

FILED

SEP 03 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY _____

Nos. 291669
291677

IN THE COURT OF THE APPEALS
OF THE STATE OF WASHINGTON

DIVISION III

THE STATE OF WASHINGTON, Appellant

v.

ANDREW G. TRUTTER, Respondent,

and

JOSHUA D. SMOLINSKI, Respondent.

BRIEF OF APPELLANT

CURT L. LIEDKIE
Asotin County Deputy
Prosecuting Attorney
WSBA #30371

P. O. Box 220
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(509) 243-2061

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II. ASSIGNMENT OF ERROR

1. THE TRIAL COURT ENTERED FINDINGS WHICH WERE NOT SUPPORTED BY THE RECORD.

2. THE TRIAL COURT APPLIED THE INCORRECT LEGAL STANDARD WITH REGARD TO REQUIREMENTS OF *TERRY V. OHIO*, AND THEREBY ABUSED ITS DISCRETION IN GRANTING SUPPRESSION.

3. THE UNDISPUTED FACTS OF THE CASE CLEARLY ESTABLISH THAT OFFICERS HAD REASONABLE SUSPICION TO CONDUCT A TRAFFIC STOP ON THE VEHICLE.

I. STATEMENT OF THE CASE

On February 11, 2010, in Clarkston, Asotin County, Washington, Officers of the Quad Cities Drug Task Force were engaging in surveillance on a suspect (hereinafter referred to as "target" and identified as "Tanner Hardin") who they had information was involved in the sales and use of controlled substances including opiates in pill form. Report of Proceedings, Volume A, (*hereinafter*: RP, Vol. A) pp. 41 - 44, 89 - 92. Detectives trailed the target who they observed travel to the Albertson's parking lot in Clarkston, Washington. RP Vol. A, p. 92. They observed the target drive his vehicle to a parking stall that was located a considerable distance from the businesses served by this parking lot. RP Vol A, p. 95. The detectives observed there to be many available stalls in close proximity to these businesses. RP Vol A, p. 95, Affidavit in Support of Search Warrant, Clerks Papers (*hereinafter* CP) 71 - 78.

A few seconds later, detectives observed a white Dodge Durango pull up next to the target's vehicle, driver's door to driver's door. RP Vol A, pp. 48, 93. Detectives observed the driver of the Durango, later identified as the Respondent, Andrew G. Trutter, exit the Durango, walk around the target's vehicle, and get into the rear passenger side of the target's vehicle. RP Vol A, pp. 48, 93. One of the officers was able to observe Trutter lean forward over

the bench seat back and into the front seat. RP Vol A, p. 93. Prior to Trutter entering the target vehicle, no greetings were exchanged between the occupants of the two vehicles. RP Vol A, 49. A short time later, another individual exited the target's vehicle, ran across the parking lot and got into a third vehicle which had entered the parking lot. RP Vol A, p. 49. Detective Darin Boyd observed the driver of this vehicle hand something to this person. RP Vol A, p. 50. That vehicle then drove around the parking lot and dropped this person off back at the target vehicle. RP Vol A, p. 50. Shortly thereafter, Trutter exited the target's vehicle and got back into the Durango. RP Vol A, p. 50. The target drove his vehicle back to the residence of origin. RP Vol A, p. 51. The entire interchange took less than ten minutes. RP Vol A, p. 52. None of the occupants of these three vehicles went into any of the stores or businesses served by the parking lot. RP Vol A, p. 52. Based upon the information from the Confidential Informant, based upon the officers' training as experience and narcotics detectives, and based upon the observations of the officers regarding the behavior of the occupants of the three vehicles, officers believed that these individuals had been involved in narcotics transactions. RP Vol A, pp. 52 - 55, 95 - 96.

After re-entering the white Dodge Durango, Trutter drove out of the parking lot and was followed by detectives. RP Vol A, p. 51.

