

No. 46205-2

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

ADAM JONES,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

By:


J. BRADLEY MEAGHER, WSBA No. 18685
Chief Criminal Deputy Prosecuting Attorney

Lewis County Prosecutor's Office
345 W. Main Street, 2nd Floor
Chehalis, WA 98532-1900
(360) 740-1240

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I. ISSUES

1. Mr. Jones was not unlawfully seized when Deputy Schlecht stopped his vehicle based on a report of a suspicious vehicle that engaged in similar conduct as the suspect in a string of burglaries in the area.
2. The trial court did not violate Mr. Jones' constitutional right to a fair and impartial jury by denying his request to change jury panels since the prior jury heard no facts related to Mr. Jones' case.

II. STATEMENT OF THE CASE

For purposes of answering this appeal, the State agrees that Appellant's statement of the case is a sufficient recitation of the facts. The State, however, supplements those facts with excerpts from the voir dire conducted at Mr. Jones' trial. During voir dire, defense counsel for Mr. Jones questioned jurors about their prior jury experience in his co-participants trial:

Mr. Baum: Some of you guys were on a jury earlier this month. I think juror number two, you were on it as well.

Juror No. 2: Yes.

Mr. Baum: Anything about that, being on that jury, would that cause you to be impartial in this case?

Juror No. 2: No.

....

Mr. Baum: Sorry. Partial. Excuse me. Sorry. It's early. Partial. Basically anything –

Juror No. 2: Separate, two separate situations should be all right.

Mr. Baum: All right. Are you familiar with the facts of that last case?

Juror No. 2: I'm familiar with the last case, yes.

Mr. Baum: And would that case.... I've got to figure out how to phrase this. Did you formulate opinions about the other people involved in that case?

Juror No. 2: There was one person.

Mr Baum: I don't want you to tell me.

Juror No. 2: All right.

Mr. Baum: Did you form an opinion on that person?

Juror No. 2: We did reach a verdict.

Mr. Baum: On the person that was charged?

Juror No. 2: Mm-hmm.

Mr. Baum: Don't tell me what it was. But what about the other people involved.

Juror No 2: I'm not aware of other people involved.

Mr. Baum: Did you hear evidence related to other people?

The Court: You need to move on from this, Mr. Baum.

Mr. Baum: Juror number three, you were also on that –

Juror No. 3: Yes.

Mr. Baum: -- trial? Anything about that make you feel like you need to be partial towards any decisions?

Juror No. 3: Two separate cases. Wouldn't affect me.

Mr. Baum: Okay. Number 14, how are you?

Juror No. 14: Good. How about yourself?

Mr. Baum: Not too bad. You were on the jury as well?

Juror No. 14: Yes, sir.

Mr. Baum: Okay. Anything about being on that jury that would cause you to be partial either way in this case?

Juror No. 14: I don't think so.

Mr. Baum: Okay. Juror number 20, how are you, sir?

Juror No. 20: Good.

Mr. Baum: You were on that jury as well?

Juror No. 20: Yes, I was.

Mr. Baum: Anything about that jury that would cause you to be partial in this case?

Juror No. 20: No, sir.

Mr. Baum: And then juror number 35, where are you at? How are you?

Juror No. 35: I'm fine.

Mr. Baum: Anything about that case cause you You were on the jury as well, correct?

Juror No. 35: Yes.

Mr. Baum: Anything about that cause you to be partial in this case?

Juror No. 35: No, hmm-mm.

2RP at 13 – 16.¹

III. ARGUMENT

A. MR. JONES WAS NOT UNCONSTITUTIONALLY SEIZED BECAUSE DEPUTY SCHLECHT HAD A REASONABLE AND ARTICULABLE SUSPICION THAT JUSTIFIED HIM STOPPING MR. JONES' VEHICLE.

Mr. Jones appeals the trial court's denial of his motion to suppress evidence of the vial located in his pants pocket, which contained methamphetamine. Mr. Jones claims that the initial stop by Deputy Schlecht was not based on a reasonable articulable suspicion of wrongdoing, making it unconstitutional. Mr. Jones does not challenge the length of detention, only the stop itself.

