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No. 28266-0-III  
IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

STEPHEN CHARLES BRANDMIRE,

Defendant/Appellant.

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APPELLANT'S BRIEF

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Spokane, WA 99223-3005  
(509) 443-9149  
Attorney for Appellant

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**A. ASSIGNMENTS OF ERROR**

1. The trial court erred in denying Mr. Brandmire's motion to suppress evidence that was illegally seized.

2. The trial court erred in finding probable cause to issue a search warrant for the driver's area of the car.

*Issues Pertaining to Assignments of Error*

1. Was the officer's detention and investigation of Mr. Brandmire's parked car illegal, where the officer did not have a reasonable suspicion, arising from specific and articulable facts, that criminal activity was afoot?

2. Did the facts create probable cause to issue a warrant to search Mr. Brandmire's car?

**B. STATEMENT OF THE CASE**

Around 7:00 a.m. on September 13, 2008, Stephen Brandmire pulled into a gas station in Grandview, Washington. RP 24-25. Mr. Brandmire was suffering from a head cold and had recently had a wisdom tooth extracted for which he was taking prescription medication. CP 44. While Mr. Brandmire was sitting in his car at the gas pumps, an anonymous person called the police, identified himself only as a drug and alcohol counselor, and said he had just witnessed someone sitting at the

gas pumps snort cocaine. RP 25. The anonymous caller, who was later identified as Mr. Jeppson, told the police, “He looked over and could see him snorting something due to his facial expressions, and was moving something away from his nose.” CP 44, RP 25. Mr. Brandmire had the windows rolled up so Jeppson was unable to hear any sounds coming from inside the car. CP 44, RP 26, 34-35.

Officer Glasenapp was dispatched to the gas station. He arrived within one or two minutes. RP 34. He pulled in behind the car and saw Mr. Brandmire sitting in the driver’s seat reaching toward the floorboard with his right arm. RP 25. Officer Glasenapp got out of his car and approached the passenger side of Mr. Brandmire’s car. Mr. Brandmire did not roll down his window. The officer opened the car door and asked Mr. Brandmire what he put on the floor board. Mr. Brandmire responded that he was putting his shoes on. He also denied snorting any drugs. RP 25-26. Officer Glasenapp later testified that Mr. Brandmire was not free to leave when he opened the car door. RP 35

At some point, Officer Glasenapp contacted Jeppson by phone. Officer Glasenapp couldn’t remember whether that occurred before or after he arrived at the gas station and opened the car door. RP 27, 35-36. Jeppson reiterated that he observed Mr. Brandmire put something up near

his nose and snort something that was cocaine or some other drug, based on his experience as a drug counselor. RP 27.

Officer Glasenapp asked Mr. Brandmire for consent to search his car. Mr. Brandmire refused to give consent. Officer Glasenapp and another officer then removed Mr. Brandmire from his car, handcuffed him and placed him in the backseat of the patrol car. Two hours later, at 9:27 a.m., the officers obtained a telephonic search warrant to search the driver's area of the vehicle. They found some marijuana. RP 29.

The officers then obtained a second telephonic search warrant to search the entire car. They found methamphetamine, a glass pipe and two prescription pills. RP 30-31, CP 45. Mr. Brandmire was arrested and charged with possession of a controlled substance, methamphetamine. RP 31, CP 48. He moved to suppress the drug evidence as fruits of an unlawful search. CP 43-47. The Court denied the motion. RP 5-7. Mr. Brandmire was subsequently found guilty following a trial to stipulated facts. RP 64-70. This appeal followed. CP 2.

