involved also observed the defendant's negative reaction to his presence and her walking away from him. The court in *Pressley* found this set of facts to give the officer more than an "inarticulable hunch" and held that the stop was lawful. *Id.* at 597-98.

As in *Pressley*, the police officers in this case had more than an "inarticulable hunch" that the defendant was engaged in criminal activity. Based on all their observations, there were sufficient grounds to justify an investigatory stop that was minimally intrusive and limited in time to confirm their suspicions. Based on the location of the contact – in a back alley way where reports of drug activity had recently been made and no legitimate businesses were accessible to the defendant and his companion – and based on the use of a counterfeit drink can used to conceal and disguise the actual contents, and the showing of the contents to the

companion, along with the officers' training and experience, gave reasonable suspicion of criminal activity. Based on the case law as applied to the facts at hand, the facts amount to reasonable, articulable suspicion of criminal activity and the police were justified in seizing the petitioner and investigating.

Levine likens the use of a fake drink can with a disguised top opening to the use of a purse by a woman. This comparison fails. A purse is routinely used not to conceal or disguise its contents, but more often as a larger receptacle of many small items to assist in carrying and transporting needed items while away from your home or vehicle. A drink can, which announces its contents as a liquid beverage, opens instead of the usual pop top, as a screw-off lid and appears to contain non-liquid items, would raise suspicions in any circumstance where a purse which is typically used by the majority of women in our society would not. Police may notice many seemingly innocent situations and, based on their training and experience, understand something is amiss in a situation where a casual observer may not believe that to be the case. The courts have found that an officer's training and experience should be taken into consideration when viewing the totality of the circumstances. In this situation, given all the facts known to police at the time of the seizure, and the officer's training and experience, the police were justified in telling the

petitioner to stop and asking him what was in his hand. The trial court's ruling below, denying the motion to suppress, should be affirmed.

D. CONCLUSION

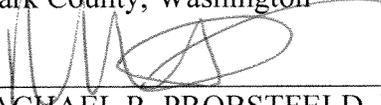
This Court should affirm the trial court's denial of Levine's motion to suppress. As the *Terry* stop of Levine was lawful, the exclusionary rule does not apply and the trial court properly denied Levine's motion to suppress. The State respectfully requests this court reject Levine's argument that the evidence should have been suppressed based on an unlawful *Terry* stop and affirm the petitioner's conviction.

DATED this 27th day of February, 2013.

Respectfully submitted:

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