

COA NO. 44723-1-II

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

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STATE OF WASHINGTON,

Respondent,

v.

FRANK YOELL,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Bryan E. Chushcoff, Judge

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

THE POLICE UNLAWFULLY SEIZED YOUELL IN VIOLATION OF ARTICLE I, SECTION 7 AND THE FOURTH AMENDMENT.

The State relies heavily on Division One's decision in State v. Randall, 73 Wn. App. 225, 868 P.2d 207 (1994) to argue Youell's investigative detention was lawful. Brief of Respondent (BOR) at 7-10. In particular, the State claims Youell's case is similar to Randall in that the suspect matched the description of the perpetrator and the reported crime of armed robbery posed a significant threat to public safety. BOR at 7-10.

As argued in the opening brief, the description given by the 911 caller in Youell's case is so general that it does not single out Youell in any meaningful sense. The 911 operator asked "Is he white, black, Asian?" Ex. 1, track 3 at 18 seconds. The caller answered "Black, Asian, I don't know what he is, Indian, I don't know. I'm not sure." Ex. 3, track 1 at 20 seconds. She was only able to say the male was light skinned. Ex. 3, track 1 at 26 seconds. The man had on a black jacket and gray pants. Ex. 3, track 1 at 35 seconds.

A light skin color is hardly a stand out piece of information. A black jacket is not a distinct item of clothing. Youell, meanwhile, was wearing blue jeans, not gray pants. 1RP 9, 21-22. No other identifying information, such as height, build, facial features, or hair style of the

person was provided. Unlike Youell's case, the description of the suspect in Randall was fairly specific and the person who was stopped matched it in all respects. Randall, 73 Wn. App. at 230-31.

Furthermore, the analysis in Randall is circumspect. According to Randall, police need not determine an informant's reliability when the informant reports a violent crime to police. Randall, 73 Wn. App. at 230.

Randall does not take into account that calling 911, without more, cannot establish an unknown informant's reliability for purposes of justifying an investigative stop. State v. Z.U.E., \_\_ Wn. App. \_\_, \_\_P.3d \_\_, 2014 WL 47071 at \*6-7 (Slip op. filed Jan. 07, 2014). "Even a named, but otherwise unknown, citizen informant is not presumed to be reliable and a report from such an informant may not justify an investigative stop." Z.U.E., WL 47071 at \*6. In Z.U.E., the absence of any information regarding two 911 callers beyond name, phone number and location precluded a finding of reliability. Id.

Youell's case is similar to Z.U.E. in that respect. The 911 caller in Youell's case only gave her name and location. Ex. 3, track 1 at 5 seconds and 54 seconds; 1RP 8-10. The caller did not offer her phone number during the 911 call. Ex. 3, track 1. It is apparent, then, that the 911 call center obtained her number from its caller identification technology. Ex. 2, track 27; 1RP 9-10. The police did not know anything about the caller

beyond this basic identification information. The 911 caller's report in Youells' case cannot be deemed reliable under Z.U.E.. That is problematic because her report forms the basis for the stop in Youell's case.

Reasonable suspicion to conduct a stop is measured under the totality of circumstances. Z.U.E., WL 47071 at \*4. The seriousness of the reported crime is one circumstance to consider. But Randall is incorrect in dispensing with reliability altogether. This Court took a different approach in Z.U.E. in considering the reliability of a 911 caller without regard to whether the reported crime was of a serious or violent nature.

In regard to whether an imminent threat to public safety was a factor in support of the stop, it is worth pointing out that the man police identified as the suspect (Youell) was not a present and imminent danger to the reported robbery victim at the time police encountered him. The caller, after initially described being robbed by a man with a .38 revolver (Ex. 3, track 1 at 2, 38 seconds), called back and said "I'm sorry, he just brought it back to me just now." Ex. 3, track 2 at 13 seconds. After saying she did not know the man, the phone call disconnected. Ex. 3, track 2 at 15 seconds.

When police encountered Youell on the street a few minutes later, he was not observed threatening or committing a crime against anyone as he walked along. He was not observed walking with anyone that police

thought could have been the 911 caller. Police did not see him carrying a gun. Although public safety concerns may allow for a less stringent reliability analysis, here there was no indication of an immediate threat to public safety at the time Youell was stopped. A less stringent analysis is therefore not called for. Z.U.E., WL 47071 at \*11.

Randall did state, in assessing a report of a violent crime, "the officer should be able to rely on the reliability of information disseminated by police dispatch *and, when his or her observations corroborate the information and create a reasonable suspicion of criminal activity*, to make an investigatory stop." Randall, 73 Wn. App. at 230. This Court recognizes "if an informant is unreliable and/or the tip lacks sufficient factual basis, an officer's corroboration can justify an investigative stop." Z.U.E., WL 47071 at \*8.

Even so, "confirming a subject's description or location or other innocuous facts does not satisfy the corroboration requirement." Id. This observation likewise sets Z.U.E. apart from Randall. Randall stated the corroboration standard but did not meaningfully apply it.

Police thought Youell's appearance was sufficiently similar to the vague description given by the 911 caller and they saw Youell four blocks away from the reported robbery scene. 1RP 11-12. Before conducting the investigative stop, however, police did not observe Youell with a gun or

engaged in any illegal, dangerous, or suspicious activity. Police corroboration of the 911 caller's report is absent here. The officers did not corroborate the presence of actual or potential criminal activity. Z.U.E., WL 47071 at \*8 (citing State v. Hopkins, 128 Wn. App. 855, 858-59, 117 P.3d 377 (2005) (investigatory stop not justified where informant reported a young man had a gun, described the man, and provided his location, and officers observed a man who resembled the informant's description at the described location, but did not observe a gun or any illegal, dangerous, or suspicious activity)).

The State also relies on another Division One case, State v. Harvey, 41 Wn. App. 870, 707 P.2d 146 (1985). BOR at 8-9. It is clear that no reasonable suspicion would have been found on the facts of Harvey if the analysis in Z.U.E. were applied. There is no showing of reliability of an informant or requisite corroboration in that case: "Harvey matched the description that Officer Allen had received, he was walking away 1 1/2 blocks from the scene only a few minutes after the radio report, and he was pointed out as the suspect by a taxi cab driver." Harvey, 41 Wn. App. at 874. That was sufficient in Harvey but fails under the thoughtful analysis advanced in Z.U.E. That being said, at least the taxi driver in Harvey personally pointed out the suspect as the perpetrator. In Youell's case, the 911 caller did not point out Youell as the robber.

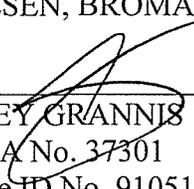
B. CONCLUSION

For the reasons set forth above and in the opening brief, Youell respectfully requests reversal of the conviction and dismissal of the charge with prejudice.

DATED this 23<sup>rd</sup> day of January 2014

Respectfully Submitted,

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\_\_\_\_\_  
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DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 23<sup>RD</sup> DAY OF JANUARY 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] FRANK YOUELL  
DOC NO. 321976  
CLALLAM BAY CORRECTIONS CENTER  
1830 EAGLE CREST WAY  
CLALLAM BAY, WA 98326

SIGNED IN SEATTLE WASHINGTON, THIS 23<sup>RD</sup> DAY OF JANUARY 2014.

X *Patrick Mayovsky*

# NIELSEN, BROMAN & KOCH, PLLC

## January 23, 2014 - 1:13 PM

### Transmittal Letter

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Court of Appeals Case Number: 44723-1

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