## C. ARGUMENT

**1. The officer's detention and investigation of the occupants of the parked car was illegal because the officer did not have a reasonable suspicion, arising from specific and articulable facts, that criminal activity was afoot.**

*Standard of Review.* In reviewing a trial court's findings of fact following a suppression hearing, the reviewing court makes an independent review of all the evidence. State v. Apodaca, 67 Wn. App. 736, 739, 839 P.2d 352 (1992), (citing State v. Mennegar, 114 Wn.2d 304, 310, 787 P.2d 1347 (1990)). Findings of fact on a motion to suppress are reviewed under the substantial evidence standard. Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. Conclusions of law in an order pertaining to suppression of evidence are reviewed *de novo*. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

*Substantive Argument.* The Fourth Amendment, made applicable to the states by way of the Fourteenth Amendment, guarantees the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. Mapp v. Ohio, 367 U.S. 643, 647, 81 S.Ct. 1684, 1687, 6 L.Ed.2d 1081, 84 A.L.R.2d 933 (1961). Its

"key principle," or "ultimate standard," is one of "reasonableness."

Dunaway v. New York, 442 U.S. 200, 219, 99 S.Ct. 2248, 2260, 60

L.Ed.2d 824 (1979) (White, J., concurring). This key principle has many

specific applications. Of those involving the detention of persons,

undoubtedly the most fundamental is that it is reasonable for an officer to

detain a person indefinitely, e.g., for appearance in court or prosecution,

only if the officer has probable cause to believe the person has committed

a crime. Gerstein v. Pugh, 420 U.S. 103, 114, 95 S.Ct. 854, 863, 43

L.Ed.2d 54 (1975); State v. Broadnax, 98 Wn.2d 289, 293, 654 P.2d 96

(1982).

Another, narrower application is that even in the absence of probable cause, it is reasonable for an officer to detain a person briefly, for investigation, if the officer harbors a reasonable suspicion, arising from specific and articulable facts, that criminal activity is afoot. Terry v. Ohio, 392 U.S. 1, 21, 88 S.Ct. 1868, 1879, 20 L.Ed.2d 889 (1968); State v. Kennedy, 107 Wn.2d 1, 5-6, 726 P.2d 445 (1986). A police officer's act of stopping a vehicle and detaining its occupants constitutes a seizure. State v. Takesgun, 89 Wn. App. 608, 610, 949 P.2d 845 (1998) (*citing* Delaware v. Prouse, 440 U.S. 648, 653, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979)). To

be lawful, it must have been justified at its inception and reasonable in scope. State v. Henry, 80 Wn.A pp. 544, 549-50, 910 P.2d 1290 (1995).

A warrantless, investigatory stop must be reasonable under the Fourth Amendment and article I, section 7 of the Washington State Constitution. State v. Duncan, 146 Wn.2d 166, 171, 43 P.3d 513 (2002). The State must prove an investigatory stop's reasonableness. Id. An investigatory stop is reasonable if the arresting officer can attest to specific and objective facts that provide a reasonable suspicion that the person stopped has committed or is about to commit a crime. State v. Armenta, 134 Wn.2d 1, 10, 948 P.2d 1280 (1997). An investigatory stop occurs at the moment when, given the incident's circumstances, a reasonable person would not feel free to leave. Armenta, 134 Wn.2d at 10, 948 P.2d 1280; State v. Williams, 102 Wn.2d 733, 739, 689 P.2d 1065 (1984).

It is generally recognized that crime prevention and crime detection are legitimate purposes for investigative stops or detentions. Kennedy, 107 Wn.2d at 5-6, 726 P.2d 445. However, there must be sufficient articulable facts supporting a reasonable suspicion of criminal activity to justify a temporary investigative stop. *See* State v. Thornton, 41 Wn. App. 506, 705 P.2d 271 (1985); State v. Samsel, 39 Wn. App. 564, 694 P.2d 670 (1985).

