

No. 48837-0-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

COLIN BLAINE BECCARIA,

Appellant.

On Appeal from the Pierce County Superior Court
Cause Nos. 15-1-02207-7 & 15-1-03106-8
The Honorable Jerry Costello, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied Colin Beccaria's CrR 3.6 motion to suppress.
2. The State failed to show by clear and convincing evidence that the challenged investigative detention was justified.
3. The arresting police officer failed to articulate sufficient facts to establish a reasonable suspicion of criminal behavior that justified an investigative detention of Colin Beccaria.
4. Any future request by the State for appellate costs should be denied.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Did the arresting officer fail to articulate sufficient facts to establish a reasonable suspicion of criminal behavior that justified an investigative detention of Colin Beccaria, where his suspicion was based on the behavior of someone other than Beccaria, and was also based on improper factors such as presence in a high-crime area and avoiding contact with police, and on actions that were as consistent with innocent behavior as with criminal behavior? (Assignments of Error 1, 2, 3)
2. If the State substantially prevails on appeal and makes a

request for costs, should this Court decline to impose appellate costs because Colin Beccaria does not have the ability to pay costs, he has previously been found indigent, and there is no evidence of a change in his financial circumstances? (Assignment of Error 4)

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Colin Beccaria with three offenses under cause number 15-1-03106-8, relating to an incident on August 7, 2015. (CP 52-53) He was charged with one count of unlawful possession of a firearm in the first degree (RCW 9.41.040); one count of unlawful possession of a controlled substance (RCW 69.50.4013); and one count of unlawful use of drug paraphernalia (RCW 69.50.102 and 69.50.412). (CP 52-53)

Beccaria moved to suppress the evidence discovered in the vehicle in which he was an occupant at the time he was detained and arrested. (CP 61-71) The trial court denied the motion. (CP 199-202; 01/21/16 RP 78-86)¹ The jury subsequently found Beccaria guilty of unlawful possession of a controlled substance,

¹ The different volumes of the verbatim report of proceedings will be referred to by the date of the proceeding contained therein.

but not guilty of the firearm and paraphernalia charges. (CP 181-83; 01/29/16 RP 167-68)

The State also charged Beccaria with two offenses under cause number 15-1-02207-7, relating to an incident on June 7, 2015. (CP 52-53) The State charged Beccaria with one count of unlawful possession of a controlled substance (RCW 69.50.4013); and one count of driving with a suspended or revoked license (RCW 46.20.342). (CP 1-2) Beccaria pleaded guilty to these charges. (CP 4-13; 02/18/16 RP 4-11)

Beccaria was sentenced under both cause numbers on the same day. The trial court considered Beccaria's stipulated criminal history, and determined that his multiple current offenses and high offender score would result in some offenses going unpunished and thereby resulted in a presumptive sentence that is clearly too lenient. (CP 14-16, 39-41, 184-85, 203-05; 02/18/16 RP 24-25) Accordingly, the court imposed a standard range sentence for each cause number, but ordered that the sentences run consecutively for a term of confinement totaling 48 months. (CP 23-24, 26, 89, 92; 02/18/16 RP 25) This timely appeal follows. (CP 42, 206)

B. SUBSTANTIVE FACTS

1. *Facts from CrR 3.6 Hearing*

Puyallup Tribal Police Officer Joseph O'Connell was on patrol in East Tacoma in the early morning hours of August 7, 2015. (01/21/16 RP 30-31) As he drove past a home located at 2025 East 34th Street, he noticed a woman standing outside of what appeared to be a bedroom window. (01/21/16 RP 31-32) He found this to be suspicious and thought there was a possible burglary being planned or already in progress. (01/21/16 RP 33) Officer O'Connell also saw an occupied Honda Accord parked in the driveway of the home. (01/21/16 RP 32) O'Connell thought the temporary license plate on the Honda looked fake. (01/21/16 RP32)

Officer O'Connell stopped and exited his patrol car, and approached the woman. (01/21/16 RP 34) The woman immediately began to walk away from the house. (01/21/16 RP 34-35) O'Connell asked her what she was doing, and she told O'Connell she was checking in on her friend Lonna because she received a call from her and wanted to make sure she was ok. (01/21/16 RP 34)

Officer O'Connell did not believe her explanation, and

directed the woman to stand next to the Honda so that he could safely contact its occupant. (01/21/16 RP35) As he approached the Honda, a man opened the driver's door and started to exit the car. (01/21/16 RP 35) O'Connell ordered the man to remain in the car. (01/21/16 RP 35-36)

