

**NO. 47735-1-II**

**COURT OF APPEALS OF THE STATE OF WASHINGTON,**

**DIVISION II**

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**CITY OF LONGVIEW,**

**Respondent,**

**vs.**

**MARK REYES,**

**Appellant.**

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**BRIEF OF APPELLANT**

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## ***ASSIGNMENT OF ERROR***

### ***Assignment of Error***

1. The trial court erred when it entered findings claiming that a 911 caller was “a known informant” or “a named informant” because this fact is not supported by substantial evidence.

2. The trial court erred when it denied a defense motion to suppress evidence the police obtained after stopping the defendant as he parked his vehicle in front of his home because the sole legal justification for that detention was based upon the claims of an informant whose identity and reliability had not been verified?

### ***Issues Pertaining to Assignment of Error***

1. Does a trial court err if it enters findings of fact unsupported by substantial evidence?

2. Does a trial court err if it denies a defendant’s motion to suppress evidence the police obtained after stopping the defendant as he parked his vehicle in front of his home when the sole legal justification for that detention was based upon the claims of an informant whose identity and reliability had not been verified?

## STATEMENT OF THE CASE

On April 29, 2014, at about 12:15 in the morning, the Cowlitz County Communications center received a 911 call. CP 58-59. The following is a transcript of the entire call.

Operator: 911

Caller: Yes, I'm at the..uh...the AM/PM on 15<sup>th</sup>.

Operator: Okay...

Caller: And somebody just left in a Dodge Durango, alright? He's headed towards Safeway. 681 WWK. It's a blue Dodge Durango, and this guy is fuck - excuse me, he's really, really drunk. He's like barefooted, somebody told me that DOC Off - 681 Walter....

Operator: Yeah, now I know what you're reporting. So is it a possible DUI? A dark blue Dodge Durango?

Caller: It's definitely - I mean this guys drunk. He's fried. He don't know his own name.

Operator: Okay...

Caller: And he's going fast now. He's going heading towards Safeway.

Operator: Okay, male driver then?

Caller: Yes, a male driver. Um...

Operator: Did you see his driving, or did you just contact him in the store or what?

Caller: No! I seen him get out of his vehicle, I was talking to somebody else in the vehicle next to him, and uh...I mean he's got to hug me - he could barely stand. He

was barefooted, pair of shorts on and a sweatshirt, and he's fried, toast, I mean uh....

Operator: Okay, may I have your name please?

Caller: Names Chris.

Operator: Last name?

Caller: Melillo.

Operator: Okay. I'll put out the information. Thank you for calling.

Caller: Yeah, you got to try an get him because he's going fast, and uh you know, somebody could get run over, you know?

Operator: Okay, I'm gonna let em know.

Caller: Okay. Did you get that plate?

Operator: Yep! Got it.

Caller: Okay, bye-bye.

Operator: Thank you, bye-bye.

CP 58-59.

Upon receipt of this call dispatch put out an "attempt to locate" or "ATL" on the vehicle the caller claimed he saw. CP 25; RP 3-4. The officers who heard the ATL then ran the plates identified, and determined that the vehicle was registered to the defendant, who lived at 1110 18<sup>th</sup> Avenue in Longview. CP 25; RP 4. Officers then drove to the area of the 1100 block of 18<sup>th</sup> Avenue, saw the defendant turn onto 18<sup>th</sup> Avenue from Florida Street

and drive down the block towards his home. CP 25; RP 5, 7-8. At this point the officers then turned on their stop lights as the defendant stopped his vehicle in front of his home. CP 25; RP 7-8 . When the officers activated their stop lights, the defendant waited in his vehicle until an officer walked up and asked the defendant a number of questions. *Id.* At this point the officer smelled alcohol on the defendant's breath and noted that his speech was slurred. CP 25; RP 5. He then had the defendant get out of his vehicle and perform some field sobriety tests after which he arrested the defendant for driving while intoxicated. *Id.*

Following arraignment in this case the defendant moved to suppress all of the evidence the police had obtained after turning on their lights to detain the defendant as he parked his vehicle in front of his home. CP 56, 57-59, 60-65. Specifically, the defendant argued that the stop violated the defendant's right to privacy under Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment, because the police took no steps to establish the 911 callers veracity prior to acting upon his claims. CP 60-65.

The court later held a hearing on this motion, during which the City called Officer Christopher Maini as its sole witness. RP 1-36, 37-42. Following argument, the trial court denied the defendant's motion to suppress and later entered the following findings of fact and conclusions of law.

