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Court of Appeals
Division III
State of Washington

90039-6

NO. 309835-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

MARISA MAY FUENTES, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 11-1-01361-1

BRIEF OF RESPONDENT

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I. STATEMENT OF FACTS

On Wednesday, October 5, 2011, at 22:00 hours Officer Trujillo and Officer Veitenheimer of the Kennewick Police deployed as an undercover unit to watch the residence located at 108 N. Conway Street, Apartment B, in Kennewick, because they had information that certain named wanted subjects frequented that residence. (RP[1] 4, 5, 7). Police had earlier approached the residence planning to ask if the wanted subjects were there. As they approached the residence, a man and a woman ran into the residence, shut the door, and would not answer when the police knocked. (RP 8). This residence is the home of Richard Edward Fenton, DOB 01/22/69. (RP-30). Fenton is known to the police as the inhabitant of the apartment, a known user and dealer of drugs, and police had as recently as November 10, 2010, conducted controlled buys at that location. (RP 6, 30-33). Police seized drugs from the residence during the service of that warrant. (RP 6).

In the span of time from 22:00 to 00:02 police watched as eight to ten people went to the residence, each staying from between five minutes and 20 minutes, and then departing. (RP 8, 33).

At approximately 23:00 hours, the police watched Jacob Estep,

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[1] "RP" refers to the February 29, 2012, Verbatim Report of Proceedings.

leave the apartment. (RP 8). Short-stay traffic of this sort is strongly indicative of drug dealing. (RP 8). An officer followed him and arrested him on three warrants. (RP 33, 50).

At approximately 00:02 hours Marisa May Fuentes drove to the residence, walked upstairs to the second floor residence, tried the door, and then went back to her car retrieving a grocery sack from the trunk of her car. (RP 34). She went to the residence, stayed five minutes and then exited the apartment with the now empty or near-empty bag, placed the bag in the trunk of the vehicle, and drove off. (RP 34-35).

Officer Veitenheimer and Trujillo radioed ahead and asked Officer Merkl and Slocomb to stop the vehicle and question the driver. (RP 51-52).

Officer Merkl stopped the vehicle, identified the driver, had her step from her vehicle, and told her that she was not free to leave. (RP 53). Merkl asked the defendant to sit in the back of his patrol vehicle, and she did. (RP 53). He advised the defendant of her *Miranda*[2] rights, and she agreed to speak to him. (RP 53-54). The defendant told the officer that she had been to the apartment, but had carried nothing into the apartment except her purse. (RP 56). The officer knew this to be a lie. (RP 56).

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[2] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

When asked to be honest, the defendant admitted that she had carried a quantity of marijuana into the apartment. (RP 15, 59).

II. ARGUMENT

The officer's suspicion was reasonable. The reasonableness of the officer's suspicion is determined by the totality of the circumstances known to the officer(s) at the inception of the stop. A reasonable suspicion can arise from the information that is less reliable than that required to establish probable cause. The "whole picture" or "totality of the circumstances" must be taken into account when evaluating whether there is reasonable suspicion. *State v. Lee*, 147 Wn App. 912, 917, 199 P3d.445 (2008). As part of the ambit of "circumstances," police may take into account past reports of criminal activity especially when connected to suspicious behavior. *State v. Martinez*, 135 Wn. App 174, 143 P.3d 855 (2006); *State v. Bray*, 143Wn. App. 148, 177 P.3d 154 (2008). *Terry*[3] stops are allowed on vehicles and have been extended to traffic infractions. *State v. Day*, 161 Wn.2d 889, 897, 168 P.3d 1265 (2007).

The scope of the detention was reasonable. A *Terry* stop of a person or car and its scope is determined by considering (1) the purpose of the stop, (2) the amount of physical intrusion on the suspect's liberty, and

[3] *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 20 L. Ed. 2d 889 (1968).

(3) the length of time of the seizure. *State v. Laskowski*, 88 Wn. App. 858, 950 P.2d. 950 (1997) *Review denied*, 135 Wn.2d 1002 (1998). Here, the officer can point to specific and articulable facts, which taken together with rational inferences from those facts warrant that intrusion. *State v. White*, 97 Wn.2d.92, 105, 640 P.2d 1061 (1982).

A *Terry* stop is not rendered unreasonable solely because the officer did not rule out all possibilities of innocent behavior before initiating of the stop. *State v. Anderson*, 51 Wn. App 775, 780, 755 P.2d 191 (1988).

III. CONCLUSION

In the case at bar, the facts giving rise to the stop of the defendant were legion. The locus of the stop was not a high-crime area, but a high-crime apartment with a high-crime defendant. The time was the middle of the night on a Tuesday night. Police had two informants tell them of the dealings from the suspect apartment; the apartment was rented by a known drug dealer who had been arrested out of that same apartment eleven months prior. (RP 6). Officers observed a high volume of short-stay traffic from the apartment. Some 10 persons came to the apartment and departed within five to 20 minutes. (RP 8, 33). This contact is indicative of drug traffic. One person exiting the premises was wanted on three arrest warrants. (RP 50). When the apartment had been approached by

officers earlier that shift, subjects scurried for cover and would not answer the door. (RP 8). The defendant was seen to approach the apartment, walk up to the second floor residence, and then return to her car to remove a sack from the trunk; and wind her way back up to the apartment with a bag. (RP 34). The defendant then returned to her car within five minutes; placed the now less full bag in the trunk and leave. (RP 34-35).

The totality of the circumstances, as noted by the trial court, gives rise to an articulable suspicion of criminal activity which gave rise to a *Terry* stop. The police are not required to think of any number of lawful explanations for this unusual and surreptitious midnight visitation and are free to characterize it as it was, a drug delivery to a known drug dealer at a known drug house.

The stop was reasonable and the admission of the evidence taken from it was proper.

RESPECTFULLY SUBMITTED this 28th day of March 2013.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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Signed at Kennewick, Washington on March 26, 2013.

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