1. Standard Of Review.

A trial court's denial of a motion to suppress is reviewed to determine whether substantial evidence supports the challenged factual findings and, if so, whether factual findings support the conclusions of law. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2008). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

¹ 2RP refers to the verbatim report of voir dire.

2. Mr. Jones Was Not Unconstitutionally Seized.

Under the Fourth Amendment of the United States Constitution and article I, section 7 of the Washington Constitution, police may conduct “an investigative or *Terry* stop” so long as it is reasonable. *State v. Glover*, 116 Wn.2d 509, 513, 806 P.2d 760 (1991). “Officers may briefly, and without warrant, stop and detain a person they reasonably suspect is, or is about to be, engaged in criminal conduct.” *State v. Day*, 161 Wn.2d 889, 895, 168 P.3d 1265 (2007). Conducting a *Terry* stop requires “[l]ess than probable cause ... because the stop is significantly less intrusive than an arrest.” *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986).

A *Terry* stop is justified when an officer can “point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” *Terry v. Ohio*, 392 U.S. 1, 21, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968). When reviewing the merits of an investigatory stop, a court must evaluate the totality of circumstances presented to the investigating officer. *Glover*, 116 Wn.2d at 514. “[C]rime prevention and crime detection are legitimate purposes for investigative stops or detentions.” *Kennedy*, 107 Wn.2d at 5-6. An officer need not rule out every

innocent explanation for the suspicious behavior before initiating a *Terry* stop, so long as the behavior is more consistent with criminal than with innocent conduct. *Kennedy*, 107 Wn.2d at 6.

Here, the facts show that Deputy Schlecht was dispatched to the south Chehalis area on a report of a suspicious vehicle. RP at 4-5. That call came in at approximately 5:25 in the morning, while it was still dark outside from an identified caller. RP at 4. The caller had indicated that a van-type vehicle, that she did not recognize, had pulled into her driveway. RP at 5. When the caller approached the van, the driver yelled out, "Sorry, ma'am," and left in a hurried manner. RP at 5. The caller thought that was suspicious and wanted law enforcement to check on it. RP at 5.

Deputy Shclecht responded to the area and observed a vehicle matching the description given by the caller. RP at 5. Deputy Schlecht testified that he stopped the vehicle because in the past month or two, in the greater Chehalis area, there were early morning burglaries while the homeowners were gone. RP at 6. Deputy Shclecht testified that based on surveillance photos from one of those burglaries, law enforcement was able to determine that the suspect would pull up to the residence, check to see if anyone was home, break in, and steal items. RP at 9. Deputy

Schlecht testified that he felt this might have been what was going on, or there was someone in the area casing properties, so he decided to stop the vehicle. RP at 6.

These facts provided Deputy Schlecht with a specific and articulable basis to stop the vehicle and investigate its possible involvement in a string of recent burglaries that had taken place in the area. This is not a situation like that in *State v. Doughty*, 170 Wn.2d 57, 239 P.3d 573 (2010), cited by Appellant. In *Doughty*, an officer saw a vehicle pull up to a building, stay for a short period of time, and leave. There was no indication that anyone called to report suspicious activity, the officer based his stop on speculation that something nefarious may have happened while Doughty was inside the building. Here, based on the call to 911 from the concerned citizen, Deputy Schlecht knew that the driver of the vehicle had engaged in similar behavior as a person associated with recent burglaries in the area. The conduct observed by the caller is what allowed the trial court to determine that the *Terry* stop was valid. This additional knowledge would be like the officer in *Doughty* receiving reports of Doughty's interactions at the house, the absence of which the court relied on in invalidating the investigative stop by the officer in that case.