### Findings of Fact

1. On April 29, 2014, at 12:15 am. Longview Police officers, including Officer Maini, were dispatched, based upon a call to 911 from a known informant reporting a person possibly driving while impaired by alcohol.

2. The known informant gave his name and address to 911 and Officer Maini was advised that the report was from a known informant. It is unclear from the record whether Officer Maini knew the reporting party's actual name, address or phone number or observed it on his patrol computer before his stop of the defendant.

3. The information Officer Maini possessed prior to the stop was as follows:

a. That a named informant personally observed the driver stumbling outside his vehicle.

b. The named informant saw the driver leave the AM/PM on 15<sup>th</sup> Avenue in Longview, Washington headed toward the Safeway store.

c. The named informant believed the driver was impaired by alcohol.

d. The named informant specifically described the vehicle as a blue Dodge Durango with Washington license number 681 WWK.

e. Officer maini checked the license plate and recognized the name of the registered owner of the vehicle as the defendant, with whom he had had a recent contact for DUI investigation.

### CONCLUSIONS OF LAW

1. Warrantless investigatory stops must be reasonable under both the Federal and State Constitutions.

2. An investigative stop is reasonable if supported by a reasonable suspicion that an individual has violated the law.

3. An informant's tip can provide a reasonable suspicion to

justify an investigative stop so long as it has sufficient indicia of reliability considering the totality of the circumstances.

4. The information supplied by the known citizen informant in this case exhibited sufficient indicia of reliability for the following reasons:

a. The 911 call was a first-hand observation report of drunk driving in progress.

b. The nature of the crime required an immediate response to protect public safety.

c. The 911 call was recorded, a commonly known fact, which heightens reliability and lessens the possibility of fabrication.

d. The informant's information was fresh and specific as to time, place, car make and model and contained not only the conclusion of the defendant's intoxication, but direct observations of impaired behavior.

e. The innocuous factual details provided by the information were corroborated by the police within minutes of the 911 call.

CP 9-11.

Following denial of the motion the defendant submitted to conviction upon stipulated facts, was sentenced and filed timely notice of appeal. CP 17-18. By decision filed June 3, 2015, the Cowlitz County Superior Court affirmed the conviction and entered the following Findings of Fact and Conclusions of Law. CP 111-113.

#### **FINDINGS OF FACT**

1. Listing the informant as a known and therefore a presumed reliable informant is not supported by the evidence.

2. The informant was a named but unconfirmed informant.
3. The presumption of reliability as defined in the case law for a known informant does not attach to the named but unconfirmed informant.
4. The named and unconfirmed informant provided a lot of non-  
inculpatory information that was confirmed.
5. In some fashion the police came into contact with Mr. Reyes.
6. Assuming an investigatory traffic stop the issue is a reasonable suspicion based on totality of the circumstances rather than probable cause.

#### **CONCLUSIONS OF LAW**

The stop does not rise to the level sufficient to amount to a reasonable suspicion given the totality of the circumstances.

BASED ON THE FOREGOING, the Defendant's Motion to vacate is denied.

CP 111-113.

After entry of these findings Appellant filed a timely Motion for Discretionary Review, which this court accepted by order entered on August 31, 2015. *See* Ruling Granting Review.

## ARGUMENT

### **I. THE TRIAL COURT ERRED WHEN IT ENTERED FINDINGS CLAIMING THAT A 911 CALLER WAS “A KNOWN INFORMANT” OR “A NAMED INFORMANT” BECAUSE THIS FACT IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.**

The standard of review of a trial court’s findings of fact is the “substantial evidence test.” *In re J.N.*, 123 Wn.App. 564, 95 P.3d 414 (2004) Under this test, the reviewing court will sustain the findings “if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise.” *State v. Ford*, 110 Wn.2d 827, 755 P.2d 806 (1988). In making this determination the reviewing court will not revisit issues of credibility, which lie within the unique province of the trier of fact. *Id.* Finally, findings of fact are considered verities on appeal absent a specific assignment of error. *State v. Hill, supra.*

By contrast, an appellant need not assign error to a specific conclusion of law by number in order to preserve the issue on appeal because this argument presents an issue of law that the appellate court reviews de novo. *State v. Dempsey*, 88 Wn.App. 918, 947 P.2d 265 (1997). However, when a conclusion of law contains an assertion of fact, it functions as a finding of fact and is reviewed under the substantial evidence rule and requires an assignment of error. *Estes v. Bevan*, 64 Wn.2d 869, 395 P.2d 44 (1964).