Trutter drove to a public park located at the corner of Burns and Maple Streets (Arnold Park). RP Vol A, p. 55. Trutter pulled into a parking stall on the north east corner of the park. RP Vol A, p. 56. Detectives observed a tall male on foot approach the vehicle, walk up to the driver's window and contact Trutter. RP Vol A, p. 58. After approximately a minute, this person left on foot and Trutter drove away. RP Vol A, p. 57- 58. Based upon his training and experience relating to drug transactions and activities of person involved therein, Detective Boyd directed other officers to conduct a Terry stop on the Trutter vehicle based upon the above described observations and his knowledge of the investigation. RP Vol A, p. 60. Once stopped, officers contacted to two occupants; the driver was then identified as Trutter and his passenger identified as the co-Respondent, Joshua Smolinski. Search Warrant Affidavit and Statement of Arresting Officer and Preliminary Finding of Probable Cause, CP 1 - 3, 71 - 78. Trutter was asked to step out of the vehicle and was advised of the reason for the stop. CP 1 - 3, 71 - 78. Trutter told officers he had come down from Moscow with Smolinski to go to the bars. CP 1 - 3, 71 - 78. Trutter was advised to keep his hands out of his pockets and after failing to do so, was placed in handcuffs and frisked for officer safety. CP 1 - 3, 71 - 78. The patrol officer who frisked Trutter felt a large bulge in his right front pocket which he immediately recognized as a large wad of

U.S. currency. CP 1 - 3, 71 - 78. The officer stated he could feel money and Trutter asked him how he knew it was money. CP 1 - 3, 71 - 78.

When Detective Boyd asked Trutter why he was at the park, he replied that he was fixing a headlight. CP 1 - 3, 71 - 78.

Detective Boyd knew from his observation of Trutter's activities that he had not exited his vehicle while at the park. CP 1 - 3, 71 - 78.

The Detective asked who he had met at the park and Trutter stated that he had met a friend named "Chris." CP 1 - 3, 71 - 78. Trutter was unable to provide a last name for "Chris." CP 1 - 3, 71 - 78.

Trutter claimed that he had come down from Moscow and stopped in at his parents' house and then stopped at the park to fix a headlight. CP 1 - 3, 71 - 78. He denied being involved in any narcotics transactions in the park. CP 1 - 3, 71 - 78. Trutter also denied making any other stops that night. CP 1 - 3, 71 - 78.

Specifically, Trutter denied being in the Albertson's parking lot earlier where he met with the target. CP 1 - 3, 71 - 78.

While Detective Boyd was contacting Trutter, Detective Rodney Wolverton was contacting Smolinski who was seated in the passenger seat of the Durango. CP 1 - 3, 71 - 78. Detective Wolverton told Smolinski to keep his hands on the dash board. CP 1 - 3, 71 - 78. Detective Wolverton asked where Smolinski was from and he stated he was from Moscow. CP 1 - 3, 71 - 78.

Detective Wolverton told him that he knew they were involved in illegal drug transactions and Smolinski stated that he never purchased or sold drugs. CP 1 - 3, 71 - 78. Detective Wolverton asked Smolinski about Trutter purchasing or selling drugs and Smolinski at that point invoked his right to counsel. CP 1 - 3, 71 - 78. Detective Wolverton then observed Smolinski take his hands off the dash and reach down with his right hand toward the floorboards of the vehicle and out of sight of the officers. CP 1 - 3, 71 - 78. Detective Wolverton then ordered Smolinski out of the vehicle. CP 1 - 3, 71 - 78. As Smolinski exited the vehicle, Detective Wolverton saw a brown pill bottle nearly full of pills. CP 1 - 3, 71 - 78. This bottle was lying near where Smolinski's feet had been. CP 1 - 3, 71 - 78.

