

NO. 48446-3-II

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

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STATE OF WASHINGTON, Respondent

v.

JEFFERSON DELP-MARQUEZ, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO.15-8-00472-2

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BRIEF OF RESPONDENT

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## **RESPONSES TO ASSIGNMENTS OF ERROR**

- 1. THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT A FINDING OF FACT THAT THE THREE INDIVIDUALS WERE WALKING AWAY QUICKLY**
- 2. THE TRIAL COURT CORRECTLY FOUND THAT THE COMMAND TO STOP WAS LAWFUL**

### **III. STATEMENT OF THE CASE**

#### **A. PROCEDURAL FACTS**

J.D.M. was charged with Obstructing a Law Enforcement Officer on July 27, 2015. CP 1. Trial was originally set for October 12, 2015. CP 3. It was later continued to November 18, 2015. CP 5. Both sides filed trial briefs. CP 6 – 31. As part of his trial brief, J.D.M., raised the issue of the stop and sought dismissal. CP 10 – 31. The trial court set the case over to allow the State time to respond to the issues raised by J.D.M. and a new trial date was set. CP 32. The State filed its response on December 22, 2015. CP 38. The trial was ultimately held on December 23, 2015. CP 49.

On December 23, 2015, upon consent of the parties, the court held a joint suppression hearing and fact-finding hearing. CP 47, RP 3 – 8. During the CrR 3.6 hearing, the CAD printout was admitted as Trial Exhibit 2. After the joint hearings, the trial court denied J.D.M.'s motion to suppress and dismiss and found him guilty of Obstructing a Law

Enforcement Officer. CP. 51, RP 63 – 68, 75 – 77. J.D.M. was sentenced and given notice of his right to appeal. CP 54 – 60. Written findings of fact and conclusions of law were entered on February 10, 2016.

#### 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 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.

This timely appeal followed. CP 63.

### B. ADJUDICATORY HEARING

On June 25, 2015, Vancouver Police Officer Julie Ballou was working patrol when she was dispatched to Fourth Plain and Broadway where she came into contact with J.D.M. RP 10 – 13, 21; Trial Exhibit 2. Officer Ballou received reports of several subjects beating up on one person, with one of the individuals having a gun. RP 18 – 19. She receiving the following information on the individuals involved in the fight, “the guy with the gun [was] a white male, about 18, average build,

red shirt, blue jeans. They gave another description of a white male, 18-years-old, with a gray marijuana shirt and blue shorts. Another guy did not have a shirt, and then a mixed race male with a red shirt and blue jeans, another subject described in a white shirt....” RP 18 – 19. Of those calling into 911, dispatch identified them by name and phone number, which appeared on Officer Ballou’s computer in her car and was heard by Officer Ballou over the radio. RP 13 – 15; Trial Exhibit No. 2.

She had been on another call just a few blocks away from the reported scene and was able to get to the scene one minute after dispatch made the call. The record indicates, “the call came in at 17:14 hours and my arrival time was 17:15 hours.” RP 20.

When arrived on scene, she was in her marked patrol car, with her lights and possibly sirens on, and wearing her police uniform. RP 21 - 22. Officer Ballou was the first to arrive. RP 22. She approached from the north and saw a variety of people at the scene, “as well as three males that were coming from the area eastbound on 4<sup>th</sup> Plain.” RP 22. Those males stood out to her. RP 22. Two of the individuals matched the descriptions she was provided, including J.D.M who was wearing a red shirt. RP 22, 39. She stopped her car in the middle of the roadway, jumped out of her car, and told all three to stop. RP 23. Two of them complied, however J.D.M. did not. RP 23. He took off running north and then headed west.

RP 24. He was about five feet away from her, about the length of her patrol car hood, as she told him to stop. RP 36. As J.D.M was running away the man in the gray shirt pointed toward J.D.M. and said, “That’s your guy.” RP 24. J.D.M. was watching Officer Ballou as the man in the gray shirt made the above statement. RP 39.

At this point, Officer Ballou ran after J.D.M. RP 24. As he ran, she observed him holding his waistband. RP 25. Based on her training and experience, she believed that he could be holding a weapon in his waistband and she had concerns that he might have a gun. RP 25. She put out the call that she was in pursuit of him and about two blocks down the road he was intercepted by another officer. RP 24 - 25. Officer Ballou made it clear during their interaction that she was ordering him to stop; he never did. RP 27. She ultimately arrested him for obstructing a law enforcement officer. RP 28.

