NO. 48446-3-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JEFFERSON DELP-MARQUEZ,

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court erred when it entered that portion of Finding of Fact No. 3 wherein it found that Officer Ballou "saw three individuals walking quickly away from the scene" because this finding is not supported by substantial evidence.

2. The defendant's refusal to stop upon a police officer's command to do so does not support a conviction for obstructing because the officer did not have lawful authority to order the defendant to stop.

Issues Pertaining to Assignment of Error

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

2. Under Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment, does a defendant's refusal to stop upon a police officer's order constitute obstructing when the officer issued that command upon information provided by an anonymous 911 caller?

STATEMENT OF THE CASE

Factual History

At 5:14 pm on June 25, 2015, Vancouver Police Officer Julie Ballou was on routine patrol when she received a call from dispatch stating that a 911 caller claimed that five young men at the intersection of 4th Plain and Broadway Street in Vancouver were assaulting another young man and that one of the four possibly had a gun. RP 11-13. This is a fairly busy intersection and there is a bus stop at this location. *Id.* This information was also set out on Officer Ballou's computer. RP 11-13; Trial Exhibit No. 2. The 911 dispatcher stated that the caller or callers had described the young men as follows: (1st) white male with firearm, about 18-years-old, average build, red shirt, blue jeans, (2nd) white male, about 18-years-old, gray Marijuana t-shirt, blue shorts, (3rd) white male without shirt, (4th) mixed race male with red shirt and blue jeans, and (5th) male in white shirt. RP 19. The 911 dispatcher also gave a name and telephone number for one of the 911 callers, although Officer Ballou was not acquainted with that person. RP 15.

Based upon this call from the 911 dispatcher Officer Ballou drove to the intersection indicated with her red and blue lights on and perhaps her siren on also. RP 21-22. It took her about one minute to do so. RP 21. Once at the intersection she saw a number of people at the bus stop, as well as three young males walking away. RP 22. According to Officer Ballou,

two of the young men were similar to the descriptions dispatch gave, including the defendant, who was wearing a red shirt. *Id.* Seeing this, Officer Ballou stopped her patrol car in the middle of the street and ordered the three young man to "spread out" against a nearby brick wall. RP 23-24. Two of the young men complied with her order. *Id.* However, the defendant turned and ran. *Id.*

As the defendant ran, one of the other young men said "That's your guy." RP 24. Officer Ballou then began running after the defendant yelling for him to stop. RP 24-25. About two blocks away an assisting officer was able to intercept the defendant. *Id.* When Officer Ballou caught up she arrested the defendant for obstructing. RP 27-28.

Procedural History

By information filed July 27, 2016, the Clark County Prosecutor charged the defendant Jefferson Delp-Marquez with one count of obstructing under RCW 9A.76.020. CP 1. Following arraignment the defendant filed a motion to suppress and dismiss, arguing that under the decision in *State v. Z.U.E.*, 183 Wn. 2d 610, 352 P.3d 796 (2015), (1) the officer did not have the lawful authority to order the defendant to stop based upon a 911 call, and (2) that the defendant could not be found guilty of obstructing because his failure to comply with an unlawful command did not constitute this crime. CP 10-31.

The court eventually held a joint suppression motion and fact-finding hearing upon the consent of both parties. CP 3-4. During this joint hearing Officer Ballou testified to the proceeding facts as the sole witness for the state. CP 9-38. The defendant then took the stand and testified that while walking away from the intersection he saw that the person next to him had a gun in his hands. RP 46-55. He then ran away as the officer arrived on the scene as he did not want to get into a confrontation between the officer and the person with the firearm. *Id.* He claimed that he did not hear the officer ordering him to stop. *Id.* Following this testimony the court denied the defendant's motion to suppress and dismiss. RP 42-43, 63-69.

The court also found the defendant guilty of obstructing and later entered the following findings of fact and conclusions of law in support of its finding of guilt. RP 75-77.

FINDINGS OF FACT

> 1. On June 25, 2015, Jefferson Delp-Marquez, hereafter "the respondent," was near the corner of Broadway and Fourth Plain Boulevard when a disturbance occurred. This was in Vancouver, Washington, in Clark County, Washington.
>
> 2. Officer Ballou was dispatched to the disturbance and arrived within approximately one minute of being dispatched.
>
> 3. When she arrived, in her fully-marked police car, she saw three individuals walking quickly away from the scene. All three matched some kind of description she was provided but two matched more specifically to the descriptions of those involved in the fight.

4. She commanded all three individuals to stop. At this time she was in her police uniform. Two individuals stopped as requested but the third individual, the respondent, took off running.