Based upon the earlier observations consistent with drug activity at the parking lot and at the park, as well as Trutter's false statements that he wasn't in the parking lot earlier, the large wad of cash in Trutter's pocket, and the observation of the full pill bottle, Detective Boyd decided to apply for a search warrant for the vehicle and the suspects. CP 1 - 3, 71 - 78. While preparing the paperwork, Detective Boyd learned that the City of Asotin had taken a theft report earlier that day wherein it was reported that a person identified as "Tanner" had stolen morphine pills from a residence in Asotin. CP 1 - 3, 71 - 78. All the above information

was relayed to the Magistrate who approved issuance of the search warrant on the vehicle and the persons of Trutter and Smolinski. CP 1 - 3, 71 - 78. The search warrant was executed and the officers discovered one thousand six hundred seventy dollars (\$1,670.00) in U.S. currency in Trutter's right front pants pocket of the and another four hundred seventeen dollars (\$417.00) in his wallet. CP 1 - 3, 71 - 78. Officers found twelve 80 mg oxycodone tablets inside a blue pill container/cutter which was located in the center console of the vehicle. CP 1 - 3, 71 - 78. In the cupholder officers found half a pill of oxycodone. CP 1 - 3, 71 - 78. In the bottle on the floorboards, officers located a large number of morphine pills. In the backseat on the driver's side, officers found a backpack which contained two ziplock bags holding a total of approximately one pound of marijuana, along with two large bundles of U.S. currency, all in twenty dollar bills, totaling five thousand eight hundred eighty dollars (\$5,880.00) and another ten capsules of morphine. CP 1 - 3, 71 - 78. On the floor of the rear passenger area, officers found a soft zipper case containing a loaded .45 caliber pistol with extra loaded magazine. CP 1 - 3, 71 - 78.

Trutter and Smolinski were ultimately charged with Possession of a Controlled Substance with Intent to Deliver (Morphine), Possession of a Controlled Substance with Intent to

Deliver (Oxycodone), and Possession of a Controlled Substance with Intent to Deliver (Marijuana), along with Firearm Enhancements on each charge. Amended Information, CP 44 - 46, 47 - 49.¹ Trutter filed a motion requesting suppression of the evidence seized in this matter in which Smolinski later joined. Motion to Suppress Evidence, (*respectively*) CP 51 - 59, 126 -144. On May 11, 2010, a hearing was held on the motions. RP Vol A, Vol. A. pp. 1 - 129. At hearing, the trial judge limited the testimony to the events which occurred prior to the stop of the white Durango after it left Arnold Park. RP Vol A, p 12 - 13, 35. At hearing, and in addition to the above facts and circumstances, Detectives Boyd and Wolverton testified at length regarding their training and experience, specifically relating to “open air” drug dealing and the behaviors and activities of person engaging therein. RP Vol A, pp. 36 - 40, 53 - 55, 83 - 88, 95 - 97. Detective Boyd testified that, in his experience, persons involved in narcotics transactions limit them to a short period of time. RP Vol A, p. 54. Rarely are any pleasantries or greetings exchanged between the participants. RP Vol A, p. 54. He testified to the contrast between that behavior and

¹ Mr. Smolinski’s charges were later amended to add a School Zone Enhancement to each charge. Second Amended Information, CP 110 - 112. The State’s Second Motion to Amend the Information in Mr. Trutter’s case, requesting addition of the School Zone Enhancements was still pending when the trial court granted suppression.

the actions of two persons who meet up socially, where greetings would be exchanged. RP Vol A, p. 54. Boyd further testified that in the social setting, a person meeting another in a parking lot would most likely stand at the driver door and speak to the occupant, as contrasted with his observation of Trutter getting into the target vehicle. RP Vol A, p. 54. Detective Boyd explained this behavior is indicative of narcotics activities as it allows for physical cover for the participants in an otherwise public environment. RP Vol A, p. 54.

Detective Boyd also explained the use of public places by those involved in the sale of narcotics. RP Vol A, pp. 38 - 39. Boyd explained that persons selling narcotics use public venues, as opposed to their residences, to frustrate police surveillance efforts and to avoid drawing attention to their residences where drugs and proceeds are often stored. RP Vol A, p. 39. Detective Boyd explained that neighbors may complain about the suspicious visiting patterns at their residence, which would draw the attention of law enforcement. RP Vol A, p. 39. Detective Boyd testified that a parking lot allows the participants to blend into the other vehicles and draws less attention. RP Vol A, p. 39. He further testified that these individuals will avoid parking near stores or storefronts so as to further avoid detection. RP Vol A, p. 39. He testified that it is common for someone engaged in drug sales to conduct several

transactions at one time so as to avoid multiple trips, each one an opportunity for police detection. RP Vol A, p. 54. Detective Boyd testified he has conducted approximately a dozen controlled purchase operations in the Albertsons' parking lot. RP Vol A, p. 53. Detective Boyd further testified that what he observed on the night of February 11, 2010, was consistent with what he had observed during the controlled purchase operations. RP Vol A, p. 54.