"The reasonableness of the officer's suspicion is determined by the totality of the circumstances known to the officer at the inception of the stop." State v. Lee, 147 Wn. App. 912, 917, 199 P.3d 445 (2008) (citing State v. Rowe, 63 Wn. App. 750, 753, 822 P.2d 290 (1991)); *See Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). The totality of the circumstances test allows the court and police officers to consider several factors when deciding whether a Terry stop based on an informant's tip is allowable, such as the nature of the crime, the officer's experience, and whether the officer's own observations corroborate information from the informant. Kennedy, 107 Wn.2d at 8, 726 P.2d 445; State v. Sieler, 95 Wn.2d 43, 47, 621 P.2d 1272 (1980); State v. Lesnick, 84 Wn.2d 940, 944, 530 P.2d 243 (1975). Moreover, "the determination of reasonable suspicion must be based on common sense judgments and inferences about human behavior." Lee, 147 Wn. App. at 917, 199 P.3d 445 (citing Illinois v. Wardlow, 528 U.S. 119, 125, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000)).

Reasonable suspicion, like probable cause, is dependant upon both the content of information possessed by police and its degree of reliability. Id. Both factors--quantity and quality--are considered in the "totality of the circumstances--the whole picture," that must be taken into account

when evaluating whether there is reasonable suspicion. Id. (quoting Alabama v. White, 496 U.S. 325, 330, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990)).

Herein, the “content of information” possessed by Officer Glasenapp when he decided to get out of his patrol car and conduct an investigative detention did not support a reasonable suspicion of criminal activity. “Common sense judgment and inferences about human behavior.” would lead any reasonable person to believe that Mr. Brandmire’s actions were as much consistent with someone with a cold blowing his or her nose, as they were with someone snorting cocaine. The fact that no cocaine or any other “snortable” drug was found in the car confirms the former over the latter.

In State v. Sieler, an unknown but named informant called the police and said he had just witnessed a possible drug transaction in a car in a high school parking lot. Sieler, 95 Wn.2d at 44, 621 P.2d 1272. The police did not corroborate the informant’s tip, but conducted an investigatory stop anyway. Sieler, 95 Wn.2d at 45. Our Supreme Court held the information was unreliable stating:

Even assuming that an unknown but named telephone informant was adequately reliable . . . this reliability by itself generally does not justify an investigatory detention. . . . [T]he State generally should not be allowed to detain and question an individual based

on a reliable informant's tip which is merely a bare conclusion unsupported by a sufficient factual basis which is disclosed to the police prior to the detention. Some underlying factual justification for the informant's conclusion must be revealed so that an assessment of the probable accuracy of the informant's conclusion can be made.

Sieler, 95 Wn.2d at 48

The Court went on to note that “[e]ven if the reliability of the informant had been established in this case, the detention and questioning of defendants was unconstitutional. The police conducted an investigatory detention based upon an informant's bare conclusion unsupported by any factual foundation known to the police.” Sieler, 95 Wn.2d at 49.

The situation in the present case is indistinguishable from Sieler. Officer Glasenapp conducted an investigatory detention based upon an informant's bare conclusion unsupported by any factual foundation known to him. The unconstitutional detention here was even more egregious than in Sieler, since the factual basis for the detention could easily be accounted for as normal innocuous human activity, i.e. blowing one's nose.

Therefore, the detention was unlawful.

**2. The facts did not create probable cause to issue a warrant to search Mr. Brandmire's car, and the evidence obtained pursuant to the warrant should have been suppressed.**

*Standard of Review.* Appellate courts generally review the issuance of a search warrant only for abuse of discretion. State v. Maddox, 152 Wn.2d 499, 509, 98 P.3d 1199 (2004). Normally great deference is given to the issuing judge or magistrate. State v. Young, 123 Wn.2d 173, 195, 867 P.2d 593 (1994) (citing State v. Huft, 106 Wn.2d 206, 211, 720 P.2d 838 (1986)). However, at the suppression hearing the trial court acts in an appellate-like capacity; its review, like the appellate courts, is limited to the four corners of the affidavit supporting probable cause. State v. Neth, 165 Wn.2d 177, 182, 196 P.3d 658 (2008) (citing State v. Murray, 110 Wn.2d 706, 709-10, 757 P.2d 487 (1988); Wong Sun v. United States, 371 U.S. 471, 481-82, 83 S.Ct. 407, 414, 9 L.Ed.2d 441 (1963)). Thus, although it defers to the magistrate's determination, the trial court's assessment of probable cause is a legal conclusion the appellate court reviews de novo. Id. (citing State v. Chamberlin, 161 Wn.2d 30, 40-41, 162 P.3d 389 (2007)).