As the man was standing up, Officer O'Connell noticed a bullet and a baggie containing what appeared to be heroin on the driver's seat. (01/21/16 RP 37, 49-50) O'Connell immediately took the man into custody and placed him in handcuffs. (01/21/16 RP 37) Using his flashlight, O'Connell observed a gun protruding from under the driver's seat. (01/21/16 RP 37, 41-42)

Officer O'Connell asked the man, Colin Beccaria, about the items, and Beccaria told him they were not his and that he was at the house to visit Heidi and Dan. (01/21/16 RP 39, 42) O'Connell eventually spoke to the occupants of the house, who said that persons named Heidi and Dan did live there. (01/21/16 RP 40)

Officer O'Connell testified that his suspicions were aroused because it was dark and late at night in a high crime area, and it was odd to see the woman standing at the window and an occupied but unregistered Honda in the driveway. (01/21/16 RP 32-33, 44) But he acknowledged that he did not observe a crime taking place.

(01/21/16 RP 45) He also acknowledged that Beccaria was not free to leave once he stopped his patrol vehicle to investigate.

(01/21/16 RP 48-49, 50-51, 55)

The trial court found that the detention and investigation was proper, and entered the following relevant conclusions of law:

1. Based on a totality of the circumstances, the officer had a reasonable belief that the defendant was engaged in criminal conduct. The officer observed an unregistered and occupied Honda Accord parked in a driveway and observed a woman looking through a bedroom window of a residence. The woman attempted to flee after observing the officer.
2. The woman was contacted and her explanation did not dispel the suspicion. During that conversation, the defendant attempted to exit the vehicle and was immediately approached by the officer. The officer observed a baggie of heroin and a bullet on the front driver's seat.

(CP 205; 01/21/16 RP 83-86)

2. Facts from Trial

Officer O'Connell testified at trial consistent with his testimony from the CrR 3.6 hearing. (01/25/16 RP 17-56) Additionally, the State's witnesses testified that the substance in the baggie found on the driver's seat was heroin, and that the firearm found under the driver's seat was operable. (01/25/16 RP 84; 01/26/16 RP 7-8) Beccaria stipulated that he was ineligible to

possess a firearm due to prior convictions. (CP 60; 01/26/16 RP 4-5)

Beccaria testified on his own behalf. He testified that the woman, Brianna March, was planning to purchase the Honda from a man named Don. (01/26/16 RP 28) Don and Brianna picked up Beccaria earlier that evening. (01/26/16 RP 28) After dropping Don off, March and Beccaria went to the house where the girlfriend of Beccaria's father lived. (01/26/16 RP 28) They knocked on the door but, when no one answered, Beccaria got into the driver's seat of the Honda and ate a hamburger while he waited for March. (01/26/16 RP 29-30, 31) Beccaria did not see the gun or bullet or heroin inside the car and did not know they were there. (01/26/16 RP 30, 34, 47)

IV. ARGUMENT & AUTHORITIES

A. BECCARIA'S MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED BECAUSE THE STATE FAILED TO PRESENT SUFFICIENT FACTS TO ESTABLISH AN INDIVIDUALIZED AND REASONABLE SUSPICION OF CRIMINAL BEHAVIOR THAT JUSTIFIED A TERRY DETENTION.

In reviewing the denial of a motion to suppress, the trial court's conclusions of law are reviewed de novo. State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009).

Under the Fourth Amendment to the United States

constitution and article I, section 7 of Washington's constitution, an officer may not seize a person without a warrant. Garvin, 166 Wn.2d at 248. According to article I, section 7, a person is "seized" when an officer restrains—physically or by a show of authority—that person's freedom of movement to such an extent that a reasonable person would not feel free to leave or to decline the officer's request and terminate the encounter. State v. Fuentes, 183 Wn.2d 149, 158 fn. 7, 352 P.3d 152 (2015) (citing State v. O'Neill, 148 Wn.2d 564, 574, 62 P.3d 489 (2003)). In this case, Officer O'Connell testified that neither March nor Beccaria were free to leave once he stopped his patrol vehicle, and O'Connell ordered Beccaria to "stay put" when he tried to exit the Honda. (01/21/16 RP 34, 35-36, 48-51) There was no question that Beccaria was seized when Officer O'Connell arrived.

There are "a few 'jealously and carefully drawn exceptions' to the warrant requirement," however, including the Terry investigative stop. State v. Duncan, 146 Wn.2d 166, 171-72, 43 P.3d 513 (2002) (quoting State v. Williams, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984), and citing State v. Rife, 133 Wn.2d 140, 150-51, 943 P.2d 266 (1997)); Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

The State has the burden of proving that a warrant exception applies. State v. Vrieling, 144 Wn.2d 489, 492, 28 P.3d 762 (2001); State v. Ladson, 138 Wn.2d 343, 349–50, 979 P.2d 833 (1999). The State must show by clear and convincing evidence that the Terry stop was justified. Garvin, 166 Wn.2d at 250.