Detective Wolverton testified that, aside from attending the Idaho State Patrol Basic Narcotics Detection School, he had been involved in approximately eight hundred controlled purchase operations. RP Vol A, p. 85. He further testified that approximately forty percent of those involved open air or parking lot meets. RP Vol A, p. 86. He testified that he had conducted undercover purchases where he actually participated in the transactions. RP Vol A, p. 86. Wolverton stated that most recently he had been involved in an undercover operation where he purchased controlled substances in the parking lot of a Walmart store in Lewiston, Idaho. RP Vol A, p. 87. He testified that he and the suspect parked out away from the store in the middle of the parking lot. RP Vol A, p. 87. There was very limited conversation. The suspect therein contacted him and obtained the purchase money. RP Vol A, p. 87. Then the suspect entered another vehicle and departed, and a short time later returned, got into the

Detective's vehicle and tossed the drugs on his lap. RP Vol A, p. 87.

Detective Wolverton testified that in the open air meet, officers are looking for "short-time stays," participants who exit and enter other vehicles, and other non-social behaviors. RP Vol A, p. 88. Detective Wolverton testified that what he had observed and what other officers had observed, he believed, based upon his training and experience, that the occupants of the white Durango had been engaged in a drug transaction. RP Vol A, p. 95.

Detective Wolverton explained that the centralized location in the parking lot, away from all business was suspicious. RP Vol A, p. 95. Further, the fact that the driver of the Durango got out of his vehicle and entered the target vehicle when they were parked driver's window to driver's window and could easily have conversed without leaving the vehicle was further indication of suspicious drug activity. RP Vol A, p. 95.

The State offered up an aerial view of the Albertsons parking lot as well as an aerial map of Arnold Park and the surrounding area, both of which were admitted into evidence. RP Vol A, pp. 43, 55. The trial judge took judicial notice of the Affidavit for Search Warrant. RP Vol A, p. 104. Neither Trutter nor Smolinski offered any evidence or testimony. RP Vol A, pp. 104, 105.

At the conclusion of the hearing, the trial judge granted

suppression of the evidence. RP Vol A, p. 118. In so ruling, the court specifically found that the Confidential Informant was reliable and credible based upon the testimony of the officers with regard to his “track record.” RP Vol A, p. 114. The court stated, “This is, in my opinion, a classic case where, as the officer testified, under the totality of the circumstances, ah, we had enough. And under Illinois versus Gates,² I think you did had enough, but I’m constrained to use Aguilar-Spinelli,³ the tighter, more stricter test.” RP Vol A, p. 117. The court therefore found that there was insufficient facts and circumstances to establish reasonable suspicion to believe that Trutter was involved in illegal activities. RP Vol A, p. 118. The court then reiterated, “Ah, so, again, the court’s conclusion is -- is that while you met Illinois v Gates, you didn’t meet Aguilar-Spinelli, and the stop was bad.” RP Vol A, p. 118.

At presentment, the court entered findings. RP Vol B, pp. 134 - 152. The State lodged several objections to the findings presented. RP Vol B, pp. 135, 136, 137, 138, 140, 141, 143, 144,

²Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983).

³Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964) and Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969).

145, and 148. The court entered the written findings, over the State's objections. CP 145 - 148, 151 - 154. The court then entered an order dismissing the respective cases with prejudice. Order of Dismissal with Prejudice, CP 149 - 150, 155. The State then filed a notice of appeal in both cases. Notice of Appeal, CP 156 - 162, 162 - 168.