In the case at bar appellant assigns error to that portion of each finding

of fact and conclusion of law entered by the Longview Municipal Court that refers to the 911 called as “a known informant” or “named informant.” These phrases appear in each portion of the three findings of fact and are repeated in the conclusions of law. What a careful review of the evidence reveals is that the 911 caller claimed that his name was “Chris Mellilo” and only gave that claim in response to a question by the 911 operator. As is explained in Argument II, an anonymous caller does not change his or her status to a “known informant” or “named informant” by simply giving a name. *See State v. Hopkins, infra*. Thus, to the extent the court’s use of the phrase “a known informant” or “named informant” indicates that the police knew who the informant was, it is unsupported by the evidence presented during the suppression motion.

**II. THE TRIAL COURT ERRED WHEN IT DENIED A DEFENSE MOTION TO SUPPRESS EVIDENCE THE POLICE OBTAINED AFTER STOPPING THE DEFENDANT AS HE PARKED HIS VEHICLE IN FRONT OF HIS HOME BECAUSE THAT STOP WAS BASED SOLELY UPON THE CLAIMS OF AN INFORMANT WHOSE IDENTITY AND RELIABILITY HAD NOT BEEN ESTABLISHED.**

Under Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment, warrantless searches are per se unreasonable. *State v. Simpson*, 95 Wn.2d 170, 622 P.2d 1199 (1980). As such, the courts of this state will suppress the evidence seized as a fruit of that warrantless detention unless the prosecution meets its burden of proving

that the search falls within one of the various “jealously and carefully drawn” exceptions to the warrant requirement. R. Utter, *Survey of Washington Search and Seizure Law: 1988 Update*, 11 U.P.S. Law Review 411, 529 (1988); *Welsh v. Wisconsin*, 466 U.S. 740, 749, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984). Thus, once a defendant meets the burden of production in proving the fact of either a warrantless arrest or a warrantless search, the burden shifts to the state to prove an exception to the warrant requirement. *State v. Young*, 135 Wn.2d 498, 957 P.2d 681 (1998).

In the case at bar, the defendant met his burden of production of evidence of a seizure of his person through the affidavit of counsel. Thus, it was the City’s burden to prove the existence of an exception to the warrant requirement. In this case, the City sought to excuse the officers’ initial warrantless seizure of the defendant’s person by claiming that he was justified based upon information from a 911 caller. The trial court agreed. However, as the following explains, that legal conclusion is incorrect under the facts of this case because the police failed to establish the reliability of the informant prior to acting upon his information.

Before the police may conduct an investigatory stop they must have a reasonable suspicion based upon objective facts that the person to be stopped has been or is about to be involved in criminal conduct. *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). An informant’s tip can

provide police such a reasonable suspicion sufficient to justify an investigatory stop. *State v. Sieler*, 95 Wn.2d 43, 621 P.2d 1272 (1980); *State v. Lesnick*, 84 Wn.2d 940, 530 P.2d 243, *cert. denied*, 423 U.S. 891 (1975). However, the informant's tip must be reliable. *Sieler*, 95 Wn.2d at 47; *Lesnick*, 84 Wn.2d at 943. A tip from an informant is "reliable" if the state establishes that (1) the informant is reliable, and (2) the informant's tip contains enough objective facts to justify the detention of the suspect or the non-innocuous details of the tip have been corroborated by the police, thus suggesting that the information was obtained in a reliable fashion. *State v. Hart*, 66 Wn.App. 1, 830 P.2d 696 (1992); *State v. Saggars*, 182 Wn.App. 832, 840, 332 P.3d 1034 (2014).

For example, in *State v. Hopkins*, 128 Wn.App. 855, 117 P.3d 377 (2005), the police made a *Terry* stop on a defendant based upon information provided by a named but unknown telephone informant. Specifically, police dispatch informed two officers of a citizen informant's 911 call that reported a minor carrying a gun. Dispatch reported that the informant described the person as a "[l]ight-skinned black male, 17, 5' 9", thin, afro, goatee, dark shirt, tan pants, carrying a green backpack and a black backpack." According to dispatch, the informant also reported that the person was "scratching his leg with what looked like a gun." According to dispatch, about seven minutes later, the informant called again and stated that the person was now

at a pay phone at a certain address and that he thought the person put the gun in his pocket.