## 1. ARGUMENT

### 3. THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT A FINDING OF FACT THAT THE THREE INDIVIDUALS WERE WALKING AWAY QUICKLY

Findings of fact are reviewed under the substantial evidence standard to ascertain whether they are supported by evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999). Unchallenged

findings are treated as verities on appeal. *State v. Ross*, 106 Wn.App. 876, 880, 26 P.3d 298 (2001).

In the combined CrR 3.6 hearing and trial, Officer Julie Ballou did not specifically testify that the three individuals were walking “quickly away from the scene.” RP 22. However, the CAD printout, which was admitted into evidence during the 3.6 hearing portion of the trial as Trial Exhibit 2, reveals that: 1) Officer Ballou was dispatched to East Fourth Plain and Broadway, 2) one 911 caller reported people running toward Fourth Plain and, 3) that Officer Ballou reported back to dispatch that “3 RUNNING EB BROADWAY.FOURTH PLAIN.” Trial Exhibit 2.

When J.D.M. testified in the CrR 3.6 hearing portion of the trial, he put himself in the intersection at the time of the incident, he said he saw a guy with a gun and that he did not want to be near him, and that when the officer arrived on scene he took off running – not in response to her but in response to the situation and wanting to get out of there. RP 47 – 48.

The State submits that while the officer did not testify on direct examination that the three individuals were “walking quickly away from the scene” there is substantial evidence in the record to support Finding of Fact No. 3. The “scene” was at the intersection of Fourth Plain and Broadway as supported by Trial Exhibit 2. The evidence to support

“walking quickly” can be found in the Trial Exhibit 2 and through J.D.M.’s testimony.

However, if the Court determines that there is not substantial evidence to support this portion of the finding, the State contends that this factual statement in no way contributed to the trial court’s determination that the command to stop was a lawful command. Therefore, it has no effect on the outcome here.

#### **4. THE TRIAL COURT CORRECTLY FOUND THAT THE COMMAND TO STOP WAS LAWFUL**

The appellant’s assignment of error states that there is insufficient evidence to support a conviction for obstructing a law enforcement officer. However, in his briefing he focuses solely on the CrR 3.6 hearing, stating that denial of the suppression motion was in error. Thus, his assignment of error appears to be misstated. As a result, the respondent is replying to the briefing.

A denial of a motion to suppress is reviewed by determining “whether substantial evidence exists to support the trial court’s findings of fact, and whether those findings support the trial court’s conclusions of law.” *State v. Ross*, 106 Wn.App. at 880, 26 P.3d 298. Conclusions of law are reviewed de novo. *State v. Dyreson*, 104 Wn.App. 703, 708, 17 P.3d 668 (2001).

A stop is a seizure that must be reasonable under the Fourth Amendment and article 1, section 7 of the Washington Constitution. State v. Howerton, 187 Wn.App. 357 (2015). “An investigatory *Terry* stop is permissible if the investigating officer has ‘a reasonable and articulable suspicion that the individual is involved in criminal activity.’” *Id.*, quoting State v. Walker, 66 Wn.App. 622, 626, 834 P.2d 41 (1992). A reasonable suspicion is the “substantial possibility that criminal conduct has occurred or is about to occur.” Howerton, 187 Wn.App at 364, 348 p.3d 781, quoting, State v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1986).

An officer’s reasonable suspicion may be based on an informant’s tip. State v. Hart, 66 Wn.App. 1, 5, 830 P.2d 696, 699 (1992). However, the State must show through a totality of the circumstances analysis that the tip possesses some “indicia of reliability.” State v. Z.U.E., 183 Wn.2d 610, 618, 352 P.3d 796 (2015). “Indicia of reliability” is established either by (1) circumstances establishing the informant’s reliability or (2) corroborative observations that show either (a) the presence of criminal activity or (b) that the information was obtained by the informant in a reliable fashion. *Id.*, citing State v. Sieler, 95 Wn.2d 43, 47, 621 P.2d 243 (1980).