IV. DISCUSSION

The State contends that the trial court erred in suppressing the evidence. The trial court erred when it entered findings which were inconsistent with, or unsupported by the testimony and evidence presented at hearing. The court further erred when it applied the incorrect legal standard in determining whether the officers had reasonable suspicion to stop the vehicle. Finally, based upon the evidence and testimony taken at the hearing, the trial court erred in concluding that the officers lacked sufficient facts and circumstances to support reasonable suspicion that the occupants of the white Dodge Durango were involved in drug transactions. For these reasons, the State respectfully requests that this Court reverse the decision of the trial court suppressing the evidence and reinstate the charges against the Respondents.

1. THE TRIAL COURT ENTERED FINDINGS WHICH WERE NOT SUPPORTED BY THE RECORD.

The Trial Court erred in entering certain findings of fact upon which it relied in granting suppression. The trial court's findings of fact in a suppression motion are reviewed for substantial evidence.

See State v. Hill, 123 Wn.2d 641, 645-47, 870 P.2d 313 (1994)..

Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding.

See id. at 644. In paragraph 3.2 of the Findings, Conclusions, and

Order on Motion to Suppress Evidence, the court found, “No specifics were given by the confidential informant as to how recently such activity of Tanner had taken place.” CP p. 146, ll. 7 - 8. This finding is contrary to the testimony of Detective Wolverton.

When asked about the recency of the informant’s information,

Detective Wolverton testified:

Ah, on that date we were actually asking -- acting on some information -- the informant had called me earlier that day and had advised me that, ah -- ah, Mr. Hardin was sounding like he was trying to get money together, and was planning on, ah, re-upping or -- resupplying himself with heroine (*sic*). And, ah -- so, with that information, that’s actually what kind of stemmed our surveillance that day.

RP Vol A, p. 91. Clearly, based upon the testimony, there was a time frame given regarding the fact that Tanner’s activities were ongoing and active on the day in question. The court’s finding that no information was given regarding “how recently such activity of Tanner had taken place” was clearly erroneous.

In paragraph 3.5 of the court’s findings, with regard to the location within the parking lot, out away from the businesses, the court stated, “However, such parking location may also be consistent with non-drug activity, such as avoiding having a car being damaged or dinged.” CP p. 146, ll. 22 - 23. No testimony was given or elicited at hearing regarding door dings. This finding is not supported by any evidence and is, therefore, erroneous. At

presentment, the court stated, “Circumstantial evidence -- ah, I’m allowed to use, ah, common experience, ah, to infer additional facts, ah, circumstantially. And so, that’s how I came up with that.” RP Vol B, p. 141, ll. 6 - 9. In entering this finding, the court conceded that no evidence in the record supported the finding, but was based entirely on his own “common experience.” Even if proper to do so, the court’s finding is contrary to common experience. In the case at bar, the target vehicle parked out away from businesses. When Trutter arrived, he pulled driver’s door to driver’s door with the target vehicle. If someone were in the parking lot for legitimate business and looking to avoid door dings, they would not pull up next to an occupied vehicle out away from businesses. Further the court’s finding ignores the evidence that none of the occupants of any of the three vehicles approached or entered any of the businesses served by the parking lot. The court’s finding is not supported by the evidence or common experience. It was therefore improper for the court to enter such a finding, other than to create an innocent explanation for obvious suspicious behavior.

Further, the court’s attempt to justify suspicious activities with innocuous explanation ignores the law. Actions equally consistent with criminal or non-criminal activity may justify a Terry

stop. See State v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1986).

Stated another way, just because a person can speculate as to a plausible, non-criminal explanation does not negate reasonable suspicion for an officer to stop and investigate.

The State also takes exception to the court's finding of fact in paragraph 3.6, wherein the court found that the Albertsons' parking lot was not a high crime area or known as a high drug crime area. CP p. 146, ll. 24 - 25. This finding ignores the testimony of Detective Darin Boyd that he had personally been involved in approximately a dozen controlled purchases of drugs in that parking lot in the three years he had been assigned to the Quad Cities Drug Task Force. RP Vol A, pp. 36, 53. This fact supports the reasonable inference that the parking lot is frequently used by those involved in drug sales for conducting business. Further, the evidence take at hearing regarding the actions of the participants herein further supports this inference.