Although dispatch did not provide a name for the 911 caller, a computer inside the officers' patrol car displayed an incident report indicating the informant's name and cell phone number and a different phone number for the second call. However, neither officer attempted to contact this person. Neither did they know anything about the caller. Rather, the officers went to the public pay phone at the location the informant identified. Once there, they saw the defendant, a black male who resembled the informant's description, hanging up the phone. Neither officer observed a gun or any illegal, dangerous, or suspicious activity. Upon seeing the defendant, they approached and ordered him to raise his hands. They then frisked him and found a firearm. Upon determining who the defendant was, they also uncovered outstanding warrants for his arrest. A search of his person incident to arrest uncovered a small bundle of methamphetamine.

The state later charged the defendant with illegal possession of a firearm and possession of drugs while armed with a firearm. The defendant responded with a motion to suppress, arguing that the information provided by a named but unknown telephone informant did not constitute a reasonably articulable suspicion based upon objective facts that the defendant was involved in criminal conduct sufficient to justify a *Terry* stop. The trial court

disagreed, and denied the motion. Following conviction, the defendant appealed, arguing that the trial court had erred when it denied the motion to suppress. In addressing the issue concerning the reliability of the informant's information, the court of appeals held as follows:

Generally, we may presume the reliability of a tip from a citizen informant. Here, the record demonstrates that at the time of the dispatch, the officers knew only that the informant was a citizen. Although the informant's name and cell phone number appeared on the officers' computer in their patrol car, they did not know the informant or the call's circumstances. The officers did not attempt to call the informant back on his cell phone or the other number to obtain more information about his suspicions. Indeed, one officer believed she should not contact the informant because "[t]he caller had requested no contact." RP at 20. We agree with the trial court that the officers "just assumed everything this guy told them, the tipster told them, was true." RP at 51.

The State emphasizes that a citizen informant is generally presumed reliable and that the informant called back a second time regarding the person's location. But as discussed above, the informant's name was meaningless to the officers and the mere fact that the informant called again to update the person's location is unpersuasive. It may mean that the informant is watching the person, but it tells the officers nothing more about the informant's reliability. Further, a named and unknown telephone informant is unreliable because "[s]uch an informant could easily fabricate an alias, and thereby remain, like an anonymous informant, unidentifiable."

We hold that the State failed to establish the informant's reliability, thus it was reversible error to deny Hopkins' suppression motion.

*State v. Hopkins*, 128 Wn.App. at 863-864 (citations omitted).

In the case at bar, the police officer had even fewer facts from the 911 caller than did the officers in *Hopkins*. In that case, all the officers knew was

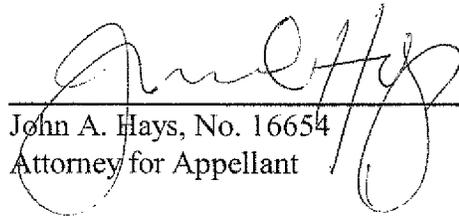
that a person called 911 and gave what he claimed to be his name. The only thing the officers were able to verify was that there was a truck of the make, model and license number described and that it belonged to the defendant, who lived in Longview. Although the officer saw this vehicle drive down the street and park in front of the defendant's home, the officer did not observe any bad driving prior to initiating the stop by turning on his lights. Since the officer did not even attempt to determine the veracity of the 911 caller, and since his observations did not confirm any of the claims of criminality, the stop of the defendant's vehicle violated the defendant's right to privacy under Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment. As a result, the trial court erred when it denied the defendant's motion to suppress all information the officer obtained when he illegally stopped the defendant's vehicle, and the Superior Court erred when it affirmed this decision on appeal.

## CONCLUSION

This court should reverse the decision of the Cowlitz County Superior Court, vacate the defendant's conviction, and remand to the Longview Municipal Court with instructions to grant the defendant's motion to suppress.

DATED this 29<sup>th</sup> day of October, 2015.

Respectfully submitted,



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John A. Hays, No. 16654  
Attorney for Appellant

**APPENDIX**

**WASHINGTON CONSTITUTION  
ARTICLE 1, § 7**

No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

**UNITED STATES CONSTITUTION,  
FOURTH AMENDMENT**

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons and things to be seized.

**COURT OF APPEALS OF WASHINGTON, DIVISION II**

**CITY OF LONGVIEW,**  
**Respondent,**

**NO. 47735-1-II**

**vs.**

**AFFIRMATION  
OF SERVICE**

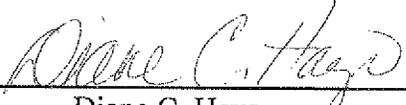
**MARK REYES,**  
**Appellant.**

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The under signed states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

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\_\_\_\_\_  
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