A more apt comparison would be *State v. Wheeler*, 43 Wn. App. 191, 716 P.2d 902 (Div. 1, 1986) where the Appellant conceded the initial stop was a valid *Terry* stop. *Wheeler*, 43 Wn. App. at 195. In *Wheeler*, officers responded to a possible burglary. *Wheeler*, 43 Wn. App. at 193. Two callers called to report suspicious circumstances. *Wheeler*, 43 Wn. App. at 193. One of the callers observed a male walking around the area as though he were "checking out" the neighbor's house. *Wheeler*, 43 Wn. App. at 193. A short time later, the man returned with another person in a vehicle. *Wheeler*, 43 Wn. App. at 193. The caller watched as the two parked the vehicle, got out, and darted through the neighbor's yard. *Wheeler*, 43 Wn. App. at 193-94. Law enforcement responded to the area and detained one individual as he walked down the street. *Wheeler*, 43 Wn. App. at 194. The other individual was stopped as he attempted to leave. *Wheeler*, 43 Wn. App. at 194.

B. THE TRIAL COURT DID NOT DENY MR. JONES HIS RIGHT TO A FAIR AND IMPARTIAL JURY BECAUSE NO JUROR WAS PREJUDICED BY THE PRIOR TRIAL OF HIS CO-PARTICIPANT.

Mr. Jones next challenges the trial court's denial of his motion for a new jury panel. Mr. Jones based his motion on the fact that the same panel was composed of jurors who had sat for his co-

participant's trial several weeks earlier. Mr. Jones points to no prejudice on the part of any particular juror, only that the panel was prejudiced by hearing evidence from his co-participant's trial. There is nothing in the record to support Mr. Jones' contention that the prior jury learned of his DWLS3 status in his co-participant's trial.

1. Standard Of Review.

In deciding whether Mr. Jones was denied his constitutional rights to a fair and impartial jury, courts review the record de novo. *State v. Elmore*, 155 Wn.2d. 758, 767-68, 123 P.3d 72 (2005).

2. The Court Did Not Deny Mr. Jones A Fair And Impartial Jury.

A criminal defendant has a constitutional right to a fair trial by an impartial jury. U.S. Const. amend VI; U.S. Const. amend XIV; Const. art. I, § 3; Const. art. I, § 21; Const. art. I, § 22. "The right to a fair trial includes the right to the presumption of innocence." *State v. Gonzalez*, 129 Wn. App. 895, 900, 120 P.3d 645 (2005) (citations omitted). The presumption of innocence is the "bedrock foundation in every criminal trial." *Gonzalez*, 129 Wn. App. at 900, citing *Morissette v. United States*, 342 U.S. 246, 275, 72 S. Ct. 240, 96 L. Ed. 288 (1952). The trial court has a duty to be alert to any

factor which “could undermine the fairness of the fact-finding process.” *Gonzalez*, 129 Wn. App. at 900.

Mr. Jones challenged his jury panel shortly before the start of trial on the basis that the same jury had heard evidence in a trial for a co-party, Cassandra Anderson, a few weeks prior, and that their knowledge of the facts of that case would prejudice him in his pending trial. 1RP at 11. The court reviewed its notes of the previous trial, and came to the following conclusion:

“What I’ve done is I wanted to get my notes from that last trial, Cassandra Anderson, and confirm that that was panel one just as we have here. I looked at my notes from the testimony that was given. The testimony was really - - it was very, very brief. We basically have the introductory evidence from Deputy Schlecht saying that there was a suspicious vehicle call, I stopped the vehicle, there was three people, he took the driver out of the vehicle for driving while suspended, male passenger had a warrant and then the defendant was left in the car and then Deputy Almond contacted the defendant, being Ms. Anderson, in that case. And then Deputy Almond testified about his contact with Ms. Anderson and the search of the backpack and it was separate from the other people.

So what the jury has heard would be the basic background information that they are going to hear in any event. So I’m going to deny the request given that the testimony that they heard was from someone else, they’re going to have the same basic information here in any event, together with the fact that this

motion is late being brought 15 minutes before we're supposed to bring the jury in here."

1RP at 12 – 13.