Based upon these erroneous findings, the court improperly ruled in favor of suppression. As stated below, the undisputed evidence taken at hearing clearly supported the officers' decision to stop the Respondents' vehicle and question them regarding their activities that night.

2. THE TRIAL COURT APPLIED THE INCORRECT LEGAL STANDARD WITH REGARD TO REQUIREMENTS

OF TERRY V. OHIO, AND THEREBY ABUSED ITS DISCRETION IN GRANTING SUPPRESSION.

In finding that the officers lacked reasonable articulable suspicious to stop the Respondent's vehicle, the court applied the incorrect standard. In so ruling, the court stated, "This is, in my opinion, a classic case where, as the officer testified, ***under the totality of the circumstances, ah, we had enough***. And under Illinois versus Gates, I think you did had enough, but I'm constrained to use Aguilar-Spinelli, the tighter, more stricter test." RP Vol A, p. 117. (*emphasis added*). The court therefore found that there was insufficient facts and circumstances to establish reasonable suspicion to believe that Trutter was involved in illegal activities. RP Vol A, p. 118. Application of this standard was not proper. A Terry stop is justified if the officer can "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." See Terry v. Ohio, 392 U.S. 1, 21, 88 S.Ct. 1868 (1968); State v. White, 97 Wn.2d 92, 105, 640 P.2d 1061(1982). We look at the ***totality of the circumstances*** known to the officer to decide whether the stop meets these criteria. See State v. Glover, 116 Wn.2d 509, 514, 806 P.2d 760 (1991). Here, the court specifically found that the totality of the facts and circumstances known to the officer established reasonable suspicion to justify the stop. However, the court

rejected this test and instead erroneously applied a different standard. The reviewing court will find an abuse of discretion “when the trial court’s decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons.” See State v. Blackwell, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993); State v. Michielli, 132 Wn.2d 229, 240, 937 P.2d 587 (1997). A decision is based “on untenable grounds” or made “for untenable reasons” if it rests on facts unsupported in the record ***or was reached by applying the wrong legal standard.*** See State v. Rohrich, 149 Wn.2d 647, 653, 71 P.3d 638 (2003)(*emphasis added*)(*citing State v. Rundquist*, 79 Wn.App. 786, 793, 905 P.2d 922 (Div. II, 1995)). Here, the court used a standard which applies to a wholly separate and distinct context. The Aguilar-Spinelli standard applies to use of hearsay statements in determinations of probable cause which is, of course, a higher standard than reasonable suspicion. Courts of this state have rejected application of the Aguilar-Spinelli standard in the context of Terry stops. See State v. Kennedy, *supra*, 107 Wn.2d at 8. In State v. Lee, 147 Wn.App. 912, 199 P.3d 445, 447 (Div. I, 2008), the Court specifically rejected such an argument for application of Aguilar-Spinelli in the context of Terry stops. Therein, the Court stated:

Lee challenges the Terry stop that led to his arrest, arguing that the information provided by the citizen

informant was not, by itself, sufficiently reliable to allow the officers to stop his vehicle. He contends that the trial court should have applied the Aguilar-Spinelli test, as derived from Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), and Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969), which requires a threshold examination of the informant's veracity and basis of knowledge. Moreover, Lee contends that the trial court erred because, rather than applying the Aguilar-Spinelli test, it erroneously applied the "totality of the circumstances" test, as described in State v. Randall, 73 Wn.App. 225, 228-29, 868 P.2d 207 (Div. I, 1994). Lee and amicus, the American Civil Liberties Union of Washington, argue that Randall should be overruled and that the Aguilar-Spinelli test should be applied to this case. For the reasons set forth below, we disagree.

Lee at 916. In Randall, the Court held:

We hold that where an investigatory stop is based on information given the detaining officer by another person, the stop is valid if under the totality of the circumstances the officer has a reasonable suspicion that the defendant was engaged in criminal activity.

Randall, 73 Wn.App. at 228, 229. The Court's application of Aguilar-Spinelli to the informant's information, as supporting the officers' decision to stop the Respondents' vehicle was clearly erroneous as applying the wrong legal standard. As such, the court's conclusions in granting suppression and order pursuant thereto should be reversed.