A Terry stop requires a well-founded suspicion that the defendant has engaged in criminal conduct. Terry, 392 U.S. at 21; Garvin, 166 Wn.2d at 250. “[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” Terry, 392 U.S. at 21.

“The circumstances must suggest a substantial possibility that the particular person has committed a specific crime or is about to do so.” State v. Martinez, 135 Wn. App. 174, 180, 143 P.3d 855 (2006) (citing State v. Garcia, 125 Wn.2d 239, 242, 883 P.2d 1369 (1994)). But an important safeguard to individual liberty in a Terry stop analysis is the principle that the circumstances justifying a Terry stop must be more consistent with criminal conduct than with innocent conduct. State v. Pressley, 64 Wn. App. 591, 596, 825 P.2d 749 (1992); State v. Thierry, 60 Wn. App. 445, 448, 803 P.2d 844 (1991).

For example, “[a] person’s presence in a high-crime area at a ‘late hour’ does not, by itself, give rise to a reasonable suspicion to detain that person.” State v. Doughty, 170 Wn.2d 57, 62, 239 P.3d 573 (2010) (citing State v. Ellwood, 52 Wn. App. 70, 74, 757 P.2d 547 (1988)). And “[s]tartled reactions to seeing the police do not amount to reasonable suspicion.” State v. Gatewood, 163 Wn.2d 534, 540, 182 P.3d 426 (2008).

Furthermore, suspicion must be “individualized,” so “a person’s ‘mere proximity to others independently suspected of criminal activity does not justify the stop.’” Doughty, 170 Wn.2d at 62 (quoting State v. Thompson, 93 Wn.2d 838, 841, 613 P.2d 525 (1980)). And “a hunch alone” does not warrant police intrusion into people’s everyday lives. Doughty, 170 Wn.2d at 63.

In Doughty, the defendant was stopped “for the suspicion of drug activity” and subsequently arrested for driving with a suspended license. 170 Wn.2d at 60. Doughty challenged his seizure and arrest at trial. 170 Wn.2d at 61. The facts relied upon by the State to support Doughty’s seizure included: (1) that Doughty was seen leaving a house that law enforcement had identified as a drug house; (2) there had been recent complaints from neighbors; (3) Doughty visited the house at 3:20 AM; and (4)

his visit lasted less than two minutes. 170 Wn.2d at 62. Doughty's challenge to this seizure was rejected by the trial court, but on appeal the Supreme Court reversed, stating:

These facts fall short of the reasonable and articulable suspicion required to justify an investigative seizure under both the Fourth Amendment and article I, section 7. Police may not seize a person who visits a location—even a suspected drug house—merely because the person was there at 3:20 a.m. for only two minutes.

The Terry–stop threshold was created to stop police from this very brand of interference with people's everyday lives.

170 Wn.2d at 62-63.

Recently, in Fuentes, the Court held that the totality of the circumstances did not justify an investigatory stop when the arresting officer felt “the entire circumstance was suspicious.” 183 Wn.2d at 161. The officer involved in that case relied on five facts to stop Steven Sandoz at an apartment building that had experienced a high number of criminal incidents: (1) Sandoz's surprise when he saw the officer, (2) conflicting stories between Sandoz and the driver of the vehicle in which Sandoz was a passenger, (3) Sandoz's pale appearance and shaking, (4) the presence of an unfamiliar vehicle, and (5) the officer's alleged authority to prevent loitering by nonoccupants. 183 Wn.2d at 159.

Considering all of these facts, the Fuentes Court concluded that the officer lacked a sufficiently individualized and reasonable suspicion to justify his stop of Sandoz. 183 Wn.2d at 159. After considering Sandoz's conduct and all the accompanying circumstances, the Court determined that nothing suggested that Sandoz specifically was engaged in criminal activity. 183 Wn.2d at 161. According to the Court, the officer's hunch did not justify the stop. 183 Wn.2d at 161.

In this case, Officer O'Connell's hunch that March was engaged in criminal activity was based on her actions of standing outside a house in a high-crime area and immediately walking away when she saw the officer approach. As noted above, her presence in a high crime area and decision to avoid police contact cannot form the basis for an investigative detention. And her behavior, standing outside of a house at night, is just as consistent with non-criminal behavior as with criminal behavior. Officer O'Connell therefore did not observe facts to support a reasonable suspicion that March was engaged in criminal conduct that justified a Terry detention.