There was no other basis provided by Mr. Jones that he was prejudiced other than the same jury heard his co-participant's case. After the court's denial of Mr. Jones' motion, the parties proceeded to jury selection. "Voir dire is a significant aspect of trial because it allows parties to secure their article I, section 22 right to a fair and impartial jury through juror questioning." *State v. Momah*, 167 Wn.2d 140, 217 P.3d 321 (2009), cert. denied, 131 S. Ct. 160, 178 L. Ed. 2d 40 (2010), abrogated as stated in *State v. Slett*, 169 Wn.App. 766, 282 P.3d 101 (Div. 2, 2012), abrogated in part as stated in *State v. Wise*, 176 Wn.2d 1, 288 P.3d 1113 (2012).

Selection of the jury panel is governed, in part, by CrR 6.3 and 6.4. "A defendant has no right to be tried by a particular juror or by a particular jury." *State v. Gentry*, 125 Wn.2d 570, 615, 888 P. 2d 1105 (1995). Challenges to the entire panel shall only be sustained for a material departure from the procedures prescribed by law for their selection. CrR 6.4(a). Otherwise, challenges to a juror based on prior knowledge of the case should be brought for cause. Mr. Jones does not claim any material departure from the

procedures used for the jury's selection, so he was required to determine prejudice from voir dire.

“Voir dire plays a critical function in assuring the criminal defendant that his [constitutional] right to an impartial jury will be honored. Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled.” *Rosales-Lopez v. United States*, 451 U.S. 182, 188, 68 L.Ed.2d 22, 101 S.Ct. 1629 (1981), CrR 6.4(b).

Mr. Jones' attorney questioned prospective jurors extensively about their prior jury experience on his co-participant's trial. 2RP at 13 – 16. Mr. Jones' attorney did not challenge any juror for cause after his voir dire. As the jury selection demonstrates, no juror was prejudiced against Mr. Jones because of his co-participant's trial. In fact, as stated by one potential juror, the jury in Ms. Anderson's trial was not aware of anyone else being involved in her case. 2RP at 15. In addition, Mr. Jones' attorney was aware, prior to voir dire, of which potential jurors served on the earlier trial. 1RP at 11. Because of this, Mr. Jones cannot show any prejudice on the part of the jury that sat for his trial. As a result, he was not

denied his right to a fair and impartial jury under the United States Constitution or Washington State Constitution.

IV. CONCLUSION

Deputy Schlecht had a reasonable and articulable suspicion that Mr. Jones was involved in burglaries that had occurred in the area of the caller's residence. The caller described behavior that was shown to be associated with burglaries that Deputy Schlecht had knowledge of prior to stopping Mr. Jones' vehicle. Mr. Jones was not denied his right to a fair and impartial jury because his attorney conducted voir dire where he questioned jurors about their prior experience. During voir dire, there was no prejudice shown by any juror.

RESPECTFULLY submitted this 19 day of December, 2014.

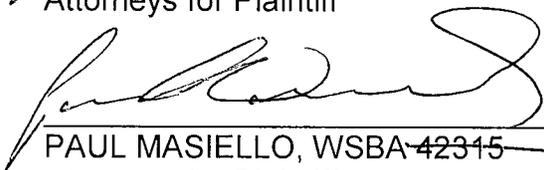
JONATHAN L. MEYER
Lewis County Prosecuting Attorney

by:



J. BRADLEY MEAGHER, WSBA 18685
Attorneys for Plaintiff

And by:



PAUL MASIELLO, WSBA 42315
Attorneys for Plaintiff

33039

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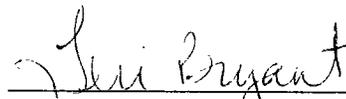
Appellant.

No. 46205-2-II

DECLARATION OF SERVICE

Ms. Teri Bryant, paralegal for J. Bradley Meagher, Chief Criminal Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On December 19, 2014, the appellant was served with a copy of the **Respondent's Brief** by email via the COA electronic filing portal to Lise Ellner, attorney for appellant, at the following email addresses: liseellnerlaw@comcast.net.

DATED this 19th day of December, 2014, at Chehalis, Washington.



Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office

LEWIS COUNTY PROSECUTOR

December 19, 2014 - 9:48 AM

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