3. THE UNDISPUTED FACTS OF THE CASE CLEARLY ESTABLISH THAT OFFICERS HAD REASONABLE SUSPICION TO CONDUCT A TRAFFIC STOP ON THE VEHICLE

This Court should reverse the decision of the trial court granting suppression as the facts, which were undisputed at hearing, clearly establish that the officers had sufficient cause to conduct a Terry stop of the white Durango for the purpose of contacting and questioning the occupants as to their activities. Whether the warrantless Terry stop passes constitutional muster is a question of law and review is then *de novo*. See State v. Rankin, 151 Wn.2d 689, 694, 92 P.3d 202 (2004). As such, this Court is in just as good a position as the trial court to review the facts and determine whether reasonable suspicion existed.

The Court must look at the totality of the circumstances known to the officer to decide whether the stop meets these criteria. See State v. Glover, *supra*, at 514. The level of articulable suspicion necessary to support an investigatory detention is “a substantial possibility that criminal conduct has occurred or is about to occur.” See Kennedy, 107 Wn.2d at 6. The reasonableness of a stop is a matter of probability not a matter of certainty. See State v. Mercer, 45 Wn.App. 769, 774, 727 P.2d 676 (Div. III, 1986). In Mercer, the Court stated:

While an inchoate hunch is insufficient to justify a

stop, circumstances which appear innocuous to the average person may appear incriminating to a police officer in light of past experience. The officer is not required to ignore that experience.

Mercer at 774.

Other cases demonstrate that the threshold for reasonable suspicion is substantially lower than probable cause. In State v. Glover, (*supra*), the officers observed the defendant therein exiting one of the apartment buildings and, upon seeing the police, he began to act suspiciously. The officers frequently patrolled the area, were familiar with the residents of the area and they did not recognize the defendant as an apartment resident. See id. On these facts, the Court held:

In viewing the totality of the circumstances presented to the investigating officers, we hold that the police, based upon experience, location, and the conduct of Glover, possessed sufficient reasonable suspicion to stop him to investigate him for criminal trespass.

See id.

The case at bar is analogous to the drug house cases where officers observe an individual approach and enter a suspected drug house and leave after a short stay. Under those circumstances, Courts of this State have held that a Terry stop is justified on suspicion that the individual purchased controlled substances. See State v. Biegel, 57 Wn.App. 192, 787 P.2d 577(Div. III, 1990), *review denied*, 115 Wn.2d 1004, 795 P.2d 1156(1990)(Short visit

to suspected drug house justified Terry stop on suspicion that suspect had just purchased drugs). See also State v. Doughty, 148 Wn.App. 585, 201 P.3d 342 (Div. III, 2009)(*review granted*166 Wn.2d 1019, 217 P.3d 782 (2009)). There as here, a short contact with a person identified as being involved in narcotics, during which the officers observed an associated individual engage in a transaction with another involved person, followed almost immediately by a short contact in the park by an unknown male, supported the officer's belief that the Defendant had either delivered or obtained drugs in the parking lot of Albertsons' and then sold drugs to the person he met at Arnold Park. The facts of the current case are even stronger as we have multiple short contacts, which occurred in suspicious locations at a suspicious time of day, as apposed to a single visit to a suspected drug house.

The facts of this case are also analogous to the "see/pop" operation wherein a spotter officer watches from a remote and observes suspected drug activities on the street below. See eg. State v. White, 76 Wn.App. 801, 888 P.2d 169 (Div. I, 1995). These types of operations are termed "cold" as the participating officers generally have no prior information about the involved persons. In the "see/pop" operation, the spotter notifies an officer on street level when he observes a suspected drug transaction and

the involved individuals are contacted by police. In State v. White, the spotter observed two individuals (later identified as White and Murray) split up a short distance. See id. at 803. The spotter observed Murray make contact with a third person. See id. The spotter officer observed what appeared to him to be an exchange. See id. The spotter then observed this person leave and White and Murray met back up. See id. The spotter saw “hand movements”, but could not tell what, if anything, had passed between White and Murray. See id. White then entered a restaurant and Murray waited outside. See id. These observations were determined by the Court to be sufficient to establish probable cause to arrest White. See id. at 805. In that case, White was merely the lookout and had not directly participated in the suspected transaction. See id. at 804-805. Further, the officers in White did not have the benefit of information from a reliable CI.