5. Officer Ballou testified that the respondent was five to ten feet away from her when she gave the order.

6. The respondent knew he had been ordered to stop but took off running. He continued to run even though Officer Ballou continued to tell him to stop.

7. The respondent was eventually stopped with the assistance of another officer.

Based on the foregoing Findings of Fact, the court makes the following:

CONCLUSIONS OF LAW

1. The court has jurisdiction of the respondent, Jefferson Delp-Marquez, and of the subject matter.

2. Based on the facts in evidence the respondent ignored the officer's lawful commands to stop; chasing him prevented the officer from performing her official duties; and the respondent knew the officer was discharging her official duties at that time.

3. On June 25, 2015, in Clark County, Washington, the respondent, Jefferson Delp-Marquez, did willfully obstruct a law enforcement officer in the performance of her official duties.

4. The State has proven beyond a reasonable doubt that the respondent is guilty of the crime charged: Obstruction of a Law Enforcement Officer.

5. Judgment and Disposition should be entered accordingly.

CP 77-79.

The defendant was later sentenced within the standard range on this

conviction, after which he filed timely notice of appeal. CP 54-56, 63-66.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT ENTERED THAT PORTION OF FINDING OF FACT NO. 3 WHEREIN IT FOUND THAT OFFICER BALLOU "SAW THREE INDIVIDUALS WALKING QUICKLY AWAY FROM THE SCENE" BECAUSE THIS FINDING IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

The purpose of findings of fact and conclusions of law is to aid an appellate court on review. *State v. Agee*, 89 Wn.2d 416, 573 P.2d 355 (1977). The Court of Appeals reviews these findings under the substantial evidence rule. *State v. Nelson*, 89 Wn.App. 179, 948 P.2d 1314 (1997). Under the substantial evidence rule, the reviewing court will sustain the trier of facts' 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*, 123 Wn.2d 641, 870 P.2d 313 (1994).

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 for consideration on review. *Estes v. Bevan*, 64 Wn.2d 869, 395 P.2d 44 (1964).

In the case at bar, appellant assigns error to that portion of Finding of Fact No. 3 shown in bold and italics:

> 3. When she arrived, in her fully-marked police car, she saw three individuals ***walking quickly away from the scene***. All three matched some kind of description she was provided but two matched more specifically to the descriptions of those involved in the fight.

CP 78.

In fact, Officer Ballou's testimony on this point was as follows:

> I approached the area, I came from the north and came into the intersection of 4th Plain and Broadway. I saw a variety of people at the bus stop, as well as three males that were coming from the area eastbound on 4th Plain.

CP 22.

The trial court's finding that the three individuals Officer Ballou saw were "walking quickly away from the scene" is not supported by substantial evidence.

II. THE DEFENDANT'S REFUSAL TO STOP UPON A POLICE OFFICER'S COMMAND TO DO SO DOES NOT SUPPORT A CONVICTION FOR OBSTRUCTING BECAUSE THE OFFICER DID NOT HAVE LAWFUL AUTHORITY TO ORDER THE DEFENDANT TO STOP.

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 it 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 argument of counsel. Thus, it was the State's burden to prove the existence of an exception to the warrant requirement. In this case, the State sought to excuse the officers' warrantless command that constituted a seizure of the defendant's person by claiming that

she 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 officer failed to establish the reliability of the informant prior to acting upon his or her 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. Saggers*, 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 bindle 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).

Recently, in *State v. Z.U.E.*, 183 Wn. 2d 610, 352 P.3d 796 (2015), the Washington Supreme Court again addressed the issue of when the police may base a *Terry* stop upon information provided by 911 callers. In this case a number of 911 callers reported seeing a bald, shirtless man seen carrying a gun "in a ready position" through a park in Tacoma that had a reputation as a gang hangout. A subsequent 911 caller, who identified herself as Dawn, stated that she had seen a 17-year-old female hand off a gun to the shirtless man. She gave a description of the female.

Upon hearing these reports two officers drove to the park, arriving within six minutes of the initial dispatch. Although the officers did not find anyone present, they did talk to a person who lived next to the park who told them that there had been a big fight involving a number of people. A short time later the officers found a vehicle in the vicinity with a female in the back matching the description of the 17-year-old who the 911 caller name Dawn

stated had handed the gun to the bald, shirtless man. There were three other persons in the car. The officers then made a "felony" stop on the vehicle and arrested the 17-year-old for obstructing when she failed to follow the officer's orders. A search incident to arrest revealed that she had marijuana on her person.