In *Z.U.E.*, the Supreme Court acknowledged that the Court of Appeals divisions differed in how their analysis of this issue. *Id.* at 620,

352 P.3d 756. Thus, to resolve the split, the Supreme Court adopted the totality of the circumstances test, "...we acknowledge that both the "veracity" and "factual basis" prongs are helpful to the reliability inquiry but we decline to adopt a rule whereby each prong is treated as a necessary element. Such a bright line rule could potentially restrict officers in their ability to act in scenarios not yet contemplated." *Id.* It then stated that it was not overturning *State v. Lesnick*, 84 Wn.2d 940, 530 P.2d 243 (1975) or *State v. Sieler*, acknowledging that in both cases the officers "were unreasonable in relying solely on bare assertions of criminal activity from essentially anonymous informants." *Id.* at 621, 352 P.2d 796. Despite the fact that the informant *Sieler* gave his name, the only information he provided to police was a conclusory assertion that the car was involved in a drug sale. *Id.* at 620, 352 P.2d 796. The caller did not provide any factual basis for his belief that a drug sale had been made. *Id.* This was the same factual situation as the informants in *Z.U.E.* *Id.*

The informants in *Z.U.E.* were essentially anonymous. Of the multiple callers who reported seeing a bald, shirtless man with a gun in the park, only two provided their name and contact information. *Id.* at 613-14, 352 P.3d 796. Only one caller, who identified herself as Dawn, reported seeing the gun passed off to a seventeen year old female. *Id.* Dawn provided no information on how she knew the girl to be seventeen. *Id.* The

officers arrived on the scene within six minutes of being dispatched, saw a female matching the physical description provided but did not stop her. *Id.* Instead they continued to look for the male. *Id.* They left the park and later approached a car with the two females they had seen earlier in the backseat. *Id.* at 15, 352 P.3d 796. At this point, the officers explained they were investigating a minor in possession of a firearm and a gang-related assault with a firearm. *Id.* However, the Court noted, the officers only had the information provided by Dawn and that information had no factual basis to support her conclusion that the female was a minor. And the proposition that the female was seventeen was the only basis that made the possession of a gun unlawful for the articulated crime. *Id.* at 622-23, 352 P.3d 796. The Court held that the basis for the stop of the car and its occupants was unlawful because the 911 calls did not provide officers with any reasonable articulable suspicion to suspect that the passengers in the car were engaged or about to be engaged in criminal activity. *Id.* at 624, 352 P.3d 796.

The Court also acknowledged that under certain conditions, i.e., when a tip involves a serious crime or potential danger, officers should be granted some leeway and less reliability may be required. *Id.* at 623, 352 P.3d 796; *Sieler*, 95 Wn.2d at 50, 621 P.2d 1272; *Lesnick*, 84 Wn.2d at 944-45, 530 P.2d 243. One example provided by the Court was *Navarette*

*v. California*, -- U.S. --, 134 S.Ct. 1683, 188 L.Ed.2d 680 (2014), where a single anonymous 911 caller was sufficient when reporting a possible drunk driver. *Id.* at 624, 352 P.3d 796; *Navarette*, 134 S.Ct., at 1691-92.

In *Navarette*, the United States Supreme Court, which applies a similar “totality of the circumstances” approach, decided that several factors supported the lone 911 caller’s reliability: “the caller was an eyewitness, she made the report contemporaneously to the incident, and she called the emergency 911 line, making her accountable for the provided information, since police can trace those calls.” *Id.*, quoting *Navarette*, 164 S.Ct. at 1689.

In regard to the reliability of informants, this case shares more factually with *Navarett*, 134 S.Ct. 1683, mentioned above, and *Howerton*, 187 Wn.App. 357, 348 P.3d 781. In *Howerton*, the 911 caller called from her cell phone to report that she had just watched someone break into a van across the street. *Howerton*, 187 Wn.App. at 362, 348 P.3d 781. “She provided her name, address, and telephone number to the dispatcher.” *Id.* The caller also gave a physical description of the suspect and the direction the suspect headed in when he left the scene. *Id.* The officer arrived in the area six minutes after the 911 call. *Id.* He saw the defendant, matching the physical description of the suspect and the direction the caller described. *Id.* The defendant saw the officer then

turned around and started the opposite direction but stopped when ordered to by the officer. *Id.* at 362-63, 348 P.3d 781. The witness was contacted soon after and confirmed that the defendant was the person she witnessed break into the van. *Id.*

Division One found that the caller, being a named citizen informant was presumptively reliable. *Id.* at 366, 348 P.3d 781; citing *State v. Gaddy*, 152 Wn.2d 64, 73, 93 P.3d 872 (2004) (“Citizen informants are deemed presumptively reliable.”). It then held that even if there was no presumption of reliability, the caller’s tip provided adequate indicia of reliability to justify a *Terry* stop. *Id.* at 368, 348 P.3d 781.