The police may stop a suspect and ask for identification and an explanation of his or her activities if they have a well-founded suspicion of criminal activity. See State v. White, supra, 97 Wn.2d at 105. The officer's experience will be taken into account in assessing whether a suspicion of wrongdoing was justified under the circumstances. See State v. Samse, 39 Wn.App. 564, 570-71, 694 P.2d 670 (Div. III, 1985); See also State v. Selvidge, 30

Wn.App. 406, 409-10, 635 P.2d 736 (Div. II, 1981), *review denied*, 97 Wn.2d 1002 (1982). As stated by the Washington Supreme Court:

An officer of a narcotics detail may find probable cause in activities of a suspect and in the appearance of paraphernalia or physical characteristics which to the eye of a layman could be without significance. His action should not, therefore, be measured by what might or might not be probable cause to an untrained civilian passerby, but by a standard appropriate for a reasonable, cautious, and prudent narcotics officer under the circumstances of the moment.

See State v. Patterson, 83 Wn.2d 49, 57, 515 P.2d 496 (1974).

Here, the trial court found that the informant was reliable and credible. CP p. 148, ¶ 4.1, 4.2. RP Vol A, p. 114. As such, the officers were entitled to rely upon the informant's statement that Tanner was involved in drug sales and was currently looking to "re-up" with heroin. The suspicious time, location and activities of those Tanner interacted with supported the officers belief that these individuals were involved in drug transactions with Tanner in the parking lot of Albertsons. Further, the action of Trutter and Smolinski leaving the parking lot, traveling to an unlit park and meeting briefly with a subject on foot further heighten the suspicion of officers. These observations were further coupled with the detectives' training and experience distinguishing between ordinary social contacts and behavior associated with drug transactions.

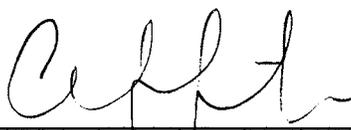
The court ignored the officers' training and experience and instead, substituted its own experience to create innocent explanations for what officers could clearly identify as suspicious criminal behavior. The trial court clearly erred in concluding that the stop of the Durango was unjustified under the facts and circumstances, as known to the officers at the time of the stop. As such, the court's order granting suppression should be reversed.

V. CONCLUSION

The trial court entered findings unsupported by the evidence and ignored the undisputed testimony of the officers. The trial court applied incorrect standards in determining the existence of reasonable suspicion to stop the vehicle driven by Mr. Trutter and in which Mr. Smolinski was a passenger. The court further erred in concluding that officers lacked reasonable suspicion to stop the vehicle. As such the trial court's order granting suppression should be reversed, the order of dismissal set aside, the charges reinstated, and the matter remanded for trial. The State would respectfully request this Court enter an opinion and order granting the States' prayer for relief.

Dated this 15th day of September, 2010.

Respectfully submitted,



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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

**COURT OF APPEALS OF THE STATE OF
WASHINGTON - DIVISION III**

THE STATE OF WASHINGTON,
Respondent,

v.

JOSHUA D. SMOLINSKI

and

ANDREW G. TRUTTER,

Appellant.

Court of Appeals No: 291677

DECLARATION OF MAILING

DECLARATION

On September 2, 2010 I deposited in the mail of the United States a properly stamped, and addressed envelope directed to all counsel and parties as listed below a copy of the BRIEF OF APPELLANT in this matter to:

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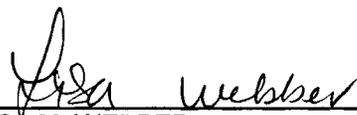
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I declare under penalty of perjury under the laws of the State of Washington the foregoing statement is true and correct.

Signed at Asotin, Washington on September 2, 2010.



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By _____

Nos. 291669
291677

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STATEMENT OF ADDITIONAL AUTHORITIES

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