The state later charged the 17-year-old with obstructing and possession of marijuana. The defense then brought a motion to suppress, arguing that the officers did not have the authority to detain the defendant based upon the uncorroborated claims of the 911 callers, who were themselves essentially anonymous. Although the court denied the motion it did find her not guilty on the obstructing charge. The defendant then appealed her conviction for possession of marijuana. On review the court of appeals reversed, finding that

> the 911 calls lacked sufficient "indicia of reliability" to justify the stop because (1) the callers were essentially unknown callers, (2) the officers did not know the factual basis supporting the caller's assertion of criminal activity, (3) the officers did not corroborate the assertion of criminal activity, and (4) the officers could not corroborate that the information was obtained in a reliable manner.

State v. Z.U.E., 183 Wn.2d at, 616-17.

The Court of Appeals also concluded that the officers' public safety concerns did not justify their decision to act on the less than reliable information.

Following entry of the Court of Appeals decision the state sought and obtained review before the Washington Supreme Court. However, the Supreme Court affirmed, holding as follows concerning the state's claim that the officers could rely upon the information provided by the 911 callers:

> Similar to the facts in *Sieler* and *Navarette*, the officers' alleged suspicion hinged on a named, but otherwise unknown, 911 caller's assertion that the subject was engaged in criminal activity. Specifically, the caller alleged that the female was 17 years old, and therefore a minor, which is the only "fact" that potentially makes the girl's possession of the gun unlawful for the articulated crime. However, because the caller did not offer any factual basis in support of that allegation, the officers could not ascertain how the caller knew the girl was 17 rather than, say, 18 years old. The officers knew nothing about Dawn (aside from her contact information), Dawn's relationship with the female, or why Dawn suspected that the girl had committed a crime in the first place. Although we presume that Dawn reported honestly, the officers had no basis on which to evaluate the accuracy of her estimation. We follow our holding in *Sieler* and conclude that this 911 caller's assertion cannot create a sustainable basis for a *Terry* stop.

State v. Z.U.E., 183 Wn. 2d at 622-23.

Similarly, in the case at bar the officer had no basis upon which to evaluate the reliability or accuracy of the 911 callers claims and no basis upon which to believe that the defendant had been involved in any assault or illegal possession of a weapon. Thus, in the same manner that the officers in *Z.U.E.* acted without lawful authority when they detained the defendant based upon the 911 caller's claims, so the officer in the case at bar acted without lawful authority when she attempted to detain the defendant based upon a 911

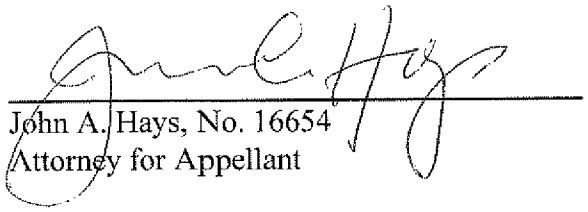
caller's claims. As a result, the trial court erred when it denied the defendant's motion to suppress and when it denied the defendant's motion to dismiss because the defendant's refusal to comply with the officer's unlawful order does not constitute the crime of obstructing. *See State v. Steen,* 164 Wn.App. 789, 800, 265 P.3d 901, 907 (2011) (The gravamen of the offense of obstructing is "willfully disobeying ***a lawful police order*** in a manner that hinders, delays, or obstructs the officer in the performance of his or her duties") (emphasis added).

CONCLUSION

The defendant's failure to comply with a police officer's unlawful command does not constitute the crime of obstructing. As a result this court should vacate the defendant's conviction and remand with instructions to dismiss.

DATED this 23rd day of June, 2016.

Respectfully submitted,



John A. Hays, No. 16654
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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.

RCW 9A.76.020
Obstructing a Law Enforcement Officer

(1) A person is guilty of obstructing a law enforcement officer if the person willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties.

(2) "Law enforcement officer" means any general authority, limited authority, or specially commissioned Washington peace officer or federal peace officer as those terms are defined in RCW 10.93.020, and other public officers who are responsible for enforcement of fire, building, zoning, and life and safety codes.

(3) Obstructing a law enforcement officer is a gross misdemeanor.

COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON, **Respondent,** **vs.** **JEFFERSON DELP-MARQUEZ,** **Appellant.**	**NO. 48446-3-II** **AFFIRMATION OF SERVICE**

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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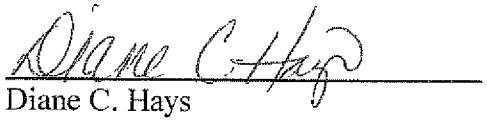
Dated this 23rd day of June, 2016, at Longview, WA.



Diane C. Hays

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