In her tip, she reported objective facts that provided a factual basis for reasonable suspicion for the stop: she made the report right after it occurred, stating it “just now happened”; she was an eyewitness to the incident; and she gave a detailed description of the suspect and the direction he was headed. *Id.* The dispatcher immediately broadcasted this description via radio and provided the information about citizen informant personally witnessing the criminal activity. *Id.* at 368-369, 348 P.3d 781.

It also found that, while not a required factor in this case, the officer’s observations did corroborate the citizen informant’s tip. *Id.* at 374, 348 P.3d 781. The officer was aware that he was arriving minutes after the informant’s call, he saw a person matching the description he was

given by the caller via dispatch walking in the direction described by the caller, and when the defendant saw the officer's car he turned around and started walking the other way. *Id.* at 375, 348 P.3d 781. "Although a suspect's flight from police alone is not enough to justify an investigative stop, it is a factor that may be considered in determining whether reasonable suspicion existed." *Id.*, quoting *State v. Gatewood*, 163 Wn.2d 534, 540, 182 P.3d 426 (2008).

Here, each of the four witnesses was a citizen informant. Each personally witnessed the fight, they called contemporaneously with the event, they described physical descriptions of those involved, and the direction those individuals went after the fight broke up. Three of the four informants called 911 directly and the fourth was a bus driver who used his bus radio dispatch to reach out to 911 dispatch. Trial Exhibit 2.

These witnesses could be identified. One of the callers, Katherine, reported seeing a four-person fight with a gun. Trial Exhibit 2. She stayed on the phone with the dispatch operator as she witnessed this incident. *Id.* Her number and address were listed in the dispatch report. *Id.* She gave a description of each person involved in the fight and remained on scene when officers arrived to provide more information. *Id.* It was Katherine who gave the physical descriptions of those involved and the direction they headed. *Id.* Specifically, she reported hearing sirens and seeing some

of the individuals running toward Fourth Plain. *Id.* The next two callers are not named in the dispatch report but the callers' phone numbers were recorded, so they were able to be identified. The last caller was a bus driver who could be easily identified and contacted for follow up.

The callers in this case were not anonymous. In addition, the callers did not provide conclusory statements such as "a minor with a gun." They called in to report a fight between four males, one of whom looked like the victim. The named caller also reported seeing a gun. A gun was found at the scene. RP 27.

Officer Ballou appeared on scene approximately one minute after being dispatched. RP 20. She reported to dispatch seeing three individuals running eastbound on Broadway and Fourth Plain. Trial Exhibit 2. She testified that two of the three individuals matched the physical descriptions as provided by the 911 caller via dispatch, and she was aware that a gun was seen on one of the individuals wearing a red shirt. RP 18 - 19. Having been provided all the information, arriving about one minute after being dispatched, and seeing two individuals matching the descriptions leaving the area where the fight had just occurred, Officer Ballou had reasonable articulable suspicion to command J.D.M., who was one of the three individuals, to stop.

Furthermore, this event took place in a busy intersection with several people around. RP 31 - 32. As a result, because there were reports of a gun being used in a fight just moments before Officer Ballou arrived, the officer did not have the luxury of time to confirm with witnesses before reacting to the scene. Public safety, as well as her own safety because she was the first officer to arrive, was a concern.

When J.D.M., took off running away from the officer and one of the other individuals yelled out, "that's your guy," the State would submit that there was additional reasonable articulable suspicion to support Officer Ballou's additional commands to J.D.M. to stop as she pursued him.

Officer Ballou had reasonable articulable suspicion to stop J.D.M. Therefore the trial court's correctly decided to deny J.D.M.'s motion to suppress.

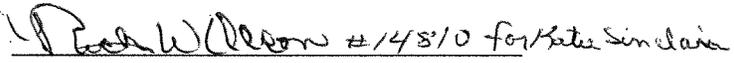
**5. CONCLUSION**

Based on the arguments above, the State respectfully requests this Court to uphold J.D.M.'s conviction for obstructing a law enforcement officer.

DATED this 26 day of August, 2016.

Respectfully submitted:

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**August 26, 2016 - 12:25 PM**

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