But even if Officer O'Connell did have sufficient grounds to detain and investigate March, that does not provide authority to

detain Beccaria simply because he was nearby. Officer O'Connell did not observe Beccaria engaged in any behavior that could be in any way interpreted as criminal. He was simply sitting in a car parked on private property. Beccaria's mere proximity to March does not authorize O'Connell to seize and investigate him.

Because Officer O'Connell did not have a reasonable, individualized suspicion of criminal activity, under the totality of circumstances, which could support Beccaria's detention, all evidence uncovered as a result of the detention must be suppressed. Fuentes, 183 Wn.2d at 158 (citing Doughty, 170 Wn.2d at 65); see also State v. Kennedy, 107 Wn.2d 1, 4, 726 P.2d 445 (1986) (because the initial contact was a seizure and detention, conducted without a reasonable and articulable suspicion of criminal activity, all evidence and statements obtained as a result of the contact should have been suppressed) (citing Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L.Ed.2d 441 (1963)). Therefore, any items found in the Honda, including the packet of heroin, should have been suppressed.

B. ANY FUTURE REQUEST FOR APPELLATE COSTS SHOULD BE DENIED.²

Under RCW 10.73.160 and RAP Title 14, this Court may order a criminal defendant to pay the costs of an unsuccessful appeal. RAP 14.2 provides, in relevant part:

A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review.

But imposition of costs is not automatic even if a party establishes that they were the “substantially prevailing party” on review. State v. Nolan, 141 Wn.2d 620, 628, 8 P.3d 300 (2000). In Nolan, our highest Court made it clear that the imposition of costs on appeal is “a matter of discretion for the appellate court,” which may “decline to order costs at all,” even if there is a “substantially prevailing party.” Nolan, 141 Wn.2d at 628.

In fact, the Nolan Court specifically rejected the idea that imposition of costs should occur in every case, regardless of whether the proponent meets the requirements of being the

² Recently, in State v. Sinclair, Division 1 concluded “that it is appropriate for this court to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellant’s brief.” 192 Wn. App. 380, 389-90, 367 P.3d 612 (2016). Beccaria is including an argument regarding appellate costs in his opening brief in the event that this Court agrees with Division 1’s interpretation of RAP 14.2.

“substantially prevailing party” on review. 141 Wn.2d at 628. Rather, the Court held that the authority to award costs of appeal “is permissive,” so that it is up to the appellate court to decide, in an exercise of its discretion, whether to impose costs even when the party seeking costs establishes that they are the “substantially prevailing party” on review. Nolan, 141 Wn.2d at 628.

Should the State substantially prevail in Beccaria’s case, this Court should exercise its discretion and decline to award any appellate costs that the State may request. First, Beccaria owns no property or assets, has no savings, and has no job and no income. (CP 44-45, 208-09) Beccaria will be incarcerated for the next four years, and already owes over \$1,500.00 in previously ordered LFOs. (CP 24-25, 26, 90, 92) And the trial court declined to order any non-discretionary LFOs at sentencing in this case. (CP 25-25, 92) Thus, there was no evidence below, and no evidence on appeal, that Beccaria has or will have the ability to repay additional appellate costs.

Furthermore, the trial court found that Beccaria is indigent and entitled to appellate review at public expense. (CP 48-49, 212-13) This Court should therefore presume that he remains indigent because the Rules of Appellate Procedure establish a presumption

of continued indigency throughout review:

A party and counsel for the party who has been granted an order of indigency must bring to the attention of the trial court any significant improvement during review in the financial condition of the party. The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent.

RAP 15.2(f).

In State v. Sinclair, Division 1 declined to impose appellate costs on a defendant who had previously been found indigent, noting:

The procedure for obtaining an order of indigency is set forth in RAP Title 15, and the determination is entrusted to the trial court judge, whose finding of indigency we will respect unless we are shown good cause not to do so. Here, the trial court made findings that support the order of indigency.... We have before us no trial court order finding that Sinclair's financial condition has improved or is likely to improve. ... We therefore presume Sinclair remains indigent.

192 Wn. App. 380, 393, 367 P.3d 612 (2016). Similarly, there has been no evidence presented to this Court, and no finding by the trial court, that Beccaria's financial situation has improved or is likely to improve. Beccaria is presumably still indigent, and this Court should decline to impose any appellate costs that the State

may request.

V. CONCLUSION

This Court should reverse the unlawful possession of a controlled substance conviction and sentence entered in cause number 15-1-03106-8. This Court should also decline any future request to impose appellate costs.

DATED: July 25, 2016



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CERTIFICATE OF MAILING

I certify that on 07/25/2016, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Colin B. Beccaria, Bk# 2015330033, Pierce County Jail, 910 Tacoma Ave. S., Tacoma, WA 98402.



STEPHANIE C. CUNNINGHAM, WSBA #26436

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