*Substantive Argument.* A search warrant should be issued only if the application shows probable cause that the defendant is involved in

criminal activity and that evidence of the criminal activity will be found in the place to be searched. State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). The probable cause requirement is a fact-based determination that represents a compromise between the competing interests of enforcing the law and protecting the individual's right to privacy. Neth, 165 Wn.2d at 182, 196 P.3d 658 (citing Brinegar v. United States, 338 U.S. 160, 176, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949) (probable cause must be based on more than mere suspicion)). The affidavit should be evaluated in a commonsense manner, rather than hyper-technically. Id. (citing State v. Jackson, 150 Wn.2d 251, 265, 76 P.3d 217 (2003)). But an affidavit in support of a search warrant must be based on more than mere suspicion or personal belief that evidence of a crime will be found on the premises searched. Neth, 165 Wn.2d at 183, 196 P.3d 658. Probable cause for a search requires a nexus between criminal activity and the item to be seized and between that item and the place to be searched. Thein, 138 Wn.2d at 140, 977 P.2d 582.

In Neth, there were a number of facts submitted to the magistrate in the trooper's affidavit for a search warrant that the trooper believed indicated evidence of drug trafficking was located in Neth's car: 1-The driver, Neth, was overly nervous, yelling at times as the officer was talking

to him; 2-He was driving a car that he could not prove he owned or rented; 3-He had no registration or insurance documents, or any transfer of ownership papers; 4-He had no identification or a wallet on him or in his vehicle and was traveling from Vancouver to Goldendale. The female passenger also had no identification; 5-He made comments that he was renting a house in Goldendale but he did not know the exact location, or address of the residence, but still claimed to be working and residing in Ridgefield; 6-He voluntarily stated he had money in the vehicle but did not know the exact amount \$2500 to \$3500 dollars. The money was in cash, was not located on his or his passenger, and he did not have a wallet; 7-His girlfriend stated they were going to rent a house in Goldendale, but she did not know that the house was already being rented, even though she had been dating him for a year; 8-Neth possessed clear plastic bags that drug traffickers are known to use for carrying illegal drugs; and 9-Neth was a convicted felon for delivery charges including possession of Heroin. Neth, 165 Wn.2d at 183-84, 196 P.3d 658.

The Supreme Court held that while these facts are unusual, and, taken together, they seem odd and perhaps suspicious, all of these facts are consistent with legal activity, and very few have any reasonable connection to criminal activity. Neth, 165 Wn.2d at 184, 196 P.3d 658.

“We do not permit searches merely because people do not have proper identification or documentation, are nervous, or tell inconsistent versions of events. . . [T]he only facts that can be said to show a nexus connecting Neth's car to criminal activity are the plastic baggies, a relatively large sum of money in the car, and his criminal history.” Id. (citations omitted). The Court concluded that these facts did not create probable cause to search Neth's car and the evidence obtained pursuant to the warrant should have been suppressed. Neth, 165 Wn.2d at 186, 196 P.3d 658.

In the present case, there are even fewer facts that could be said to show a nexus connecting Mr. Brandmire's car to criminal activity. The only facts that could possibly show a nexus are Jeppson's observations of Mr. Brandmire most likely blowing his nose, Mr. Brandmire reaching toward the floorboard with his right arm, Mr. Brandmire not rolling down his window, and Mr. Brandmire's refusal to give consent. In accordance with Neth and the other legal precedent cited above, these facts did not create probable cause to issue a warrant to search Mr. Brandmire's car. Therefore, the evidence obtained pursuant to that warrant should have been suppressed.

**D. CONCLUSION**

For the reasons stated, the conviction should be reversed and the case dismissed.

Respectfully submitted January 7, 2010,



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